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1993

### A Commentary on the Harmonization of European Private Law

George A. Bermann

*Columbia Law School*, [gbermann@law.columbia.edu](mailto:gbermann@law.columbia.edu)

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#### Recommended Citation

George A. Bermann, *A Commentary on the Harmonization of European Private Law*, 1 TUL. J. INT'L & COMP. L. 47 (1993).

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# A COMMENTARY ON THE HARMONIZATION OF EUROPEAN PRIVATE LAW

GEORGE A. BERMAN\*

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The idea behind bringing together these papers on harmonization in three such distinct fields as contract, copyright and telecommunications, and securities law must be that they may have something to tell us generally about the processes of harmonization in European private law. Each paper tells a story fascinating in its own right, but whether they in fact add up to something more, with implications for private law harmonization as a whole, is the question I naturally want to take up in this commentary.

## I. THE HARMONIZATION OF PRIVATE LAW RULES

The European Community has of late become so reliant on harmonization as a means of legal integration that it is easy to forget that this technique got underway first and foremost in fields that comfortably fall within the domain of public law rather than private law. The drafters of the Treaty of Rome<sup>1</sup>

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\* Professor of Law, Columbia University School of Law. B.A., J.D., Yale University; LL.M., Columbia University.

1. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY].

doubtless imagined that harmonization would operate directly on the Member States by causing them to modify their regulatory regimes to reflect norms agreed upon at the Community level. If properly implemented, harmonization measures would then supply administrative agents of the Member States with new and presumably more common standards to apply in their regulatory and enforcement activities.

But a State "regulates" not only through the conventional functions we in the United States associate with administrative agencies, but also through the establishment of private law rules that private parties are expected to observe (and that courts are expected, when called upon, to enforce) in the conduct of what are essentially private law relations. It is thus natural to ask how Community harmonization will fare as it is practiced in matters over which the State does not exercise direct governmental authority as such, but instead simply furnishes the legal rules that private parties may invoke against one another and that courts may if necessary enforce on their behalf.

#### A. *The Constitutional Basis of Private Law Harmonization*

A fundamental question in the harmonization of private law within the European Community, and one of special concern to jurists, is its constitutional legitimacy. In forming the Community, the Member States unquestionably limited their freedom to regulate their own economies, but they did not as such limit their freedom to define the legal rights and obligations of their citizens vis-a-vis one another. Private law harmonization in this way raises basic questions about the permissible reach of Community law.

Curiously, the Community's first initiatives in private law harmonization did not occur exclusively or even primarily in subject areas where the constitutional basis for acting was strongest. Consumer protection measures figure prominently among the Community's earliest efforts, yet that field was not (and, as of this writing, strictly speaking still is not) a constitutionally recognized Community sphere of action.<sup>2</sup> There are a number of private law matters whose governance far more directly affects the free movement of goods and services -- rules on the formation of contract, performance of contract and remedies for

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2. The Treaty on European Union (Maastricht Treaty) would add a new Title XI to the EEC Treaty authorizing the Community to enact measures directly protecting the consumer. Treaty on European Union, Feb. 7, 1992, 31 I.L.M. 247, 280 [hereinafter Maastricht Treaty]. Up to the present, the Community has had to rely on harmonization in the interest of the internal market (Articles 100 and 100a) or its implied powers (Article 235) when addressing consumer protection issues. EEC TREATY arts. 100, 100a and 235.

nonperformance of contract come most readily to mind -- yet harmonization of the rules governing them has not advanced very far. Indeed, consumer protection harmonization has proceeded far more vigorously, despite the absence of a basis in the Treaty of Rome for governing that subject as such, than has harmonization of certain indisputably public law matters, such as value-added taxation, whose bearing on the common market is unmistakable.

The appeal of consumer protection as a subject of harmonization obviously derived not from its recognition as a Community law field proper, but from the likelihood that the Member States would be enacting substantial new legislation on the subject and, if left entirely to their own devices, risked erecting new non-tariff barriers to Community trade in the course of doing so. The Community's legislative involvement in consumer protection thus shows how the Community can justify curtailing Member State sovereignty on a matter lying outside the Community sphere if it concludes that exercise of such sovereignty might tend to distort patterns of Community trade and investment.

Of course, there is some irony in this. The more clearly the Treaty of Rome leaves a matter as such to Member State governance, the more clearly the Member States are free as an initial matter to govern it. Once they do that, however, they risk introducing new non-tariff barriers to trade, the elimination of which then automatically becomes a matter of Community concern. Indeed, even before the States ever legislate on such a matter, the Community may perceive a likelihood that they are about to do so, and proceed to harmonize Member State law, as it were preemptively. This leads to the curious result that the Community will feel the greatest urge to harmonize the law on those subjects on which Member States have the greatest interest in acting, perhaps because the level of public interest in these areas is highest. These would include not only consumer protection, but also products liability, insider trading, and mergers and acquisitions.

Why have the Member States acquiesced politically (if only through their votes in the Council of Ministers in favor of such legislation) in Community governance of matters that are properly theirs to govern? Surely one explanation is that the Member States recognize that the enactment of protective legislation on matters such as these is politically inevitable, and that if they insist on proceeding alone, rather than through the Community, they risk enacting legal restraints on business that will place them at a competitive disadvantage in relation to the other Member States.

B. *"Policing" and "Private Ordering" in the Rules of Private Law*

Identifying a private law field as a legally and politically proper subject of Community harmonization is only the beginning of the analysis. Judging by the papers before us, harmonization seems to proceed more energetically over certain aspects of a given private law field than over others. This too is not without reason, as is shown by Professor Wilhelmsson's distinction between the legal and technical ("private ordering") aspects of governance, on the one hand, and the regulatory and political ("policing") aspects of governance, on the other.<sup>3</sup>

Professor Wilhelmsson observes that the Community's legislative involvement in a private law matter is systematically greater in the policing aspects than in the private ordering aspects of the matter. This is perhaps unsurprising, since issues falling in the policing category are ones that a state could just as readily govern through conventional public law regulation as through provisions of private law, if it chose to do so. These are also issues on which the state's rules are for obvious reasons likely to be mandatory rather than permissive in character, which only tends further to separate them from the issues of private ordering that are the ordinary "stuff" of private law. The fact that a state chooses to address an issue through rules denominated as private law rather than public law should not be decisive, provided those rules establish legal constraints that may in fact operate as regulatory or technical barriers to trade. The 1985 Products Liability Directive<sup>4</sup> offers an excellent and largely successful example.

The distinction between the policing and private ordering functions of private law may have the practical advantage of helping to identify the best prospects for the Community's harmonization efforts, the term "best" here meaning, in effect, "most useful to harmonize." Within the private law field of contracts, for example, rules specifying unfair terms in consumer contracts, and treating them as unenforceable, are good prospects for harmonization. Even when a rule is cast in transactional terms -- as are corporate and securities law rules on disclosure in the listing of securities -- it can clearly perform policing as well as private ordering functions and make a useful subject of harmonization.

Although a field appears primarily to be policed rather than privately ordered, and therefore its rules usefully harmonized, harmonization in that field may not necessarily be undertaken or achieved. The underlying policies that

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3. Thomas Wilhelmsson, *European Harmonization of Contract Law: Aims and Tools*, 1 TUL. J. INT'L & COMP. L. 23 (1993).

4. Council Directive 85/374, 1985 O.J. (L 210) 29.

regulatory regimes commonly reflect may readily differ from state to state, even within the Community, thus rendering harmonization of those regimes highly problematic politically. In securities regulation, for example, the subject of corporate governance is one over which the Member States have advanced distinctly different policies. The relatively poor legislative record of the Community's corporate governance initiatives, as described by Professor Karmel,<sup>5</sup> can be explained at least in part by the sheer political difficulty of achieving a Community-wide legislative consensus on the subject.

Thus, while harmonization of policing rules may be in some sense more useful than harmonization of private ordering rules -- and while the case for harmonizing them may actually be quite compelling from the point of view of the effective functioning of an internal market -- the politics of the subject may simply not favor a significant harmonization outcome. In other words, the fact that states have a pronounced regulatory interest at stake in a matter may make harmonization especially appropriate, but it also may make it decidedly difficult to achieve.

### C. *Civil Codes and Harmonization*

Private law harmonization, like public law harmonization, should theoretically present opportunities for Professor Wilhelmsson's third and most difficult form of harmonization, which he terms "ideological" and by which he means harmonization tending to affirm a common European identity.<sup>6</sup> At least on the continent of Europe, however, harmonization of private law often tends to implicate the Civil Code of the country in question. This fact, in turn, has implications for harmonization and its prospects.

Civil Codes are very largely, though of course not entirely, private ordering texts, containing rules of the legal and technical, rather than regulatory and political sort. To that extent, as shown above, they do not often deal with legal issues whose harmonization is a matter of first importance from the standpoint of eliminating barriers to Community trade.<sup>7</sup> Yet, at the same time, the Civil Code is very much the legal embodiment of a country's own national

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5. See Roberta S. Karmel, *Securities Law in the European Community: Harmony or Cacophony*, 1 *TUL. J. INT'L & COMP. L.* 3 (1993).

6. Wilhelmsson, *supra* note 3, at 40.

7. As previously discussed, products liability is an example of successful Civil Code harmonization, though one can argue over whether products liability rules primarily perform a private ordering or a policing function.

legal identity.<sup>8</sup> The Civil Code is often old and said to be venerable, and characteristically has a firm structure and system. Therefore, when harmonization does occur in a field normally covered by the Civil Code, it may call for legislative modifications that are difficult to identify and quite awkward to carry out.

No better illustration of the problem is needed than the situation that gave rise to the Court of Justice's famous *Marleasing* judgment,<sup>9</sup> in which the longstanding and typically broad Spanish Civil Code provisions on the nullity of contracts could not honestly be said to reflect the highly restrictive Community policy on the nullification of contracts for the formation of companies expressed in the much more recent Sixth Company Law Directive.<sup>10</sup> The Court's *Marleasing* judgment may represent yet another triumph for European legal integration, but it squares very poorly with respect for the integrity and meaning of the Spanish Civil Code and, to the extent the Code reflects it, Spanish legal identity.

The awkwardness of pursuing ideological harmonization within the territory of the Civil Code, and in private law more generally, does not of course foreclose the possibility of ideological harmonization. As the Community progresses toward a clearer and more articulate affirmation of individual constitutional rights, and legislates (perhaps under the Maastricht Treaty) on matters of justice, immigration, social policy and the like, occasions for affirmation of a common European identity will increasingly present themselves. That these matters represent harmonization more of "public" law than "private" law is unimportant and is, in any case, in the nature of things. It only means that we are more likely to witness the emergence of a common European Bill of Rights than we are a Common European Civil Code.

## II. THE OPERATIONAL ASPECTS OF HARMONIZATION

The remarks I have made thus far are little more than reflections on what the public or private law characterization of a field might plausibly tell us, or fail to tell us, about the character and pace of the harmonization likely to occur in that field. That the distinction between public and private law harmonization yields only very sparse and tentative conclusions should cause little surprise in

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8. RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW* 276-78, 291-95 (5th ed. 1988).

9. Case 106/89, *Marleasing S.A. v. La Comercial Internacional de Alimentación S.A.*, 1990 E.C.R. 4135, 1 C.M.L.R. 305 (1992).

10. 1982 O.J. (L 378) 47.

U.S. legal quarters, where the distinction between public and private law is looked upon with profound suspicion in the first place, for virtually all purposes. It is not, however, only the elusiveness of this ages-old distinction that complicates understanding. There is also the sheer diversity of issues and sub-issues that may arise within either of these legal categories, even if we do accept them as valid.

At bottom, both the symposium papers themselves and my own remarks on the subject of harmonization in private law are essentially about harmonization's purely normative aspects. They ask about the need and prospects for harmonization in a given field; they identify the issues on which harmonization of legal rules has been considered worth pursuing; and they analyze and, in some cases, criticize the legislative results.

Harmonization, however, also entails important non-legislative issues that, for lack of a better word, I shall call "operational." Naturally, many operational aspects of harmonization are closely related to the practice of harmonization, and they therefore surface in any discussion of the harmonization's normative side, as indeed they have in the papers in this panel. Such operational matters include the importance of qualified majority voting in the adoption of Community directives, the political and legal significance of legislative language (including treaty language) allowing states to "opt out," the use of preemption or non-preemption language, the significance of the Community's "new approach to harmonization,"<sup>11</sup> and of course the principle of subsidiarity in the Community legislative process.<sup>12</sup>

Other operational aspects of harmonization, however, do not address how directives and other harmonizing legislation come into being, but rather the question of how they are used once they come into being. Operational issues of this sort, which also have surfaced in our papers, are of course crucial to an appreciation of harmonization in any sphere. On this range of issues, the distinction between public and private law harmonization -- difficult as that line

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11. Council Resolution on a New Approach to Technical Harmonization and Standards, 1985 O.J. (C 136) 1.

12. The Maastricht Treaty would add a new Article 3b to the EEC Treaty providing as follows:

In areas which do not fall within its exclusive jurisdiction, the Community shall take action only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of proposed action, better achieved by the Community.

Maastricht Treaty, *supra* note 2, art. G(5), at 258.



may be to draw and unhelpful though it may be in other respects -- is a very significant one. This section of the paper explores the operational distinctiveness of harmonization in private law fields.

#### A. *Legislative Implementation*

Harmonization, at least by directive, presupposes that Member States will take timely and adequate normative steps to "implement" the harmonizing measure in domestic law. To the extent that Member States do not do so, the Community law system is compromised.

For many of the reasons alluded to earlier in my remarks, introducing Community norms into national law may be a bit more complicated where private law is concerned. We have already mentioned the difficulties peculiar to adapting continental Civil Codes (the private law source *par excellence*) to Community law directives. In common law countries, like the United Kingdom and Ireland, the private law remains heavily judge-made and in common law form. It may be far from obvious when and precisely how national law taking this form is to be modified by statute (as it presumably must be under Community law thinking) in order for the Community's harmonizing legislation to be adequately implemented. The process by which existing national regulatory standards -- whether on tariffs, truck sizes or pharmaceutical licensing -- are brought into conformity with new standards adopted through harmonization at the Community level will often, by comparison, be a very straightforward one.

#### B. *Remedies for Legislative Non-Implementation*

The jurisprudence of the Court of Justice on the direct effect of unimplemented directives is proof enough of the difficulty of compensating for the Member States' failure to implement Community law in their national legislation. We know from that jurisprudence that, although private parties may invoke Community directives as a source of directly effective (i.e. judicially enforceable) rights or obligations against the State, even when the directives remain unimplemented,<sup>13</sup> they may not do so *vis-a-vis* other private parties.<sup>14</sup> The reliance interest of private parties, who have guided their conduct by national law as written, dictates this result. Yet this is precisely the situation we

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13. See, e.g., Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337, 1 C.M.L.R. 1 (1975).

14. See, e.g., Case 152/84, *Marshall v. Southampton and South-West Hampshire Area Health Authority*, 1986 E.C.R. 723, 1 C.M.L.R. 688 (1986).

are likely to find ourselves in when Member States fail to implement directives in private law fields. Consider, for example, the direct effectiveness of the Products Liability Directive in a civil action in French court, in the absence of any measure implementing the directive in the French Civil Code or elsewhere in French civil law.

The recent judgment of the Court of Justice in *Francovich v. Italy*<sup>15</sup> suggests that litigants who are deprived of a private law remedy on account of a State's failures of implementation may be entitled to damages from the State. Moreover, under the Maastricht Treaty,<sup>16</sup> or any other probable constitutional reform, provision will be made for fines against the Member States for at least certain of their failures of implementation. However, these are obviously poor substitutes for giving unimplemented directives direct legal effect in private law relationships, and even poorer substitutes for the timely and adequate implementation of Community directives in national law in the first place.

In short, the private law fields, or many of them, are peculiarly susceptible to all the problems that flow from the nonimplementation of Community directives in national law. This is an operational reality of which the drafters of harmonization measures in private law fields need to be mindful.

### C. *The Administration of Community Law in the Member States*

My previous remarks suggest that failures of implementation may take a particularly high toll in private law fields. Suppose, however, the healthy (and presumably usual) situation in which harmonization directives, once adopted, are implemented into Member State law by national legislative and regulatory officials in a timely manner, conforming with Community intent. Under these circumstances -- that is, when Member State law is in conformity with Community mandate -- the chief operational problem that remains is not one of implementation (as I have used that term), but one of enforcement.<sup>17</sup>

In the proverbial public law field -- where administration of the law lies in the hands of administrative officials -- determining whether Community law principles have not only been properly implemented, but are also being properly enforced, is a task of enormous difficulty. Administration, or law enforcement in the broadest sense of the term, is a daily affair, carried on in the various

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15. Joined Cases 6 & 9/90, *Francovich v. Italy*, Nov. 19, 1991, case not yet reported.

16. Maastricht Treaty, *supra* note 2, art. G(51), at 292.

17. By enforcement, I mean the process by which the law -- in this case, national law reflecting all relevant Community harmonization -- is actually applied to the cases it properly governs.

recesses of government by countless different officers according to administrative procedures and practices that vary enormously from sector to sector and with which private persons may not be well-acquainted at the time the administrative decisions affecting them are taken. Whether and to what extent these officers may knowingly or, more often, unknowingly thwart the Community's purposes in harmonizing legislation in public law fields through failures of understanding or action is a question of enormous significance, and it is unfortunately also one about which much remains unknown and may be, practically speaking, unknowable.

In this latter respect, harmonization in the private law may actually present advantages. As I have understood them from the start, private law interests are ones that will typically be resolved by reference to the rules of private law, if need be in courts of law. The complaints of shareholders, holders of intellectual property rights and contracting parties generally (to name the classes of persons whose private law interests are affected by the harmonization efforts described in the symposium papers) are heard in an institutional and procedural landscape that is very different from the administrative landscape of the modern regulatory and enforcement state.

The officers in this setting, who are in fact judges, are in a much better position to know and appreciate the role of Community law in the matters at hand. These judges also have ready access, not only to past pronouncements of the Court of Justice on the meaning and effect of Community law, but also, through preliminary references of their own, to new pronouncements as they need them. They are thus in a reasonably good position to know whether they are adequately enforcing Community law. And if they are not, the parties, through their lawyers, will ordinarily be aware of this and will be able to comment appropriately.

The Court of Justice itself has also formulated a simple but useful rule for determining the adequacy of national judicial remedies for the vindication of claims deriving from Community law: those remedies must be as generous as the remedies governing comparable claims arising under domestic law, and they must not in any event be drawn in such a way as to render ineffective or illusory the Community law claim in question.<sup>18</sup> Appreciating the effectiveness of a state's administrative machinery in the enforcement of rights deriving from Community law is manifestly more difficult than appreciating the effectiveness of the state's judicial machinery in that respect. It is not only a matter of

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18. See, e.g., Case 33/76, *Rewe-Zentral/finanz eG v. Landwirtschaftskammer für das Saarland*, 1976 E.C.R. 1989, 1 C.M.L.R. 533 (1977).

whether administrative officers know and properly understand Community law; it is a question of whether their various decisional processes aptly accommodate Community law through, among other things, adequate administration, adequate staffing, and a proper allocation of enforcement resources. To take an American analogy, it is probably much easier to determine whether state officials are effectively enforcing federal rights when those state officials sit in state courts (as in civil rights claims, for example) than when they operate through the complex administrative processes of state and local agencies (as in the case of environmental or social welfare claims).

### III. CONCLUSION

My purpose in these remarks is not to denigrate the task of studying the legislative limits on harmonization in private law fields. On the contrary, at a time when subsidiarity is a political if not yet a justiciable watchword, it is more important than ever to ask how important harmonization of a given field of law will be to the functioning of the internal market, and thus to inquire into both the utility and political feasibility of any such initiative. It is no longer enough to ask whether harmonizing a field is justifiable. One must also ask whether the field is worth harmonizing and, if so, in what respects and to what extent. If there is anything to the distinction between public and private law, and I believe there is, it should be examined for the light it may shed on the limits of harmonization. As my previous comments suggest, a good deal more than attaching the labels "public" or "private" to a field of law must be done before we know the promise that harmonization holds. This may nevertheless not be a bad way to begin.

It is easy, in assessing the limits of harmonization, to forget that harmonization is not simply a normative process. It is at least as importantly an operational process, only some of whose features concern Community legislative practice. National law -- statute and regulation alike -- also needs to implement the Community policy, and national officials -- administrative and judicial alike -- need to enforce it. The traditional focus on nonimplementation of Community law has caused us to dwell on what national administrative and judicial officials should do with Community law when it has not previously been implemented into national law. In this respect, private law harmonization probably presents the worst scenario. On the other hand, as Member State implementation of Community law in this sense improves (as one hopes it will), our attention will belatedly be drawn to the equally important but much less tractable question of how well national officials -- again administrators and judges alike -- enforce the

Community law that they unambiguously should enforce. If and when that inquiry is made, it should not be surprising to learn that in this respect harmonization has fared much better in private law fields than in public law fields.