UNIFORMITY, HARMONISATION OR RESTATEMENT OF LAWS

desirability and implementation

In this article, **Professor John Goldring**, provides an overview of the mechanisms that can be used to unify or harmonise laws at the national or international level.

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At times governments of different jurisdictions or interest groups within those jurisdictions decide that unification, harmonisation or restatement are worthwhile: each may be more appropriate in a particular context. Bringing laws into harmony means that the relevant government chooses to surrender more or less of its own autonomy in the interest of compatible law.

In 1977 I described efforts to unify or harmonise law, both at an international level and within the context of the Australian federal system.[1] The motivation for and methods of unification and harmonisation have not changed significantly in the past 18 years, except that international agreements (such as ANZCERTA and the latest GATT agreements[2]) now require Australia to harmonise its laws in some ways. The European Union also provides a further model — for within the EU, unification and harmonisation of law is important.

Federalism and diversity of laws

Unification or harmonisation of law is more of an issue — and presents more opportunities — in federal than in unitary nations, because the constituent units within a federal state may make different political and legislative choices. Federations are also economic units, and at times interests of economic efficiency may outweigh interests of states' legislative autonomy. When this occurs, and the central legislature has power under a constitution, there is a choice:

- enactment of a single law by 'paramount' or 'prevailing' legislation
- adoption of a 'uniform' law, based on an agreed model, by individual action of the relevant units
- a hybrid of the two, that is, a legislative exhortation of general principle by a central legislature, which is to be implemented by appropriate local legislation at the constituent level (the model is the 'Directive' issued by the Parliament of the European Communities)
- the laws are 'harmonised' by some weaker measure, including 'restatement' of common law principles.

Each method has been tried at various times in Australia, with varying success. The traditional methods used internationally to unify and harmonise law are relevant. Each method has some problems.

Restatements

'Restatement' of the law is well known in the USA where, for more than 50 years, the American Law Institute ('ALI') has produced 'restatements' of common law.[3] The ALI has no official status. Its members are distinguished practising and academic lawyers, chosen for their expertise by the existing ALI members.

The ALI has been particularly important for unifying and harmonising law in the US federal system which lacks a common general appellate court[4] so that in matters of non-federal law, each State court system is entirely autonomous. Each State purports so apply 'common' principles of common law, but the common law has developed distinctive State peculiarities.

With the development of better communications the economic unity of the US became even more obvious, and the differences between State laws led traders to seek greater harmony of laws, particularly commercial laws. The restatements of law produced by the ALI result from academic analysis of all the relevant judicial decisions of all State courts.[5]

The ALI's experts then attempt to distill or reconcile the various decisions, in the form of the 'basic' principles of law, embellished by examples, qualifications and variations, which constitute the Restatement. This method was adopted in the various editions of *Halsbury's Laws of England*. It was common in many 10th century treatises,[6] and was as familiar to American as to English lawyers.

The Restatements have no binding force, but are a convenient source of relevant authority for counsel and Judges,[7] and represent the 'mainstream' of American common law thinking. In some cases parts of the Restatement have been enacted by State legislatures, but usually they are merely extremely persuasive guides.

A restatement of law can never be just a statement of what courts have decided. Those who prepare it analyse the reported cases, select decisions which they regard as significant, and interpret them. A simple proposition can only rarely be taken unequivocally as the *ratio decidendi* of a case; judges have opportunities for selection.[8]

Finally, the principle must be expressed in clear and general terms. The drafting of such a statement requires the same careful thought as legislative drafting, because the restatement is intended to have general application, and is analogous to a Bill.

Preparation of a restatement usually reveals some anomalies and anachronisms, even if not problems in underlying policies. Analysis of cases may reveal contrarieties or contradictions in policy. If the law is to be restated, these must be resolved, inevitably involving value-judgements.

The real question is whether those value-judgements ought to be made by persons who assert that they are doing no more than restating what courts have already decided.[9] How overt should the value-judgements be? What criteria are involved in the various processes of selection that have been described?

Restating the law necessarily involves processes similar to law reform or unification of law. Because restatement has a significant prescriptive, as well as descriptive, component, it is analogous to other types of law reform and unification or harmonisation of law.

Harmonisation and State sovereignty

It is not clear exactly what 'harmonisation' of law means.[10] This may be why the concept is attractive to diplomats and politicians.

It connotes at least that the laws of the different States seeking legal harmony will be changed so they are no longer inconsistent, in the sense of requiring someone to obey norms that are both mandatory and contradictory.[11] It may connote that compliance with a norm of State A is also compliance with the law of State B.

This requires harmonisation of policy as well as of laws. If a State undertakes that its laws are to be 'harmonised' with those of another State, it circumscribes its own freedom to legislate as it thinks best; it abrogates its own sovereignty.[12] This is also a major criticism of the expanded GATT and World Trade Organisation Agreements that followed the Uruguay Round, which require harmonisation of laws, and various common market/free trade agreements.[13]

Reasons for unification or harmonisation of laws

Different States regulate different social or commercial activities. They may require people to do things differently or prescribe different consequences of the same action, depending on the particular place or time.

For example, A, a resident of Victoria, draws a cheque on a Victorian bank, payable in Australian dollars in Melbourne, in favour of B, a resident of Italy, and delivers the cheque in Rome. There C steals the cheque, forges B's endorsement and negotiates it to D who takes the cheque in good

faith, without notice of any defect in C's title, and for valuable consideration. D presents the cheque to the bank, which pays it in good faith and debits A's account. The rights and obligations of the different parties vary, depending upon which law (Victorian or Italian) governs the transaction. Italian and Australian law prescribe different consequences of a forged endorsement of a bill of exchange, even though the commercial nature of the instrument is the same.

Normally, conflict of laws rules determine the ultimate question of liability, but these are often technical and complex, and may produce results quite different from those intended by the parties.[14] Reliance on conflict of laws rules can be avoided if the municipal law of each of the States involved is uniform or harmonised.

Most States acknowledge the 'autonomy' of parties to make binding agreements, including choices of a legal system to govern the agreement itself. Two businesses that enter into a contract can, and usually do, choose a governing law and often a place where the agreement is enforced.

The desire for conformity or harmonisation of laws is strongest in the area of commercial transaction. The interest of commerce may be served by avoiding reliance on conflict of laws rules and by providing a rule which is the same or similar in as many different countries as possible.

Uniformity or similarity of rules may increase certainty and predicability in the law; different legal rules in different countries or states can create considerable barriers to commerce.

States choose whether or not to unify or harmonise rules, in the light of political circumstances. Often harmonisation occurs for reasons exogenous to the law, because of business or popular practice. The lawyers are often like the workers who clean up the streets when the elephants and horses have left after the triumphant procession.[15]

Methods of unification and harmonisation[16]

The international unification of law

Once jurisdictions decide to unify or harmonise their laws on a particular subject, they must choose a method. Each may see virtues in its own rules; domestic political pressures may force governments to insist on retaining particular rules, even when they accept the principle of uniformity or harmonisation.[17] If several countries are involved, negotiations can become complex.

Many attempts to unify or harmonise laws have failed. However, experience of more than a century has shown that certain techniques can be used to advantage.

A comparative law study

The foundation of any exercise in unification or harmonisation of law is a comprehensive comparative study of the legal rules operating in all States involved, designed to reveal similarities, differences, and points likely to require specific attention.

Formulating international uniform laws

Following the comparative study, a text is formulated. International exercises tend to be dominated by the European rationalist, civil law tradition, rather than the more pragmatic common law tradition, so this task may be entrusted to academic experts. Alternatively, it may be prepared by a committee or working group of national representatives.

The order of the agenda set by the working group may determine the form of the final text. The draft, in the tradition of the European codes, appears as a series of principles expressed at a fairly abstract level. If this draft has not been prepared by a representative body drawn from the nations primarily concerned, it is considered by such a body.

Only after full debate and negotiation does an agreed final text emerge. This becomes the substance of the international legislation or model law.

Because of the process of compromise and negotiation, the text is more commonly the lowest common denominator of national interests than a pioneering text which crosses new thresholds.

Even then, there may be irreconcilable differences. For example, the civil law countries by 1930 had agreed on a uniform law on negotiable instruments, but this never was accepted by the common law States. The Vienna Sales Convention of 1980 was the culmination of 50 years' work on the text of a uniform law.

Legislation or 'model law'?

Both methods have advantages and disadvantages. UNCITRAL, the United Nations Commission on International Trade Law, which has assumed the primary role in promoting unification and harmonisation of law of international trade and commerce' has used both techniques.[18]

The 'Directive' used in the European Community is more like the International treaty, but unlike treaties, the member States of the EU are obliged to implement the Directives by legislation.[19]

The legislation model ensures that the law of each country is identical, allowing for problems of translation. A State that has accepted the terms of the international agreement, however, is bound to preserve it as part of municipal law, or risk offending international law. Unless the reasons for accession are compelling, States are often reluctant to take the first step.

'The answer to demands for uniform or harmonised laws in Australia lies less in the area of technical rules of law, and more in political co-operation and co-operative legislation.'

A model law is simply a model. There is no compulsion to adopt the whole of the text. Local drafters are tempted to add their own embellishments to provide for local circumstances; local politicians often need little pressure to be persuaded that variations to cater for the needs of particular local interest groups are desirable.[20]

Methods of unification of law in Australia

Within a federal system, like Australia, the techniques have the same advantages and disadvantages but there is nothing analogous to the international agreement. If national legislation is chosen as the vehicle for a policy, and is constitutionally valid, enactment by the Commonwealth Parliament ensures uniformity.

Experience of model laws — Australian examples include the 'uniform' hire-purchase and companies legislation of the 1960s and 1970s — within the federal system amply demonstrates their relatively unsatisfactory nature and ineffectiveness in achieving policy goals.

Some international techniques of unification and harmonisation can also be used, with slight modifications, in a federation like Australia: a comparative study is necessary, followed by negotiation and drafting.

Use of Commonwealth constitutional power

If the objective is truly uniform legislation, the most certain way of ensuring identical law in each part of the nation remains for the Commonwealth Government to enact that legislation. Whether this can be done depends on:

- the extent of the Commonwealth Government's constitutional power; and
- the willingness of the Government to use it.

If the proposed uniform law falls within power, s 109 ensures that the Commonwealth law will prevail over any inconsistent State law and there is no need for the policies of the various political units to be 'harmonised', but it raises Commonwealth-State political issues.

If the Commonwealth Parliament lacks legislative power over the subject matter, or if the extent of power is disputed, the only certain method of ensuring permanent uniformity is for the States to refer the necessary powers to the Commonwealth, under s 50(xxxvii) of the Constitution.

The decision the States must make in such cases is similar to that faced by nations considering accession to an international agreement: will they abandon a degree of autonomy?

Political co-operation

The answer to demands for uniform or harmonised laws in Australia lies less in the area of technical rules of law, and more in political co-operation and co-operative legislation. There are now regular meetings of Commonwealth and Ministers in most areas with regular work programs and agendas.

Once they achieved very little except the building of networks, but this may now be changing. If a meeting of Ministers can agree on a uniform policy, it should be possible to achieve uniformity, or at least harmony, in the laws giving effect to that policy.

In practice, it is not so easy. Technical and bureaucratic factors and ambitions often produce obstacles: these may arise from potential conflict with other laws, or from the style and practice of Parliamentary Counsel in different States.

Interstate rivalry and normal Commonwealth-State politics play their part.

The regular meetings of Ministers have led to more regular meetings of officials. These are also important in reaching a common basis for policy and better communication between the governments. Awareness of concerns at the official level can remove impediments to harmonisation of laws.

Without political consensus on the need for and degree of harmonisation or uniformity of laws, legislative measures are not possible.

Harmonisation of State laws within Australia

If the States are not prepared to surrender their autonomy, they may adopt the 'model law' approach, which amounts to 'harmonisation' rather than 'unification' of law. This is more attractive to States that seem reluctant to commit themselves to maintain uniformity of legislation.

The best known examples are the 'uniform' companies and cosumer credit laws of the 1960s and 1970s, though there are other examples, such as laws relating to packaging of food, and more recently, laws on non-bank financial institutions and commercial arbitration.

The model law approach has the attraction of offering a basic similarity of principle, even though details and mechanics may differ.

Experience in the areas of company and credit law was that, even at the outset, particular States wished to make or retain their own versions of the law.

For example, under the uniform hire-purchase legislation introduced in the early 1960s, despite similarities in the basic provisions, the details and subordinate legislation were different, so that credit providers had to prepare separate sets of standard documentation for each State.

Until the development of the co-operative company law scheme in the late 1970s, the position under the 'uniform' companies acts of the 1960s was similar.

The co-operative scheme at least sometimes allowed lodgement of a single document which would have effect throughout Australia, rather than, as under the older laws, lodgement of separate sets of documents in each State and Territory.

Commercial factors — such as the requirements of the Stock Exchanges (before they became unified) were as important as the legal requirements in establishing practical uniformity in company laws.

Recent developments

The 1980s saw further refinements. Although 'uniform' consumer credit laws have still not appeared in final form, presenting difficulties for business and consumers, the laws introduced between 1982 and 1986 in the major States are probably closer to each other than the hire-purchase legislation they replaced.

There are now co-operative agreements on corporations and securities regulation and non-bank financial institutions.

The co-operative companies arrangement was delayed by State-Commonwealth politics for nearly 20 years, but commercial pressures made it inevitable, to ensure efficient operations of the capital markets, though individual States are less able to regulate corporate affairs with local effects.

Restatement of law in Australia

Restatement has not been tried as extensively in Australia as in the United States. The High Court's general appellate jurisdiction means that the common law in the States and Territories has not diverged as much as in the United States.

Projects led by Professor Finn of the Australian National University (as he then was) and Professor Lee of the University of Queensland, were devoted respectively to the restatement of Australian law of contracts and trusts.[21]

Australian lawyers may find these compilations helpful. The law is largely uniform; a convenient statement of all the sources of authority will ensure that it is less likely to diverge.

Law Reform Commissions, unification and harmonisation of law

The ALRC's Act directs it to seek uniformity of laws in Australia and the ANZCERTA Agreement and the Memorandum of Understanding on harmonisation of laws between Australia and New Zealand,[22] requires harmonisation. The same methodological, constitutional and political problems, however, still confront efforts to unify law.

There is no guarantee that recommendations of any law reform agency will be enacted. That depends on a political decision. Where more than one government is involved, the problems of obtaining political agreement and priority in the legislative program are multiplied.

The ALRC may recommend Commonwealth legislation or an enactment which serves as a model for other jurisdictions. In other cases, the most useful contribution to uniformity of laws law reform agencies can make is through research and description of current law, and analyses of its shortcomings.

Co-operative law reform

After the establishment of Commonwealth and State law reform agencies, virtually all the State agencies, separately, considered the law of commercial arbitration. Several examined the law of rape. This duplicated effort significantly, particularly as conclusions tended to be similar. Ministers and agencies themselves, faced with declining resources, saw the need to do something about this.

The work of the Commonwealth and State law reform agencies (as well as those of New Zealand and Papua New Guinea) are now a regular agenda item at the meeting of Standing Committees of Attorneys-General. Ministers may withdraw items from the work program of all except one agency to avoid duplication. They have promoted the idea of co-operation in law reform.

Under these schemes, one agency, with the agreement of the others and the responsible ministers, agrees to undertake the research and writing. The other agencies attend meetings, participate in discussions and consultations, and make comments and suggestions on various drafts. The process may result in the presentation of a joint report: identical recommendations and draft legislation are submitted by the agencies to the respective ministers. Even if a joint report is inappropriate, access by an agency to the working papers, submissions and discussions of other agencies may eliminate a degree of duplication effort. Co-operation has been successful in cases like superannuation, informed consent to medical treatment and product liability; less so in the case of security interests in personal property.

If research work and policy analysis is shared, with full opportunity for each agency to participate in the discussion of policy, the conclusions and recommendations are likely to be common. The likelihood of diversity on technical legal issues is reduced.

If the only factor influencing a move for uniform or harmonised laws was a rational process of arriving at the right policy and expressing it in legislative form, there could be much more uniformity of law in Australia. The major factors, however, are not technical but political. The recommendations of law reform agencies are subject to politics, and the issues are often decided on political, rather than technical or policy grounds.

Conclusion

I wrote 18 years ago:

> *Uniformity of laws is not an end in itself; its value lies in its practical benefits. Many people are distrustful of modification of law; they feel that it will impose a 'dull blanket of uniformity'*[23] *and stifle experimentation by the States, or lead to a reduction in the civil rights of individuals ...*[24]

Those remarks still represent my view. A dispersal of power through a federal system has benefits as well as frustrations, but if there is the political will to achieve uniformity or harmonisation of laws throughout our nation, we have the means of doing so.

Endnotes

1. 'Unification of law in Australia' [1977] 1 *Uniform Law Review* 82. An edited version appeared as "'Unification and Harmonisation' of the Rules of Law" (1979) 9 *FL Rev* 284. Both versions contain extensive references to material dealing with unification and harmonisation of laws internationally and at other levels.

2. M Schaefer and T Singer, "Multilateral Trade Agreements and US States: An Analysis of Potential GATT Uruguay Round Agreements" (1992) *J World Trade* 631; Symposium, (1992) 48 *Washington & Lee L Rev.*

3. Recently, a study of the ALI and the National Conference of Commissioners on Uniform State Law, which I described in 1977, has not only described these institutions (and made explicit their political role) in detail, but has also subjected them to a very mathematical 'public choice' analysis, which demonstrates the essential unreality and aridity of the 'law and economics' approach when used in inappropriate contexts. Alan Schwartz and Robert E Scott, 'The Political Economy of Private Legislatures' (1995) 143 *U Pa L Rev* 595. Despite its foundation on misguided assumptions and inappropriate use of mechanistic techniques, the article is worthwhile for making explicit a great deal that has previously been assumed.

4. The United States Supreme Court has no general jurisdiction in appeals from State courts, unlike its Australian and Canadian counterparts.

5. Schwartz & Scott, op cit. This process is very similar to the process of ascertaining the nature and content of national law that must be taken before any international exercise of unification or harmonisation of the law can be undertaken.

6. This form is still adopted to some extent in classic English texts like *Dicey and Morris on the Conflict of Law* and *Chitty on Contracts.*

7. The various volumes of the Restatement contain copious annotations, referring to the sources of the statements.

8. eg, J Stone, *Precedent and Law*, Sydney, Butterworths, Sydney, 1985, Chapters 4 and 7.

9. A comprehensive and highly critical analysis of the restatement process is Kathleen Patchel, 'Interest Group Politics, Federalism and the Uniform Law Process: Some Lessons from the Uniform Commercial Code' (1992) 78 *Minn L Rev* 83, which points out that the uniform Commercial Code in the United States was drafted by lawyers who were close to commercial interests: and totally ignored the interests of consumers, who were equally affected by the provisions of the UCC. See also Schwartz & Scott, op cit.

10. If music be the analogy, it presupposes difference, for without difference in music there can be no harmony: David W Leebron, *Lying Down with Procrustes: An Analysis of Harmonisation Claims*, Working Paper No 111, Centre for Law and Economic Studies, Columbia University, New York, 1995, 2.

11. Leebron (op cit) suggests 'making the regulatory requirements or governmental policies of different jurisdictions identical, or at least more similar' (2), but this seems too restrictive.

12. Municipal constitutional law may make this invalid; see *In re Initiative and Referendum Act* [1919] AC 935.

13. Schaefer and Singer, op cit: Symposium, (1992) 49 *Washington & Lee L Rev*; Michael W Dunleavy, 'The Limits of Fair Trade: Sovereignty, Environmental Protection, and NAFTA' (1993) 51 *U of Toronto Faculty of Law Review* 204; Robert Howse, 'NAFTA and the Constitution: Does *Labour Conventions* Really Matter any More?' (1994) 5 *Constitutional Forum* 54 (1994); D Schneiderman, 'Canadian Constitutionalism and Sovereignty after NAFTA' (1994) 5 *Constitutional Forum* 93; cf Daniel A Farber and Robert E Hudec, 'Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause', (1994) 47 *Vand L Rev* 1401, 1421 et seq.

14. For the purposes of conflict of laws rules, each Australian State or Territory is, for the purpose of each other State or Territory, a foreign country. *Chaff and Hay Acquisition Committee v J A Hemphill and Sons Pty Ltd* (1947) 74 *CLR* 375, 396 (Williams J): *Pedersen v Young* (1964) 110, *CLR* 38, 49 (Windeyer J).

15. Arthur Rosett, 'Unification, Harmonisation, Restatement, Codification and Reform in International Commercial Law' (1992) 40 *Am J Comp Law* 683, 684–687, 695.

16. These questions are dealt with in more detail in the articles cited in n 2 and in works there cited. Possibly the most comprehensive study of the unification of law is R David, 'The International Unification of Private Law', in David et al, eds, *International Encyclopedia of Comparative Law*, ch 5 vol 11, Tuebingen/Paris/New York 1971. UNIDROIT, an international organisation directly involved with the international unification of law, in 1988 produced *International Uniform Law in Practice*, a study of the operation of uniform law. Some of the comments reproduced in this volume suggest that prospects of uniformity of laws in practice might not be as optimistic as some supporters of the theories international unification of law might like.

17. Patchel, op cit.

18. The Hamburg Convention on Carriage of Goods by Sea and the Vienna Sales Convention require states acceding to them to enact rules as part of national law, but UNCITRAL has also promulgated a model law on commercial arbitration. See William C Vis, 'International Unification of private law: the Multilateral Approach' (1986) Proceedings of the 80th Annual Meeting of the American Society of International Law 233.

19. eg, M Cappelletti, M Seccombe and J Weiler, *Integration Through Law: Europe and the American Federal Experience*, Walter de Gruyter, Berlin & New York, 1985–1987.

20. Patchel, op cit; Schwartz and Scott, op cit; see also Rosett, op cit at 694–6.

21. The examination of the law of trusts also produced some proposals for uniform amendments to legislation governing the powers, duties and immunities of trustees. These are areas less affected by legislation or public policy than most other areas of contemporary activity.

22. The latest GATT agreements also require harmonisation of laws in the interest of reducing non-tariff barriers to international trade: Schaefer & Singer, op cit.

23. MD Kirby, 'Uniform Law Reform: Will We Live to See It?' (1977) 8 *Sydney Law Review* 1, 2.

24. "'Unification and Harmonisation' of the Rules of Law" (1979) 9 *FL Rev* 284, 321; cf Bray, (1971) 45 *ALJ* 585–6.