◆法と経済学会・第17回全国大会　講演報告◆

□招待講演　1

『 Convergence and then Downstream Divergence 』

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場所：駒澤大学　深沢キャンパス（120周年アカデミーホール）

Saul Levmore 教授
(University of Chicago
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司会：田中　亘（東京大学）

Wataru Tanaka

We will begin the afternoon program, the special lectures by invited speakers. We have Professor Saul Levmore, University of Chicago. Professor Kanda will introduce our guest of honor.

Hideki Kanda　(GraduateSchool of Law, Gakushuin University)

Thank you. Let me briefly introduce Professor Saul Levmore. Professor Levmore is currently professor at the University of Chicago Law School. He is also President of the American Law and Economics Association. I am deeply grateful to Professor Levmore for having travelled all the way here from the United States this time. He studied at Yale, and has taught at Virginia and Chicago for long time. He was Dean of the University of Chicago Law School for several years. Professor Levmore's work is immense and wide-ranged – just too much for me to introduce all his work now. Please visit the website of the University of Chicago Law School. Now I will hand over the microphone back to Professor Tanaka.

Wataru Tanaka

Thank you. We will start the program by Professor Saul Levmore: Convergence and then Downstream Divergence. The floor is yours.

Saul Levmore

Thank you very much. I am going to speak for not the whole time, and then I hope you'll ask some questions. But I want to begin a little bit by just saying a few words about the American Law and Economics Association because we, in the United States, hope to have more interaction with the Japan Law and Economics Association. I'd just say a few things but really my goal is to invite you to come to the United States next year to Chicago to the annual meeting of the Law and Economics Association.

Law and economics in the United States is really growing. At the annual conference there will be 300 people at every session. In each session, at every hour there might be between seven to 12 sessions at one time. Of these sessions, there might be corporate law, tort law, tax law, many other sessions at one time. People choose what is of interest to them; three papers are given in each session and then there is time for questions and answers. It's very American. People always disagree with one another. They never say that was really a very good paper. They always say, I don't understand your paper. Here's my question. This is the style of law and economics in the United States but I promise that if you come to our session we'll be a little bit more Japanese and polite.

We find also in the American Law and Economics Association that there are more and more young people who come. Law and economics just before my age group. By my time there was the first set of

people who did Ph.D.'s in economics and also J.D.'s in law. Before me, there were really some economists in law school but about my age there started being people who had both degrees. It's become very common, and especially because empirical work has become very common. At our conference, perhaps one-third or one-half of the papers are empirical, using available data sets. The young people especially really like data. They have much more computer science training. I think this is the direction of law and economics in the United States. Perhaps it will switch back in a few years to more theoretical work or practical work about what law firms actually do, or government projects actually do, but it just goes up and down. Indeed, there will be sections at the meeting devoted entirely to empirical methods in law and economics, along with tax and torts and corporate law, and even criminal law and constitutional law. Every area of law now has some law and economics people in it. My prediction is that this is what will happen in other countries as well.

We also have a journal, the American Law and Economics Journal, which I encourage you to read. It is free online. Perhaps also such a journal will develop in Japanese. It is a very competitive journal. It is a peer-reviewed journal. The work in it is meant to be accessible to people who do law, to people who do economics, and people who do both. No special training is required.

I recently wrote a paper about which I will speak here today. I will also publish an extended version of it in the American Law and Economics Journal. Perhaps in the future we can develop a joint, international law and economics journal, as well as meetings.

Again, thank you very much for inviting me.

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My topic today is about convergence and downstream divergence in law. I know these are unfamiliar words, but what I mean is to address a general comparative

law question, asking why we find some legal rules to be cross-cultural, true in many countries, while other legal rules are specific to their local cultures. When law has become similar across counties I say it has "converged." For example, every legal system we know says you cannot go to your neighbor's house and steal. A theft is a common rule in every jurisdiction. That is what I mean by convergence. I also refer to this as "upstream convergence," meaning it is a basic thing of a legal system. The fact that every system has a rule against murder, and another against stealing is upstream convergence. If the precise details of these rules differ, this is downstream divergence.

There is upstream convergence in many areas of law. Every country we know has a tax system, but tax rates and exemptions differ downstream. Almost every country we know has a police force, to take another example. Often we can think of "upstream" as aspects of law that developed earlier in time, while downstream rules are refinements that came later in time.

Let me just say that divergence and convergence can be found the other way around. The concepts are not circular, as I hope to show.

Every legal system has a rule that tries to discourage people from being negligent, what we call the tort law system. If I walk over and I kick Professor Kanda in the knee and I break his leg, every legal system says that's very bad. We need to discourage that. You must pay his damages, or maybe even make it a crime. There is substantial convergence. Downstream, there is again some divergence in how damages are calculated. If it is a crime, there is substantial divergence downstream. Some legal systems might impose a prison sentence of one month, some for 3 years, some for 10 years, and so forth. Here too, the basic point is convergence upstream and divergence downstream. I want to explain why this is true. That's the essential goal of this paper.

As for convergence, we can ask why legal systems seem to share rules? There are familiar explanations, such as the fact that countries observe one another and copy, but we can say more. I have two ideas there. One idea is that sometimes there is an efficient rule, and it survives. Some rules really work better. Every legal system adopts such a rule. That's a very law and economics view. If there's only one way to be efficient, in the long term we expect everybody to be efficient or societies will not survive. For example, having a rule against theft is efficient, for otherwise people will fight one another, put one hundred locks on the doors of their houses, and engage in other costly defensive measures. It was very efficient for legal systems to outsource this task to police and a system of penalties. This may even be how law began, trying to prevent murders and theft. In short, one source of convergence, or similarity across systems, is the success of efficient rules.

Sometimes there is an efficient rule that is unpopular on moral, political, or ethical grounds. Politicians will not want to impose such a rule. Economists might like a rule, but other people will find the rule ethically unattractive. For example, there is the famous idea advanced by the economist, Gary Becker, that instead of punishing people every time they go to a store and steal, we could just punish them one in a hundred times. We can save resources with only occasional enforcement and then severe penalties. But most people are horrified by a rule that imposes a 100 year prison term on the unlucky criminal who is caught under such a system. It's morally offensive. Perhaps people can be improved during short prison terms, and so forth. In any event, no legal system has the set of rules imagined by Becker-style economists, however efficient they may seem. Put in my terms, an efficient rule will not necessarily lead to convergence; convergence requires that a rule be both efficient and ethically acceptable. If the two do not match, we can expect divergence, especially because different societies might have different ethical sensitivities.

Another source of divergence derives from the fact

that multiple rules might be efficient. Think of tort law, and the situation where a tort causes more harm than would otherwise be the case because the apparent victim contributed to the loss by also being negligent. I need to be discouraged from driving my car too fast and causing an accident but you also need to be deterred from jumping into the road from between two parked cars. Economists famously note that there are at least two efficient rules to handle this matter and deter both of us. One rule is the rule of contributory negligence. If I drive too fast, and I run you over, I must pay damages. But if you added to the accident, I can be forgiven from liability. I will still be deterred under this "contributory negligence" rule because I do not know in advance that you will jump into the road. You will be deterred, knowing that if you behave negligently you will not collect damages from me, the speeding driver. On the other hand, we can have a rule of comparative damages, where the loss is divided between us. This gives me an incentive to drive slowly and also gives you an incentive not to walk negligently. This is a famous law and economics example of multiple efficient rules. Remarkably, we once found divergence among legal systems. Some had contributory negligence and some had comparative negligence, Even within the United States, different states had different rules. Both were efficient, presenting convergence.

Many years ago, most societies had a contributory negligence rule. If I drove too fast and I ran you over, I paid. But if you ran out on the street so you're also inefficient, then you got no money at all. Over time most legal systems have moved to comparative negligence rule that I pay some money but I pay less money if you are also inefficient. I think this is a very interesting example because most people's ethical sense – something you can glimpse if you ask people which rule they prefer – is that splitting damages when both parties misbehave is far superior to an all or nothing rule, forgiving the speeding driver when the victim he injures happens also to have misbehaved.

Smoking cigarettes provides another example. Law can fine cigarette manufacturers, if they are regarded as wrongful for producing a product that causes injury, but most people will then prefer a rule that limits these damages in a world where smokers knew of the danger of cigarette smoking. Sure enough, law has moved in that direction. It looks for a rule that is efficient but that also matches people's ethical sense. In sum, we should expect rules to be the same, to converge, when there's one rule that's efficient and when it runs together with people's ethical responsibility. But we should expect rules to be different, to diverge, when either there are many rules that are efficient or when people do not share ethical sensitivities.

And now let us emphasize convergence and divergence theory with another example. We find every legal system penalizing thieves, but downstream there is no ethical or efficiency reason to prefer one length of a prison term over another, within reason. It is not surprising, then, that we find different legal systems with different lengths of terms for this sort of crime. Economists simply cannot tell us the most precise penalty, and people do not have a shared ethical sense of the correct penalty. Some people will want long terms, while others will want to give wrongdoers a second chance. With no shared ethical intuition and not even a convincing efficiency argument downstream, where the length of the prison term is concerned, we find different rules and thus divergence across legal systems.

Consistent with the theory advanced here, sometimes it is the other way around, with downstream convergence and upstream divergence. For example, legal systems agree that if there are damages for a tort or a contract, we should not multiply the damages. Economist would say that actual damages are efficient; fractional damages would under-deter the torfeasor, but multiple damages would constitute a moral hazard, for some people might hope to be injured, and might actually cause damages. If a bicycle runs into me and causes $5,000 of damages,

no legal system gives me $1 million in damages. All legal systems seem to understand if you give me $1 million for being hit by a bicycle, I might run out in front of careless cyclists in order to get hit by them.

I think these principles can be found in many areas of law. We have already seen them at work in tort law and criminal law. For one more example, think of the political decision about how to manage a police force. In large and populated societies police forces are efficient to create, upstream as I have called it, and virtually every society does so. People's ethical intuitions favor these creations, in part because they do not like self-help, when it comes to violence. And yet opinions diverge as to the precise sizes of these forces, and whether they should operate on foot, in vehicles, or even on horses and bicycles. The correct deployment of police is not easily solved with an efficiency analysis, nor is it a matter of shared ethical judgments.

In recent times, and especially in the world of law and economics, it is common to think that empirical work can solve these efficiency problems. But it is virtually impossible to fashion an experiment that will tell us what percentage of police officers should patrol on bicycles. There are so many other variables at stake. For this reason, I do not think we will ever find convergence this far downstream, regarding the number of police to put on bicycles or on other modes of transportation. As a matter of ethical intuitions, people might want police on cycles after hearing a crime in a park, where automobiles cannot easily travel, but this intuition will change over time when crimes occur in various settings, and when criminals adjust their "efficiency" conclusions.

Legal systems might converge about the deployment of police, but if so I think this will be because they copy one another – and imitation is certainly another source of convergence.

Convergence and divergence along the lines suggested here can also be found in our personal lives.

Parents seem to agree upstream that their children should not be too noisy in public places. But there is no agreement as to the right method of influencing this behavior. Empirical work is hard to find, and ethical intuitions diverge, as we all know. Some parents offer rewards for good behavior, some express displeasure, and others impose penalties, but it is hardly clear what works best and there is certainly no shared moral sense. I think it's a good way to explain to students how divergence comes about in law, even the simple things in life, how to teach children mathematics. Just as we do not agree on ways to discipline children or teach them mathematics, even though we agree upstream on the general goal, law also diverges downstream when it comes to specific rewards and penalties.

I think this might be a good place to pause, although I have other things to say, because I am hoping you have questions to ask

Wataru Tanaka
Thank you very much. The session is until 2 PM. If you have any questions from the floor? Professor Aoki?

Reiko Aoki   (Japan Fair Trade Commission)
I understand your basic principle that upstream is convergence, divergence is downstream. The last example you gave us, police, that it'll be very difficult to do empirical work because there are so many factors that would determine whether the policeman would be on a bike or a car or a horse. How far are you – what factors are you taking into account when you say divergence due to differences? Is it ethical factors only? You mentioned ethical differences but would you include things like economic situations or things what we would call socioeconomic things as well? That's the question.

Saul Levmore
I'm going to repeat the question always to make sure we understand each other. I understand the question to be: We find convergence, that is agreement, among

legal systems especially where we have an efficient rule and also one that's ethically attractive to people. Politics likes the rule. Economics likes the rule. The most interesting economics part of the theory is that we find downstream divergence precisely where economics has difficulty finding the most efficient rule.

Let me try a very different example on you, say voting. As you know from a discussion we had earlier, I'm very interested in public choice, again a big area in the United States that we count this part of law and economics to the extent there are legal implications. It's very common in democracies to have voting. We have good reason to think that majority vote reaches good results. It draws on what we call the "wisdom of crowds." We like majority votes. On the other hand, we're really not sure how to structure democracy. Should we have one person - one vote? And then should we elect politicians in nationwide elections or at the level of localities. If we look at fifty democracies, we find fifty different organizations or details of these democracies. Again, I would say that upstream they all agree on a certain kind of majority rule because that seems efficient and also ethically attractive to them. But it is very hard downstream to agree on efficiency or ethical matters. As a result, the details of democracies diverge.

Wataru Tanaka
Thank you so much. Will there be any other questions from the floor? Professor Kanda, please?

Hideki Kanda
It seems to me that it's difficult to understand why there's more convergence upstream and less convergence, or divergence, in downstream. You say in some cases the situation is the other way around. Could I ask you what explains the situation where there is more convergence upstream, and the situation where less convergence upstream and more convergence downstream? If we do not have a good theory in dividing these two, then the distinction between upstream and downstream should just be

discarded.

Saul Levmore

I understand the question to be twofold. First, do I have convincing examples of where downstream there is convergence, and upstream is divergence. But the more important part of the question as I understood was, do I have a theory about why there's more convergence upstream and less convergence or more differentiation downstream.

The only example I gave in the paper, and the one that I noted earlier was the convergence on single or "actual" damages. I think that the amount of damages paid is a downstream matter. Almost every legal system in normal tort cases limits damages to single damages. That's very downstream. Meanwhile, upstream we see divergence. Sometimes there is strict liability and sometimes a negligence rule, to take the most important example across and within legal systems. Similarly, sometimes we see comparative negligence and sometimes we observe contributory negligence. There is also divergence – and perhaps this is more of an upstream example – regarding retroactive torts liability. When there is liability it can be described in efficiency or in ethical terms. If we hold an automobile manufacturer liable because it did not put in airbags twenty years ago we are encouraging manufacturers to look ahead and come up with improvements rather than to fight against legislation that requires new safety devices. It might also appeal to common ethical intuitions to say that this is a form of strict liability. In any event, there is a great deal of variety on this matter; it is sometimes known as retroactive lawmaking and sometimes simply a matter of the length of the statutes of limitation.

The second part of your question is a comparative law question: if you accept my idea that convergence is most often found upstream, while divergence is almost necessarily downstream, then you are asking why that is the case. I offered the idea that all legal systems need to discourage killings and theft, for

example, whike the details of how they do this will vary, in part because it is difficult to identify the most efficient prison terms and things like that. I'm not sure I can do better than that. I think it really goes back to the question of why law emerges in the first place. Without it the world would be chaotic, and humans might even have disappeared, and certainly would not have formed densely populated areas that were able to invent and communicate. This also hints at the idea that "upstream" can be defined as coming early in time, while "downstream" refers to a later evolutionary development.

In more recent time, people in different societies developed gas powered engines, and eventually automobiles. Upstream there was convergence, but downstream, some legal systems suggested or forced people to drive on the right side of the road while others chose the left side. This is downstream divergence when either rule is efficient. Efficiency only required agreement to drive on a given side of the road.

And, again, I think the functioning of democracies offers another good example. of that. Voting took root in many parts of the world. It was probably a good way to reach decisions and to prevent revolts by disgruntled majorities. But how to vote exactly, how often they vote, whether the minister can stay in office many years or must leave office after a certain number of years – these are questions not easily answered with efficiency in mind or with ethical sensibilities.

Here is a final example that still puzzles me. Virtually every society that votes, has a rule requiring elected officials to come from within the jurisdiction. If we in the United States think you have a great minister, our legal system, like all others, does not allow us to vote for that person to be our presdent. Corporations can of course hire successful managers from other corporations, but countries have rules forbidding this seemingly efficient practice. I could argue that all over the world, people have the ethical intuition that

their leaders should come from within – and then this is the course uniformity. But I am not comfortable with this answer; I would have expected divergence here because efficiency suggests one thing, even if common intuitions suggest another.

Wataru Tanaka

We have time for just one more short question. Justice Kusano?

Koichi Kusano   (Justice, The Supreme Court of Japan)

What exactly do you mean by the dichotomy between downstream and upstream? I got the impression that that dichotomy is very close if not identical to the dichotomy between principles and rules. If that were the case, it would be quite understandable as principles tend to converge and rules tend to diverge. But if you mean something very different from the distinction between rules and principles, please make the point clear.

Saul Levmore

I was afraid of getting this question. The question is, can you really distinguish upstream and downstream? Maybe you are working a little backwards. When you see rules differ, you're calling it downstream. When you see rules are the same, you are just saying it's upstream. But really how do know where to draw the line between the two? Is this really different from a famous difference between principles and rules or standards and rules?

Perhaps my upstream-downstream distinction is arbitrary but I think time and evolution is the answer. When a legal system starts, it does not first say you go to prison for four years if you are a thief. It first creates the category of theft and over time tinkers with the punishment. Even if it creates prisons, it changes the length of prison sentences. Therefore, I refer to the earlier decision as "upstream," or fundamental, or earlier in legal development. I am sure you can think of counter examples, but for me this distinction works fairly well.

For a possible counter-example, every legal system is associated with a nation, and within the nation there are internal boundaries we call cities or prefectures. Here, the evolution might be in the other direction. Many local communities were solidified long before what we know call nations developed. Yet it seems awkward to think of a nation as downstream and a municipality as upstream. The former usually has control over the latter, even though the latter, the municipality was developed earlier in time.

I see that my time is up. I want to say, again, thank you very much. And, to repeat, please come to our own American law and economics meeting. I will try to send more of my colleagues to your law and economics meetings, and especially so because of the excellent work of the translators you so thoughtfully provided. Thank you so much.

Wataru Tanaka

Thank you very much.