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UNIFORM LAW: EFFICIENCY PERSPECTIVES

Kono TOSHIYOUKI

The idea of a globally uniform law is not new. In many western countries, the 18th Century had been marked by a transformation from a particular land law to a more homogeneous legal system at the nation state level. As soon as this daunting task gained its momentum, lawyers immediately raised the idea of a 'global law', i.e. law shared by every civilized nation.[1] The fashionable idea of a global uniform law has persisted until today; yet in different economic and cultural settings has prompted the change in methodological approaches as well as the uniform law-making.

This paper is divided into two main parts. The first part provides a historical account of the development of uniform law. This first part outlines the features of the uniform law-making in three periods: the early 20th Century; several decades after the Second World War; and at the turn of the millennia. This evolutionary perspective helps to single out the key features of the uniform law-making process. Further, it is argued that the theory and methodologies of unification of law has changed over time together with the evolving economic and political realities of the time. The second part of the paper aims to contribute to the ongoing debate concerning the goals and methodology of uniform law by applying an economic perspective to uniform law. It seeks to explicate a number of questions that have been left on the sidelines of the discourse. Law and economics calls for the adoption of a different —'efficiency'— criterion as a starting point of analysis. Efficiency renders some of the concepts previously applied by legal scholars obsolete and stimulates the investigation of problems that had only been scantly touched upon in the legal literature. Further, the efficiency criterion offers much stimulus for the investigation of the different possible modes of unification. That is, an efficiency perspective helps to identify the pros and

[1] Zittelmann, E., *Die Moeglichkeit eines Weltrechts* (unchanged reprint of a presentation with an afterword, 1916).

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cons of uniform law, as well as to provide guidance in the choice between different methods of unification.

The roots of uniform law could be found in the late 19th Century when the need to establish some common standards promoting international trade became obvious. The need of uniform standards of communication impelled the adoption of, for example, the International Postal Convention (1874).[2] Later, the protection of the results of intellectual activity (books, inventions etc.) resulted in the adoption of the Paris[3] and Berne[4] Conventions dealing with the protection of intellectual property works. The implementation of these international treaties was entrusted to special unions that were created under the same legal framework. The matters related with the maintenance of minimum labor standards were started to regulate by the Association of Labor Legislation (established in 1901), which in 1919 turned the International Labor Organization (ILO).

Simultaneously, a number of international or inter-governmental organizations were established with an intention to further process of unification of laws. The Hague Conference for Private International Law was first convened in 1893. The International Institute for the Unification of Private Law (UNIDROIT) was established in 1926 as an auxiliary organ of the League of Nations. After the Second World War, the task of harmonization and unification of international trade law was entrusted to the UNCITRAL (United Nations Commission for International Trade Law), a special United Nations body. Established in 1966 UNCITRAL adopted a number of international conventions dealing with various aspects of international sales and carriage of goods, commercial instruments, as well as the use of modern communication means in international trade. In addition, a number of non-binding Model Laws were prepared to address such issues as international commercial transactions, financing, insolvency, out-of-state commercial dispute settlement procedures, electronic commerce. Among others, also the Organization for Economic Cooperation and Development (OECD) significantly contributed to the unification process. Established in 1961, OECD provides for a platform to deliberate various economic, political and social issues related to economic development.[5]

[2] 1874 Berne Convention establishing a General Postal Union.

[3] 1883 Paris Convention for the Protection of Industrial Property.

[4] 1886 Berne Convention for the Protection of Literary and Artistic Works.

[5] OECD is well known for its Guidelines for Multinational Enterprises (last time updated in 2011) as well as the Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (1997).

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The last few decades of the 20th Century could be marked by a stark expansion of uniform law-making. A number of various legislative instruments in the area of international trade an private internationa law have been adopted, many of them in the form of international treaties. The work under the auspices of the Hague Conference on Private International Law has also been quite successful. Much more legal certainty as to the jurisdiction and applicable law has been brought to the areas of private, family, commercial and procedural law.

In addition, many more uniform-law-type-instruments have been drafted and put into practice by intergovernmental organizations such has the UNIDROIT as well as non-governmental organizations and trade circles. Suffice here to mention the UNIDROIT Principles of International Commercial Contracts which not only have established a firm ground for general contract-related issues, but also had significant influence in the reform of general contract law at the national law niveau. Besides, a number of uniform-law-type instruments have been drafted by such organizations as International Chamber of Commerce (ICC) which prepared a number of key instruments, such as the INCOTERMS. The ICC also drafted the Uniform Customs and Practice for Documentary Credits and other instruments dealing with the non-state resolution of commercial controversies. Further activities of unification could be identified in other areas related to maritime law and standard setting (eg ISO, accounting, ICANN etc.).

As can be noticed, the initiatives of uniform law-making have gradually shifted from the unification of certain areas of law by international treaties concluded between states towards a 'privatized' setting. This shift from the state towards "quasi-state" or "non-state" unification of law has been driven by increasing complexities associated with the drafting process as well as the political and economic hurdles associated with reaching consensus. Furthermore, it has become more and more difficult to delineate the contours of uniform law. In the wake of such a transformation, a new area of legal scholarship dealing with 'transnational law' has been gaining momentum.[6] The recent paradigm of private uniform law-making has brought about various methodological questions pertaining to the legitimacy of novel regulatory instruments. Further, a number questions arise with regard to the possible and achievable structures of uniform law.

6 See *e.g.* Calliess, G.P. and Zumbansen, P., *Rough Concensus and Running Code: A Theory of Transnational Private Law* (Hart, 2010); P Kjaer, Between Governing and Governance (Hart, 2010).

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The current institutional setting largely influences the levels of uniform law. One of possible approaches to understand uniform law is to see it as comprising three fields of unification: (a) the unification of substantive rules; (b) the unification of rules pertaining to international cases (*internationales Einheitsrecht*); (c) the unification of private international law rules. The key driving forces of unification, as indicated in previous legal scholarship could be summarized as follows. It has been thought that unification of law contributes to simplification, increases legal certainty, facilitates uniformity of court decisions as well as helps to eliminate distortions of competition. In addition, uniform plays a significant role in the courtroom: uniform law reduces the situations where there may be a conflict between norms of/or legal systems, it provides for a solid source for the interpretation of law and filling the gaps in law.

Previous legal scholarship also touched upon the relationship between the uniform substantive law and uniform private international law. It has been argued that these two stand in stark contrast with each other. While unification of substantive, if realized, could eliminate differences among national substantive laws, unification of private international law *can not* achieve such ultimate harmony of substantive laws.[7] Instead, the uniform private international law is based on the premise that substantive laws vary. However, further analysis concerning the relationship of different levels of unification has not been made.

This paper offers to offer a different perspective on uniform law. One of the possible modes of looking at the uniform law is to apply the methods developed by scholars engaged in law and economics. Law and economics takes a rather pragmatic approach to legal problems and considers legal rules from a cost-benefit (efficiency) perspective.[8] It is argued here that an efficiency perspective could provide for some further food for thought and put forward different questions which should be taken into consideration.

In order to support the economic analysis of uniform law, the paper borrows some of the methodologies developed by economics scholars.[9] Namely, an *efficiency* perspective mandates the comparison of costs associated with different kinds of rules: rules that are simple, clear and detailed;

7 Cf. Kropholler, J., *Internationales Einheitsrecht* (1975).

8 See eg MJ Whincop and M Keyes, *Policy and Pragmatism in the Conflict of Laws* (Ashgate, 2001); J Basedow, T Kono, G Ruhl (eds), *An Economic Analysis of Private International Law* (Mohr, Tubingen, 2006).

9 K Kagami, *Kokusai shakai ni okeru shiteki kankei no kiritsu to funsō kaiketsu: kokusai shihō no keizai bunseki – jōsetsu (Regulations and Settlement of Private Disputes in International Community: Introduction to Economic Analysis of Private International Law)* (Tokyo, 2009).

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and rules which are abstract (standards). These rules should be also viewed in context and the effects they produce: i.e. legal certainty or flexibility. Furthermore, a law and economics approach calls for the calculation of the costs and benefits associated with the application of different kinds of rules. For instance, the costs associated with clear and simple rules are relatively low. Yet, for the parties clear rules mean a higher degree of legal certainty. On the other hand, abstract rules (e.g. the requirement of 'fair compensation') may lead to relatively high administrative costs as well as offering less certainty for the private parties.

This cost-benefit analysis further prompts weighing of desirable policy goals: legal certainty or flexibility. In the context of current uniform law debate there is no clear consensus as to the desirable outcome. It is generally assumed that uniform law contributes to higher legal certainty and uniformity of decisions. However, legal scholars have not been able to delineate the contours either of legal certainty, nor flexibility. This paper suggests that an efficiency perspective fuels the debate by requiring consider interests of *stakeholders* as well as the factor of *timing, i.e. ex ante and ex post*.

On a more general level, it is argued here that if uniform law is viewed from an efficiency perspective, the costs associated with the uniform law-making are to be taken into account. Namely, it may happen that costs associated with uniform law making are unreasonably high. For instance, the Hague Judgments project, the objective of which was to unify grounds of jurisdiction and recognition and enforcement of foreign judgments protracted over a decade and eventually failed. Accordingly, cost-benefit analysis could be also applied to compare under what circumstances the unification of substantive rules is more efficient and should be preferred over the unification of private international law rules. In this constellation, several stages of comparison could be addressed which would include:

- Uniform substantive law versus uniform private international law;
- Uniform substantive law versus national private international law;
- Uniform private international law versus not uniform substantive law;
- National private international law versus uniform private international law.

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