

Harmonisation and the Law – an interdisciplinary approach to legislative drafting

Institute of Advanced Legal Studies

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Welcome

- This interdisciplinary research project is conducted by
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References in legal scholarship

- 25th Annual Workshop on Commercial and Consumer Law "Harmonisation and Change", held by the Faculty of Law, University of Toronto [<http://www.law.utoronto.ca/scholarship-publications/conferences>]
 - Leebron, David W. 1996. Lying down with Procrustes: an Analysis of Harmonisation Claims. In Fair Trade and Harmonization: Economic analysis, edited by J. N. Bhagwati and R. E. Hudec. Cambridge, Mass.: MIT Press.
 - Boodman, Martin. 1991. The Myth of Harmonisation of Laws. *American Journal of Comparative Law* 39 (4):699
- 35th WG Hart Workshop "Theory and Practice of Harmonisation" held in 2009 at the Institute of Advanced Legal Studies in London [http://ials.sas.ac.uk/research/hart/wgh_legal_workshop.htm]
 - Theory and Practice of Harmonisation, edited by M. Andenas and C. Baasch Andersen. Cheltenham (UK), Northampton (MA): Edward Elgar Publishing.

Our point of departure

- **‘Harmonisation of Laws’ as it is**
 - a term mainly used in European Union law
 - **Harmonisation is widely used and established to describe the mechanisms and workings of EU law.**
 - **‘Full harmonisation’ for instance is confidently used as a technical term and lawyers seem to have a clear idea what they mean by this.**
 - **This is so despite only one occurrence of the term ‘harmonisation’ in the Treaty on European Union 2010, in Art. 45 (1) lit.b.**
 - **The Treaty on the Function of the European Union (TFEU) [Official Journal of the European Union, 30 March 2012, OJ 2010/C 83/01] on the other hand displays**
 - **9 occurrences of ‘approximation’ but**
 - **32 occurrences of the term ‘harmonisation’. The meaning of harmonisation is presupposed, however, there is no definition in the Treaties.**
 - **It must therefore be vital to give this term a specifically legal meaning, a definition.**

Our point of departure

- ‘Harmonisation of Laws’ as it is
 - a term mainly used in European Union law
 - **Art 100 of the EC Treaty (“Treaty of Rome”) as amended by the Treaty on the European Union:**
 - **“The Council shall...issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market.”**
 - **Art. 100b lit.1:**
 - **“...the Commission shall...draw up an inventory of national laws, regulations and administrative provisions which fall under Article 100a and which have not been harmonised pursuant to that Article.”**
 - **Art. 114 (4) and (5) TFEU: [of the Chapter 3 entitled “approximation of laws”] “...harmonisation measure...”**
 - **Arts 196 (2) and 197 (2) TFEU: “...harmonisation of the laws and regulations of the Member States....”**
 - **Art. 352 (3): “Measures based on this Article shall not entail harmonisation of Member States’ laws or regulations in cases where the Treaties exclude such harmonisation.”**

Our point of departure

- ‘Harmonisation of Laws’ as it is
 - also in international law generally

 - what is it used for?

Our point of departure

- ‘Harmonisation of Laws’ as it is
 - “harmonisation efforts recognise that...”, p.52, “international harmonisation...has met with very limited success“, p.5113
 - “The harmonisation process... is determined by the formulation of the objectives“ (51);
 - “Harmonisation assumes the prior existence of differing legal regimes or policies,(3)
 - “Harmonisation can be loosely defined as making the regulatory requirements or governmental policies... identical or...more similar.“(3)
 - “...it describes a flexible concept embodying a range of measures that may vary according to the context in which an issue is treated.“
 - “Harmonisation is a vague, applied grouping mechanism.“18

Our point of departure

- ‘Harmonisation of Laws’ as it is
 - “... its essence is intimately linked to its application and to the identity of the elements to be harmonized.”[M Boodman, 'The Myth of Harmonisation of Laws' 39 American Journal of Comparative Law 699, 702.]
 - This description reminds of quantum physics and the theory of relativity - the object draws its character and identity from the eye of the beholder or its components which remain entirely unspecified and are variable. A true Armageddon of legal certainty!
 - what is it used for?
 -

Our point of departure

- **‘Harmonisation of Laws’ as it is**
 - what is it used for?
 - **‘Directives’ are produced by the European Union legislature**
 - **in order to make the law more similar**
 - **because to make it all the same, ie uniform, is not achievable**
 - **This means the term ‘harmonisation’ is used as a METAPHOR and a euphemism in order to make an unwanted concept (uniformisation) more acceptable and to describe a compromise stopping short of uniformisation**
 - **Now, the term ‘approximation’ is used in addition to ‘harmonisation. In the current Article 114 TFEU both expressions are used (‘harmonisation measures’)**

Our point of departure

- ‘Harmonisation of Laws’ as it is
 - what is it used for?
 - **Uniform law conventions in international such as**
 - **CISG (The Vienna Convention on the International Sale of Goods) 1980**
 - **ULF and ULIS (Hague Conventions of the 1st of July 1964 on International Sale of Goods and the Formation of the Contract of Sale)**
 - **UNIDROIT Principles**
 - **INCOTERMS**
 - **“On a higher plane, these Conventions undoubtedly represent the most important contribution which lawyers can make in the field of private law to the creation of a more harmonious and fraternal world.” [Andre Tunc, Commentary on the Hague Conventions of the 1st of July 1964 on International Sale of Goods and the Formation of the Contract of Sale. <http://www.cisg.law.pace.edu/cisg/biblio/>**

Our point of departure

- ‘Harmonisation of Laws’ as it is
 - what is it used for?
 - **“Harmony therefore, requires diversity and eschews uniformity.” [M Boodman, 'The Myth of Harmonisation of Laws' American Journal of Comparative Law 699 at 701.]**
 - **“These alternatives fall somewhere along a spectrum of models ... where the concept of regulatory competition at one end and harmonisation at the other.” [S Andreadakis, 'Regulatory Competition or harmonisation: the dilemma, the alternatives and the prospect of reflexive harmonisation' in M Andenas and C Baasch Andersen (eds), Theory and Practice of Harmonisation (Edward Elgar Publishing, Cheltenham (UK), Northampton (MA) 2011), 52.]**

Where we want to go

- 'Harmonisation of Laws' as it should be
 - If 'harmonisation' is understood in the proper way we can use it in its proper form, as a natural order principle
 - instead of using it as a term in disguise of something else,
 - This means that the element of a harmonious order have to be established and then applied to creating law.
 - In this way, harmony is a quality that the law has and it can still be a legal policy albeit not the one it currently is.

Where we want to go

- Harmony
 - has been used as a concept by mankind most likely as long as it has existed
 - Our oldest Western traditions come from ancient Greece
 - and manifest in several disciplines such as
 - **philosophy**
 - **music**
 - **architecture**
 - **literature**
 - **fine arts**
 - **physics**
 - **mathematics**

Where we want to go

- 'Harmonisation of Laws' as it should be



Where we want to go

- Harmony
 - appears in all of these disciplines
 - **philosophy**
 - **music**
 - **architecture**
 - **literature**
 - **fine arts**
 - **physics**
 - **mathematics**
 - in tangible or intangible form
 - we want to give a demonstration of a tangible or rather audible form of harmony now

Harmony: towards a definition suitable for law

- Harmony, though changing, comes down to:
 - Combinations of units, which may be judged for their degree of consonance or dissonance
 - The progressions that these combinations unfold over the course of a sequence of events
 - In terms of the law, harmonisation would refer to the quality of the law itself, not necessarily to a project in international law.
 - Categories for ‘successful law’ would have to be established.
 - Law should be drafted according to structural principles that have been defined as harmonious in various disciplines.
 - Law is often text, law as literature.
 - Law interacts with its users.
 - Therefore, harmonisation of laws is about relations and relationships even where it is not written.