The Idea of Legal Convergence and Electronic Law

Abstract: The paper commences by expounding the leading thesis in the discipline of law: the law convergence thesis. Thereafter, against this background, the paper examines the diversification of electronic laws in the area of private law from a number of jurisdictions and regions by taking a macro-comparative approach. It seeks to question such diversification in the face of globalisation and in the face of a world that operates in a number of different legal regimes when it comes to electronic law matters. In particular, in the sphere of eCommerce, one notes the absence of unified instruments that touch upon the majority of legal systems around the world. The paper will then examine national/regional regimes such as Australian Electronic Communications Act 1999, the US Uniform Electronic Transactions Act 1999 and the Electronic Commerce (EC Directive) Regulations 2002. At the international level, the paper will question in effect the UNCITRAL Model Laws on Electronic Commerce and Electronic Signatures 1996 and 2001 respectively as well as the UN Convention on the Use of Electronic Communication in International Contracts 2005 the application of which is currently very limited. The paradox of the international nature of the internet and the fact that legal systems or regions choose their own regimes for matters of international nature such as e-commerce will be highlighted. The paper concludes with juxtaposing Von Savigny's old reminder that contract law (and by extension commercial law) is universal (or so it should be) and the fact that convergence of laws in the sphere of electronic law (as in eCommerce) has not been achieved in the majority of systems around the world.

The Idea of Legal Convergence and Electronic Law

by Dr. A.E. Platsas[1]

Introduction

This paper deals with the leading thesis in the discipline of law, the law convergence thesis. The thesis stands for the coming together of different legal systems. The thesis in question is negotiated herein with a focus on the subject-area of electronic law. The author will approach a limited amount of legal systems and orders in the area by taking a macro-comparative approach. At the international level the author will question the reach of the relevant international law instruments. Most importantly, the paradox of the presence of a world-wide framework of electronic communications (the internet) and the parallel absence of world-wide regulatory frameworks will be highlighted and criticised. The paper will draw its analysis on the very nature of the internet, especially in the sphere of eCommerce, where there is now clear need for further global regulation.

Convergence of Legal Systems

It is the author's conviction that the thesis which entails the coming together of different legal systems, traditions and mentalities (law convergence thesis) stands for the leading thesis in the discipline of law. The answer for the reasons behind this is readily available: whilst other disciplines have some time ago reached a consensus of epistemological unity, law still takes a rather parochial and introvert approach. Zweigert & Kötz's well-known quote is certainly illuminating here:

> 'There is no such thing as "German" physics or "British" microbiology or "Canadian" geology'[2]

Yet, in law we find ourselves asking about the different approaches that national laws take in respect of the overwhelming majority of legal areas. For us in law there is such thing as English law, American law, Japanese law and so on. This tradition of 'national' laws goes back to the tradition of the Nation State, as this was given birth in 1648 through the Treaty of Westphalia. For better or worse, States have chosen to create their 'own' laws (even if one has it in good authority that laws tended to be transfers or borrowings from one part of the world to another) so that they uphold their *imperium* (legal power) over their *territorium* (territory). Law was and still is a symbol of national unity. All in all, the situation we found ourselves in the discipline of law is one of overall divergence of legal system to legal system. Exceptions here are the islands of legal unity between otherwise different legal systems through the relevant regulatory tools from such international organisations as the Council of Europe, the European Union, the World Trade Organization and the United Nations. Those examples are not without criticism, especially when it comes to their slow reflexes, their bureaucratic structures and their frequent distancing from their 'clientele' whether in the form of States or citizens. The author would be the first to accuse their bureaucratic character; yet, the purpose of this analysis is not to demolish but to build on current matter. And whilst these organisations are in one way or another conservative and inward-oriented structures, worthy of reform to a

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[2] Zweigert and Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn Clarendon Press, 1998) 15.

greater or lesser extent, these organisations need to be supported, especially when they promote what we in law would call the legal convergence thesis. Additionally, together with the promotion of the idea of convergence of legal systems through such organisations, the very discipline of law is also promoted, through the very re-invigoration of the discipline by way of the mechanics and outcomes of such an approach.

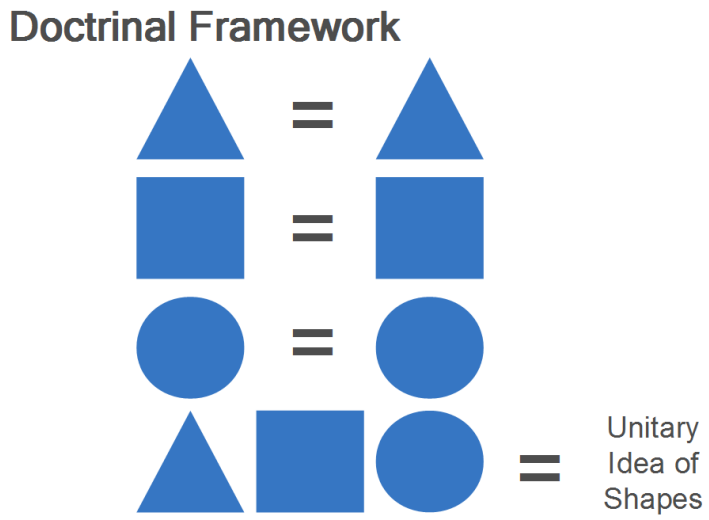
At this initial stage of our analysis, however, we would wish to maintain that the convergence thesis is defined by a degree of beauty, a degree of ideology and a degree of essence. The beauty of this thesis can be found on the fact that the convergence thesis can be found on the principle of one-over-many or what we could loosely call the 'Platonic One', a defining idea of Plato's world-view. Plato reminds us:

> 'We are in the habit of positing **a single Form for each plurality of things** to which we give the same name'[3]

whilst application of the principle of one-over-many is found in Plato's definition of beauty:

> '... if there is anything beautiful besides Beauty itself, it is beautiful for no other reason than that it shares in that Beauty. ... **nothing else makes it beautiful other than the presence of, or the sharing in**, or however you may describe its relationship to that Beauty we mentioned, for I will not insist on the precise nature of the relationship, **but that all things are made beautiful by Beauty**'[4].

This can parallelism can apply to all aspects of human life (including legal systems). Thus, the following is true of our doctrine under the convergence thesis:



In accordance with the modern convergence thesis it is not the different shapes that matter but rather the fact that all shapes are shapes (see 'Doctrinal Framework' diagram above). By extension it is not whether different legal systems come up with different solutions in the face of e-laws; it is whether or not those different legal systems have e-laws in the first instance and laws which can be assimilated by way

[3] Plato, *Republic* 596a (emphasis added).
[4] Plato, *Phaedo* 100c-d (emphasis added).

of legal outcomes, despite divergences in application. It is not the different colours that matter; it is the fact that these are all colours. It is not the different shapes that matter; it is the fact that these are all shapes. Hence, it is not that different legal systems come up with different legal solutions; it is the fact that those 'different' solutions can be assimilated as a matter of a unified system of law, especially in areas which are non-culturally specific[5] such as eCommerce laws. Furthermore, there is essence in the modern legal convergence thesis: such essence arises of practicality and economic utility. Practicality emanates from the fact that single legal standards apply throughout. Economic utility emanates from the fact that there the need for separate differentiated legislation is dispensed; so are the costs associated to such legislation. Finally, when it comes to the degree of ideology, one would be able to detect such ideology on the fact that our lives are governed by principle; so too the convergence thesis in one way or another governs, as a matter of leading doctrinal principle, much of the modern discipline of law.

What about the real then? Where would one find convergence of legal principle? Classic examples are the following in every modern legal analysis:

- The legal circle of 27 Member States participating in the European Union's integration initiatives
- The legal circle made out of 47 'Jewels' in the Crown of European Convention on Human Rights (ECHR)
- The legal circle of 76 signatory States to the UN Convention on Contracts for the International Sale of Goods (CISG)

What about the principles that drive convergence? Very briefly the following can be taken to be some of the leading principles that drive the modern convergence thesis:

- Principle of Fidelity
- Principle of Conferred Powers
- Principle of Subsidiarity
- Principle of Proportionality
- Principle of Conditionality[6]

The first principle (fidelity) asks from nation-states to refrain from breaching their international obligations; equally, the extra-national should not intervene in matters of national law, unless it has been conferred the relevant legal powers and authority to do so.[7] With regard to the classic principle of subsidiarity, this principle suggests that what can be achieved at the lower level of authority in a circle of convergence (national level) does not have to be the subject matter of legal interference at the higher level of authority (extra-national level) in the same circle.[8] Proportionality, on the other hand, requires the extra-national to exercise its administration in a fashion that does not go beyond *vires*, legal expectations and the very requisites of proportionality itself, i.e. the acts of the extra-national have to be suitable, necessary and proportionate *per se*. With regard to what the author perceives as another principle of the modern convergence thesis, the principle of conditionality, the author would simply wish to suggest that this is a principle which deals with the imposition of conditions on the part of the extra-national to the national. There is an assessor and an assessed. The extra-national is normally the assessor, the national being the assessed. The national is asked to implement an

[5] AE Platsas, 'The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks' (2008) 12(3) EJCL <http://www.ejcl.org/123/art123-3.pdf> accessed 1 October 2011.
[6] AE Platsas, 'International Economic Law and the Idea of Legal Convergence' (2009) 2(4) IJPL 383, 392.
[7] D Chalmers *et al*., *European Union Law* (CUP 2006) 193.
[8] A classic illustration of this principle can be found in Article 5 EC Treaty.

extra-national relevant agenda of convergent economic law in exchange for economic benefit.[9]

Paradox of Internet's Global Reach but Relevant Regulation's Local Reach

One is at odds, however, when it comes to the very global nature of the internet and the parallel local application of various laws in the matter (mostly at the domestic and regional level). 'Cyberspace is global'[10]; cyberspace regulation is not. The sustainability of this paradox to this day is one that puzzles. In a world that unites in law, the diversification of e-laws is striking, if not alarming. How could it be that transactions or exchange of information at the global level be regulated at the local or regional level (mostly)? A cynic would respond: 'systems will not actually collapse in the absence of a global framework for the otherwise global system of the internet'. And yet, one cannot escape the question of desirability. After all, it is the responsibility of the law academic to maintain and uphold what is desirable (and realisable) as opposed to merely describing what the current *status quo* in the area is. One needs to ask whether it is more desirable to regulate the internet at the local level or at a more global level.

Surely, one would opine that regulating the internet at a global level would come with a number of risks. This is true, when one deals, with what the author understands as domestic-oriented areas of law (areas touching upon e.g. criminal law matters, family law matters and child law matters). However, this thesis does not hold validity, when it comes to areas of law that are not as domestic-oriented (eCommerce or even data-protection). In the former case, it is the author's belief that local regulation can play a certain significant role. In the latter case, it is the author's belief that extra-national/international regulation should play a much more active role than it currently does.

Also, particularly striking is the fact that the internet as a whole is one of the clearest examples of globalisation. In particular, one speaks here of globalisation of information. However, the current legal regimes observed do not point to such finding. This is peculiar at the very least. National legislators (for better or for worse) have chosen to intervene in the matter. They did so on a piecemeal basis. Accordingly, law of global application has been caught between nation-centred politics and economics.

Additionally, we should consider whether or not the internet should be regulated, if at all.[11] Here those who argue against regulation of the internet as a whole, are of the view that the internet and electronic information should be left to its own devices. The author opines that, whilst there is beauty in self-regulation, indeed self-regulation of cyberspace law, there should be ideally a minimum level of regulation in the area. That minimum level of regulation should be the case in the core area of eCommerce law in that eCommerce seems to be playing a powerful role in trade itself nowadays. Furthermore, there is also the view that existent law can be stretched to cover the sphere of internet matters.[12] Interesting as this approach may be, we have now reached the stage where sustaining such an approach would be perceived as inappropriate, if not naïve. Naturally, the complexity of internet applications currently is far higher than the equivalent of such applications ten (10) years ago. In other words, the question will always have to be not whether or not domestic regulation can be stretched to cover these new fields of legal operation but what kind of new legislative solutions would be added to the ones existent in the

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[9] In this respect see the World Bank's approach; *Review of World Bank Conditionality* (World Bank 2005) 20.

[10] J Nederveen Pieterse, 'Global Multiculture: Cultures, Transnational Culture, Deep Culture' 1. <http://www.jannederveenpieterse.com/pdf/Global_multi.pdf> accessed 30 June 2011.

[11] YF Lim, *Cyberspace Law: Commentaries and Materials* (OUP 2007) 1.

[12] YF Lim, *Cyberspace Law: Commentaries and Materials* (OUP 2007) 2.

traditional areas of law. So too, the question will always have to be how does the legislator (at the national, regional and most importantly at the international level) will not adopt reactionary approaches but pro-active strategies.

A World Orderly Chaos of Electronic Regulation

This brings us to our next point: the nature of the beast, the beast's name being what we generically call the internet. The internet is generally a wild creature of its own which could live in principle without regulation. In addition, it has been rightly suggested that the internet is now owned by anyone.[13] Yet regulation there is; only that one would be able to argue that a close to a chaotic situation in global legal terms actually occurs at the moment. To put it bluntly: the internet in certain parts of the world is regulated, whilst in other parts of the world is little regulated or not regulated at all. So too, in the parts where the internet is regulated the situation resembles the Tower of Babel. Naturally, the legal response that one might receive in relation to the regulation of the internet worldwide arises by way of an argument that provides that the internet 'reflects the human mind and society [in which case] we cannot avoid concepts of public morality and policy.[14] Whilst the argument has a degree of validity in that all law reflects the social in one way or another, this argument does not seem to fully address the question of whether or not a global platform of communications can 'afford' local variation in its fundamentals. Somehow, the argument of policy considerations does not seem to hold firm ground with the author, especially if we orientate our analysis around eCommerce law. To make matters worse, where domestic regulation exists, the law hardly keeps up with developments in the area.[15] In essence, we wish to question the diversification of electronic laws around the world, indeed the diversification of eCommerce laws. Such a divergence of legal matter in the rather straight-forward area of international commerce should alert us. Perhaps this may be the result of the very parochial but certainly beautiful nature of our subject, the subject of law. Or, a pessimist might argue, economic nationalism keeps regulation of the internet at the national level. Whichever the cause, the fact of world orderly chaos of electronic remains.

At best, we tend to have a national/regional approach followed in legal matters in the area of e-law. In the United States and Australia we see respectively instruments such as the US Uniform Electronic Transactions Act 1999 and the Australian Electronic Communications Act 1999. Whilst those instruments would facilitate e-transactions in the domestic spheres of the United States and Australia adopting legal ideology from the UNCITRAL Model Law 1996, these developments remain exclusively domestic, i.e. have limited effect upon the jurisdictional sphere of the respective systems only. Equally, the Electronic Commerce (EC Directive) Regulations 2002 is regional and applies to consumers only. The effect of further forthcoming legislation of the EU in the area remains to be seen. Beyond these national and regional developments, the author wishes to bring to the notice of the reader that the failure of e-laws has been more remarkable where those laws are actually needed the most: in the international sphere. Whilst the term 'failure' would not probably be the politically correct one, we could not call these international eCommerce law projects a success either. In fact calling those projects a success would exaggerate the point when it comes to the limited remit of these projects. We will not examine here what the reasons of their little success have been. That would be a pointless exercise in the sense that most such projects fail for lack of political will, which would otherwise manifest itself through ratification and incorporation. In

[13] YF Lim, *Cyberspace Law: Commentaries and Materials* (OUP 2007) 3.
[14] J Forder and D Svantesson, *Internet and E-Commerce Law* (OUP 2007) 3.
[15] J Forder and D Svantesson, *Internet and E-Commerce Law* (OUP 2007) 5.

any case, we observe that, at the international level, the effect of the UNCITRAL Model Laws on Electronic Commerce and Electronic Signatures 1996 and 2001 respectively and the UN Convention on the Use of Electronic Communication in International Contracts 2005 have been less than successful. To this effect the facts speak for themselves: only 43 national legal systems/orders (out of a total of approximately 200 national jurisdictions in the world) have adopted legislation based on the 1996 Model Law;[16] the 2001 Model Law has been adopted by way of national legislation in 17 States (out of approximately 200 States),[17] whilst the 2005 Convention has been signed by 18 States (out of approximately 200 States), ratified by 2 out of those States which have signed it but was brought into effect by none.[18]

Regulation, when it comes to the internet, is probably something which goes against the very essence of freedom that comes with it. Nonetheless, a minimum degree of regulation is needed. Even more so one could argue that such a regulation is needed at the global level. If the internet is of worldwide remit, would it not make sense that legislation on a global scale regulates the internet? Should it not be the case that global issues related to the internet are dealt with in a global fashion? Conversely, a crucial distinction is to be made here. Before we address this distinction we would have to divide areas relating to the internet as culturally confined and non-culturally confined. The point has been raised above but is worthy of elaboration. To elaborate and crystallise our thesis here we need to refer to subject areas within what we call electronic law as a whole. For instance, information law, data-protection law and freedom of information as a whole as well as the right to internet access could all be perceived as areas which touch upon the legal mentality of a given legal system. Correspondingly, if this is the case these areas of e-law should probably be regulated on a domestic basis (unless, of course, a constellation of States would wish to agree otherwise in the area i.e. by setting out a legal agenda of common/convergent legal standards). On the other hand, an example of a non-culturally confined would clearly be commercial law (or eCommerce for the purposes of our analysis). There is little that could make commercial the exclusive cultural artefact of any legal mentality anywhere in the world. Von Savigny has reached this thesis sometime ago.[19] The author strongly affirms this position. If this position comes with a significant degree of validity, then the area of eCommerce (just like the generic area of commerce) is not one which would be confined to a given legal culture. This returns us back to our initial point: there are areas of which are not culturally influenced. Commercial law, in its traditional sense, is one of them. By extension, if global regulation would arise in the sphere of eCommerce, then one could readily claim that little would change in the core cultural element of national legal systems. Thus, it is only natural that eCommerce qualifies as one of the areas of e-law that can be a major field of convergent (if not uniform) legal standards around the world.

Unified Legal Standards as the Way Forward in eCommerce

Concentrating then on the key area of eCommerce in the sphere of internet law, one understands the matter as of one of key priority when it comes to the creation of unified electronic standards. There are many reasons for this but they all

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[16] <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html> accessed 10 October 2011.

[17] <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_status.html> accessed 10 October 2011.

[18] <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html> accessed 10 October 2011.

[19] J Halley and K Rittich, 'Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism' [2010] 58(4) AJCL 753, 771.

lead to one overall reason: *practicality*. Rather than having lawyers arguing on private international law rules, it would be significantly better for traders and consumers, if uniform or close to uniform standards of legal application were *ab initio* the case. Those could apply anywhere on the basis that we would have a circle of legal systems which would comply with the same standards of eCommerce. Thus, plaintiff from State A would be able to seek compensation against defendant from State B in jurisdiction Z, A, B and Z being States which would all be compliant with the same legal standards. It would not matter where the case would be heard, as there would be mutual recognition of awards irrespective of whether the case would be heard in jurisdiction A, B or Z.

Goldman has argued elsewhere that '[t]echnology is a key element of globalisation'[20]. Again, the question that we need to address is how do national standards fit in the otherwise international phenomenon of technological development? How does eCommerce make itself compatible to the fact that it is nationally-regulated when it is –by definition– an international phenomenon? One response, that of traditional private international law, is that which provides that all these matters can simply be regulated by choice of law clauses. Let us call this the 'freedom of contract doctrine approach'. Another approach, close to that of private international law, is that which suggests that we should not be concerned with such issues (even in the era of the information society), the reason being that such matters are matters falling within the sphere of national sovereignty. Let us call this the 'national sovereignty approach'. Finally, last but not least, there is (or at the very least there should be) a third approach, the 'convergence of systems in legal matters' approach. The analysis on the above points to the following: first of all, the 'freedom of contract' approach, irrespective of its attractive character, does not give us an answer as to how international matters are regulated in an international fashion. Second, the 'national sovereignty' approach is one that comes from the sphere of public law. This point is crucial for our analysis: traders, indeed e-traders, would not be particularly interested to engage with the *territorium* and the *imperium* of States in international eCommerce matters in the sense that these questions do not directly inform international trade practice. Surely, to this day, international trade matters (save in the cases of a neutral third party adjudicator) are normally dealt at the national level of litigation but that alone does not promote our analysis, in the sense that this is a mere depiction of the current *status quo*. Third, by comparison to the two approaches already explained above, it is opined that the 'legal convergence approach' presents a considerably advantageous approach in that it dispenses with the need to private international law rules. So too, national sovereignty plays an insignificant role here in that such approach (that of national sovereignty) has little to offer to traders in the sphere of international eCommerce.

It is projected that by the year 2013 the world eCommerce market will be in the region of $1 trillion. Considering the high volume of transactions taking place electronically these days, one queries the reluctance of legal systems around the world to reach a common core of legal principles in the area. After all, this would be an exercise of practicality and enhanced economic utility.

Conclusion

The developments on the internet proceed at a much faster pace than corresponding developments in law. It is crucial that a minimalist type of regulatory regimes, at a global level, is agreed, especially in response to the needs of areas which would not be otherwise culturally confined to the national. The need for global

[20] DB Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority* (Cambridge University Press 2007) 25.

regulation becomes ever-increasing, especially because the relevant regulatory moves are currently confined to the national and regional level mostly and because there is now a particularly high degree of interconnectedness of world economics. Considering the great need for such worldwide convergent regulation, one is at odds with the languish reflexes of law and politics in the area. At the very least, the central, but otherwise non-culturally specific area of eCommerce law, can be an area where the various national/regional e-laws come closer. It is believed that this will benefit not only our world traders but also our cosmopolitan consumer. Trade sees no barriers. For this reason both traders and consumers would wish to be treated in pretty much the same way whether they would deal in their home jurisdiction or abroad. If this is to be achieved, it is hoped that political will on the part of the relevant political forces and affected States will drive the agenda towards considerable re-alignment of the national to the extra-national in the area. Otherwise, it would be only regrettable that most of our current legislation in the area is of regional success at best.