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HARMONISATION AND UNIFICATION AND THEIR INFLUENCE ON THE EVOLUTION OF NATIONAL LEGAL SYSTEMS

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The author of the article explores the concepts of harmonisation and unification. Both are used in legal texts and doctrinal sources, but the distinctions among them and the implications for the evolution of the national legal systems are still poorly understood. The aim of the research is to clarify the similarities and differences between these and related concepts and understand how the processes to which they refer influence legal change. It is concluded that harmonisation and unification are uneven and fragmentary processes, even though they are often equated. National legal systems retain substantial differences and specificities precluding the assimilation of many legal norms from other jurisdictions and creating formidable barriers to harmonisation. We also find that shared history, legal traditions and commonalities in the legal order and elements of legislation facilitate harmonisation, and international organisations lay the groundwork for harmonisation. We present examples of successes in the unification of material and procedural law and highlight the essential role of supranational bodies such as the Court of Justice of the European Union and the Court of the Eurasian Economic Union in the uniform application and interpretation of the common rules.

Keywords: harmonisation; unification; convergence; national legislation; international law; private international law.

ГАРМОНИЗАЦИЯ И УНИФИКАЦИЯ И ИХ ВЛИЯНИЕ НА ЭВОЛЮЦИЮ НАЦИОНАЛЬНЫХ ПРАВОВЫХ СИСТЕМ

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Анализируются понятия «гармонизация» и «унификация», которые используются как в нормативных правовых актах, решениях и консультативных заключениях международных судов, так и в доктринальных источниках, однако зачастую им не дается определение, не проводится их разграничение, а также не выделяются особенности явлений, обозначаемых этими понятиями, виды и способы их влияния на эволюцию национальных правовых систем. Целью исследования является разграничение указанных и смежных понятий, выделение их видов и способов влияния на эволюцию национальных правовых систем. Сделан вывод о том, что гармонизация и унификация, которые иногда отождествляются, носят фрагментарный характер и в настоящее время невозможно говорить о гармонизации национальных законодательств, так как некоторые положения не могут быть восприняты в силу особенностей национальных правовых систем, принадлежащих к различным правовым семьям. По этой причине основой для гармонизации и унификации должна быть общность исторических и правовых традиций, основ правопорядка и отдельных элементов законодательства в рамках международных организаций, субъектов глобальной правовой системы, реализуемая при помощи традиционных международно-правовых механизмов. Определенных результатов достигла унификация как норм материального права, так и процессуального права. Единообразное применение и толкование норм, которое обеспечивает международный суд в рамках международных организаций, например, Суд Европейского союза и Суд Евразийского экономического союза, вынося консультативные заключения и решения, имеет определяющее значение.

Ключевые слова: гармонизация; унификация; сближение; национальное законодательство; международное право; международное частное право.

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Harmonisation and unification of law are subjects of a lively debate among lawyers. Legal texts use diverse terms – "convergence", "harmonisation", "unification" and many others – but the distinctions among them are still poorly understood. For example, art. 2 of the Treaty on the Eurasian Economic Union, dated 29 May 2014, defines harmonisation as the "approximation of the legal frameworks of the member states that creates similar or comparable legal provisions in select areas of concern". The treaty text also refers to "convergence", understood as the movement towards identical mechanisms of legal regulation in the areas of concern enumerated in the Treaty on the Eurasian Economic Union. The Proposals on enhancing the organisational and legal mechanism for implementation and systematisation of legislation in the Eurasian Economic Community, approved by the Resolution of the Bureau of the Interparliamentary Assembly of the Eurasian Economic Community of 17 November 2005 No. 7, interprets harmonisation as a process of legal change that creates common procedures for specific areas of concern by incorporating community legislation into national legal acts in member states consistent with the principles shared by the member states while recognising the precedence of the peremptory norms of general international law. Harmonisation seeks to create uniformity (homogeneity) between the provisions of national law and the legal acts of the community in content, orientation, legal consequences and principles of legal regulation. Convergence, on the other hand, implies that states commit themselves to bring their national legislation into basic conformity with the legal acts of the community, to the extent that all contradictions among them are removed, while in unification they agree to act to make their national legal acts identical (fully corresponding) to the statutory norms and provisions of the community. Similar definitions of harmonisation, unification, and convergence of national legislations can be found in other community instruments, including the Procedure for implementation of international treaties and decisions of the bodies of the Eurasian Economic Community, adopted by the Resolution of the Bureau of the Interparliamentary Assembly of the Eurasian Economic Community of 14 June 2005 No. 7, and the Concept of the legal framework for energy security in the Eurasian Economic Community, approved by the Resolution of the Bureau of the Interparliamentary Assembly of the Eurasian Economic Community of 23 December 2011 No. 7.

As suggested by the above legal definitions, all three terms (harmonisation, convergence, and unification) presuppose that the member states will act towards some degree of legal approximation. However, the terms are dissimilar in the sense that the scope of such actions and the mechanisms engaged may differ widely.

N. Garoupa and A. Ogus define convergence as the coalescence of legal systems, concepts, principles or norms, and harmonisation as the approximation of national or state laws pursuant to a law or regulation. In this framework, unification appears to be an "extreme" example of harmonisation, as it demands uniformity and leaves no room for diversity or flexibility in an area of concern. Otherwise similar to W. van Gerven [1, p. 343; 2], their position also considers competition as a driver of legal change. For example, domestic industries may push for changes in the law if their costs of regulatory compliance exceed those of their international counterparties and competitors in international markets. Where the barriers to the export of capital and relocation are low, the threat of relocation to other markets may put significant pressure on lawmakers. To the extent permitted by domestic and private international law, companies may select various jurisdictions for their business transactions. In small countries dependent on international trade, lawmakers will be particularly sensitive to such pressure, conscious of the need to attract multinational corporations and firms from other jurisdictions to provide foreign direct investments and generate demand for labour, and tax revenue [1, p. 340].

R. Ghetti describes three paths towards the convergence of law [3, p. 817]. The first, states may amend their legislation unilaterally, by transplanting a law from another jurisdiction. This practice requires no cooperation with the country from which the law originated. Therefore, it is often referred to as "non-cooperative adaptation" [3, p. 817—818].

The second, harmonisation, occurs when two or more member states delegate some of their sovereignty to a supranational body, vested with the power to lay down the principles that the participating states must incorporate in their national legislation. For example, the European Union directives are a key tool for the harmonisation of law within the European Union [3, p. 818].

The third path, unification, takes place when a multilateral treaty or an act of a supranational body lays down uniform detailed rules, with direct and immediate effect, binding on the territory of all participating jurisdictions. This is typically the case with the European Union regulations [3, p. 818].

As opposed to a unilateral amendment, harmonisation and unification have an element of cooperation intrinsic to them. By cooperating, states accept constraints on their legislative autonomy. A unilateral amendment imposes no constraints on such autonomy. Harmonisation is more restrictive, as it commits a state to a set of binding principles, and harmonisation places the highest constraints, as the states agree to be bound by the objective of the legislative measure and the means for attaining it. The legal policy mechanisms for the convergence of law are provided by the continuum from autonomy to heteronomy [3, p. 818].

In R. Ghetti's model, there are three distinct tools of convergence of company law: full legal unification, mere harmonisation, and regulatory competition [3, p. 813].

While the first two elements are consistent with the models that have been highlighted above, the third element, "regulatory competition", is an addition appearing as a "less typical" form of convergence in some domestic legal contexts.

By addressing multiple areas of concern, the harmonisation of law has a tendency for fragmentation. As observed by I. M. Zhmurko, instruments of international law are essential to the approximation of law, as it is not possible to put in place a common set of regulatory prescriptions outside a system of international legal obligations of states or a regulatory framework, especially to provide progress of the interstate cooperation towards the goals of integration [4, p. 575]. Modern instruments are quite comprehensive and address a fairly broad sphere of relations. States use a variety of legal means for coordination of interests, expression of agreed positions and fixation of common rules. These are conventions, treaties, uniform and model laws, recommendations, guidelines, decisions of judicial bodies, set of customs, etc.

In our opinion, in the modern science of private international law, there has emerged a need to establish patterns that affect the choice of specific tools, in particular, the optimal set of legal instruments for solving a specific problem by similar, identical or uniform rules. According to I. M. Zhmurko the concrete solution for legal approximation will depend on factors like the number of parties, the scope of the agreement, or the level of detail [4, p. 575–576]. Paying due attention to the technical side of the problem, in particular defining an interdependence of material and procedural law in the process of harmonisation or unification, this author still insufficiently dwells on the legal nature of the relations, for which such norms are being developed.

The deepening of research in this direction should be carried out taking into account the developments of the doctrine on the classifications of the fields of the correlation of material and procedural law. Noting the asynchrony in the unification of material and procedural law, D. I. Krymsky proposes a typology of solutions for legal unification, including internal or external (taking place between states or within states), autonomous or derivative (proceeding independently of unification of material law or conditional on it), full or partial (covering the geographic area or the issues of concern fully or partially), ideal or practical (in terms of the nature of its objectives) [5, p. 221]. This approach allows us to conduct empirical research and reveal the reasons for the unification in legal acts on the codification of uniform substantive and procedural norms for specific relations. D. I. Krymsky noted as examples that Regulation (EC) of the European Parliament and of the Council of 21 April 2004 No. 805/2004 creating a European enforcement order for uncontested claims, Regulation (EC) of the European Parliament and of the Council of 12 December 2006 No. 1896/2006 creating a European order for payment procedure, Regulation (EC) of the European Parliament and of the Council of 11 July 2007 No. 861/2007 establishing a European small claims procedure, did not preempt the relevant procedures in national legislations but contributed substantially to supranational regulation of civil proceedings [5, p. 223].

At present, the study of this issue covers more general problems, without going into a detailed differentiation of certain types of relations. According to D. I. Krymsky, unification can be grounded in common history, shared legal traditions, foundations of the legal order, or individual elements of legislation [5, p. 224]. As observed by I. M. Zhmurko, shared norms are a compromise that takes into consideration the national specifics and approaches to legal regulation in a given area and the desire of every state for an optimal regulatory regime after convergence [4, p. 576]. Meanwhile, the specificity of some issues of international relations is manifested in practice, for instance in the process of rulemaking. During the debate on amendments to the uniform law on the international sale of goods at the 6th Plenary meeting of the 1980 Vienna diplomatic conference, Mr. Sami (Iraq) proposed to exempt oil from the scope of the law because "international oil trade was too important matter to be covered by it"[1]. Mr. Sami added that unless that amendment was accepted, certain OPEC countries would not be able to accede[2]. In the end, the Iraqi proposal was rejected, but that did not stop Iraq from joining the Vienna convention on contracts for the international sale of goods. This example explains why the elaboration of international treaties can take decades.

International treaties are a very popular and convenient tool for harmonisation. Their provisions significantly influence the jurisdictions of the states that have consented to be bound. For the international norms to work, participating states must implement them in national legal systems. This begs the question whether every norm of international law must be incorporated into national law to become enforceable nationally. L. V. Pavlova argues that only self-executing norms of international law are directly enforceable without transformation into national law, and these must meet the following criteria [7, p. 4]:

- to have the status of a norm of international law, independent of the type of instrument that contains it (treaty, custom or decision of an international organisation);
- to be directed at the subjects of national law (physical and (or) legal persons) by virtue of their content;
- to be directly enforceable in the territory of the state, without the assistance of a domestic legal act.

[1]United Nations Conference on contracts for the international sale of goods: official records [Electronic resource]. URL: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a-conf-97-19-ocred-eng.pdf (date of access: 10.04.2022).
[2]Ibid.

Based on these criteria, the European Union regulations and decisions of the Eurasian Economic Union Commission are examples of instruments that establish self-executing norms, as they were written as directly applicable and enforceable in relation to a determinable range of subjects. However, whether they are instruments of international law is less certain. As the Court of Justice of the European Union has underlined in several rulings (e. g. Flaminio Costa vs. E.N.E.L. dated 15 July 1964), the EEC Treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the member states, which their courts must apply. Regulations adopted pursuant to art. 189 of the EEC Treaty are binding in their entirety. They are directly enforceable in all the member states and refusal to enforce them has no basis in national law. Consequently, the legal system of the European Union is a special legal order, which is neither international nor national but is of supranational character. However, the legal system of the European Union is not a global system, in the understanding of V. M. Shumilov[3].

As acts of primary law, the Treaty on the Eurasian Economic Union and other treaties of the union, the EEC Treaty or the Treaty on the functioning of the European Union, have direct enforceability with regard to an act of domestic law and the domestic legal order, as M. N. Marchenko and E. M. Deryabina opine [6]. The technical regulations of the Eurasian Economic Union are directly enforceable in the territory of the union pursuant to para 2 of art. 52 of the Treaty on the Eurasian Economic Union, and can also be described as self-executing.

Uniform interpretation and enforcement are essential to the effective unification and harmonisation of law in regional integration organisations. International courts contribute to the uniform interpretation of the law by issuing advisory opinions. Importantly, in some of its opinions, the Court of the Eurasian Economic Union refers to decisions of the Court of Justice of the European Union, an invaluable practice that facilitates legal conversion. In its landmark Advisory opinion of 4 April 2017, the Court of the Eurasian Economic Union affirmed that the antimonopoly regulations of the union are uniform under art. 76 of the treaty, and the Protocol thereto. Para 2 of art. 74 of the treaty establishes the general rules of competition in cross-border markets,these general rules act as self-executing norms of an international treaty. Furthermore, the Treaty on the Eurasian Economic Union does not entitle the member states to amend unilaterally the admissibility criteria for vertical agreements.

The opportunities for harmonisation and unification within the framework of regional integration are wider for those relations that are directly related to that process. Despite the fact that corporate relations are closely related to the fundamental pillar of integration in the form of the freedom of movement of capital, the patterns of establishing uniform rules are not sufficiently systematised. As the European Union has a long history of harmonisation and unification of corporate law, for the Eurasian Economic Union it is not yet so obvious.

Legal harmonisation of corporate law is possible in spite of significant disparities between national legal systems, but obstacles may arise. For example, British courts have refused to adopt the definition of legal entity from the European Union law, and have stuck to the use of the common-law term “corporation”. In distinctly different legal systems (Muslim, liberal, socialist, etc.), harmonisation remains implausible while these systems retain their antagonistic components [8, p. 27]. However, even in the absence of fundamental differences between laws of different states, there may be some domestic legal specificity that turns international norms and standards into antagonists for a domestic legal system. The doctrine notes that the problem of antagonism can be identified by constitutional provisions [9, p. 129]. Meanwhile, the formation of integrated markets and other multi-jurisdictional spaces in one way or another requires interstate legal convergence. Settlement should be found by focusing on the common goals of cooperation in the context of cooperation (integration) and through the mutually recognised principles. Thus, national legal systems have a mutual influence on each other, contributing to the progressive development of law in the multistate dimension.

Harmonisation and unification are sometimes identified, but their processes in the details of implementation and patterns of development remain uneven and fragmented. The differences between national legal systems and legal families are still deep. The specificity of different relations sets the features of harmonisation and unification of law. International organisations and instruments of international law contribute to the convergence of both substantive and procedural law, and the modern trend is to unite the corresponding results into one legal act. The development of research for certain types of relations, in particular in the field of corporate law, must rely on the priority of goals of harmonisation and unification over the differences in national laws. That is ensured by the freedom of movement of companies. Convergence in the Eurasian Economic Union can be achieved through the gradual elimination of differences in national laws that prevent the realisation of that freedom beyond the framework of antagonistic constructions. A uniform understanding of such a framework for unification and harmonisation can be provided by the Court of the Eurasian Economic Union, as was done by the Court of Justice of the European Union.

[3] *Шумилов В. М. О* «Глобальном праве» как формирующейся правовой суперсистеме // Моск. журн. междунар. права. 2015. № 4. С. 4–17.

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