Theory and Practice of Harmonisation. Edited by Mads Andenas and Camilla Baasch Anderson. Cheltenham, U.K.; Northhampton, MA: Edward Elgar, 2011. Pp. xiv, 617. ISBN978-1-84980-001-3. UK£175.00; US$295.00.

Theory and Practice of Harmonisation tackles the ambitious topic of legal harmonisation. It is an edited volume comprised of papers that were presented at the 2008 WG Hart Workshop (organized by the Institute of Advanced Legal Studies at the University of London), with some additional solicited papers. Harmonisation has both a long legal history and is an important feature of modern legal systems, as globalization "has naturally increased the need for more formal shared rules". (p. xi., 573) Yet according to the editors, a comprehensive *theory* of harmonisation has remained elusive. This is due in part to the "many faces of harmonisation" (p. 573), encompassing not only the entrenched structured harmonisation in Europe, but also the informal voluntary structure of United Nations Commission on International Trade Law (UNCITRAL) model rules, as well as "harmonised" human rights regimes through a series of treaties.

The volume exhibits many of the strengths and weaknesses one would expect from a conference publication. On the one hand, it presents a near complete picture of the practice areas touched on by legal harmonisation efforts. In a total of twenty-nine chapters, multiple authors address a wide range of legal topics, including: financial markets and financial regulation, the UN Convention on the International Sale of Goods ("CISG"), carriage of goods by sea, consumer sales, credit and security law, and international competition law. A small number of chapters cover public law topics and several address fields such as media law and broadcasting, and tobacco advertising.

However, because it is a mainly a compilation of papers, many of the chapters provide little explanation of their specific legal area or otherwise assume background legal knowledge. Most chapters reflect the European Union (EU) experience, with the exception of chapters on international commercial law, one on the Australian experience in environmental regulation, and one chapter on Africa business law. And, as one might expect from a symposium edition, the chapters do not explicitly speak to one another.

Nevertheless, some common themes can be identified. First, several papers deal with the background to or reasons for harmonisation. The reasons are often functional and include increasing free trade, establishing a common market or achieving political/regional or cultural integration through law. To

these Eva J. Lohse adds pursing joint legal policy as a "regulatory instrument" to endorse common solutions to social problems, and harmonisation that results indirectly from developing and applying general principles of law. (p. 304) Mads Andenas, Camilla Baasch Andersen, and Ross Ashcroft write, though, that in practice "the rationalisation of a harmonisation of legal phenomenon is unlikely to be made on legal grounds, but rather economic and trade considerations are going to be the most important considerations." (p. 588)[1]

Several papers consider whether harmonisation goals are being met. Andenas argues that the single monetary policy of the EU "introduced a geographical separation between money and supervision of financial institutions and markets," (p. 6) and as such, national regulators who remain responsible for banking supervision, credit policy, and borrowing are obstacles to a European financial market. Jimmy Kodo, in Ch. 14, describes resistance to harmonisation of business law in Africa and Yutaka Arai-Takahashi, in Ch. 5, outlines a "duality-discretion" that interferes with a harmonised human rights regime in Europe. Goals can also change. Lohse notes that while the European Community (EC) was based on the "economic goal of a common market," harmonisation has been extended to include environmental protection and "common values like fundamental rights." (p. 289)

A second theme around which papers converge is language-textual issues or problems with defining concepts. Inconsistent use of language impairs the practice and theory of harmonised law. For example, the term *prudential* is used by the World Trade Organization, the European Central Bank, and different national jurisdictions. These different users "will use the concept as if it only had one and a most precise meaning. The only problem is that they will ascribe different meanings to it." (p. 5) Ross Ashcroft characterizes inconsistent use of terms, in particular the term "sustainable development," as the key problem for harmonizing property, environment, and resource laws in Australia. (p. 71) And several authors complain that conceptual terms such as harmonisation, integration, convergence, and unification are used inconsistently and interchangeably, including, as the editors admit, within the edited volume itself. (p. 57 & 577)

In Ch. 2, Baash Andersen makes the important distinction between *textual* versus *applied uniformity*, essentially transposing Pound's

[1] But compare with Stelios Andreadakis, who, in Ch. 3, looks at the extremes in the regulatory debate, where both regulatory competition and common market are lauded as the best environments for trade.

observations on "law on the books" versus "law in action."[2] On this basis, she is able to challenge the perceived wisdom that the CISG, which is in force in 77 different countries, is an example of a successful uniform law.

A third centralizing theme is the role of legal institutions, in particular courts, in facilitating harmonisation. It is courts that address the conflict between unifying efforts and the obligation to "interpret the law as it immediately stands in a particular jurisdiction." As a result, several authors point to judicial interpretation and discretion as the determining factor in the success or failure of harmonisation.[3] Sandeep Gopalan, in Ch. 9, claims that positive application by courts and tribunals is the reason for the success of the UNIDROT Principles and the Principles of European Contract Law. And Heidemann notes the role that English and German judges play in "allowing the evolution of international commercial and private international contract law" (p. 186) despite the critical attitudes of German and English legislatures toward "non-state" contract law. On the other hand, judges hinder efforts to harmonise laws when they apply or interpret legislation inconsistently or when they refuse to acknowledge uniform acts or the authority of centralized common courts. (p. 66, 264)

Finally, a fourth recurring theme is evident in those papers that look at the instruments, mechanisms or legal techniques that are used to implement harmonisation.[4] Examples of legal harmonisation mechanisms include binding directives on member states of the EC, informal or "information" mechanisms like model rules issued by the UNCITRAL and uniform principles enshrined in constitutions or in pieces of legislation. (p. 90, 129, 326, 581)

Several papers consider whether it is best to use "hard" versus "soft" uniform rules. For example, in Ch. 15, Louis F. Del Duca, Albert H. Krtizer and Daniel Nagel, compare "hard" treaty law with principles, restatements or model laws to argue that "soft" laws sometimes represent a more realistic endeavor, particularly as it relates to their case study of global consumer law. Similarly, Miriam Goldby, in Ch. 8, discusses the drawbacks to using a convention like UNCITRAL's Convention on Contracts for the International

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[2] Roscoe Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12 (1910). Rene Franz Henshel makes a similar distinction in Ch. 11 between doctrinal innovation and "harmonizing the terminology and language without introducing any dogmatic changes to the existing state of the law."

[3] But compare with Baasch Andersen who argues that judges' role in monitoring the application of international commercials laws may not be as important to the development of uniformity. (p. 38)

[4] Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 Buffalo L. Rev. 973 (2005).

Carriage of Goods Wholly or Partly by Sea, which may inadvertently introduce more uncertainties about the applicable law.

Juxtaposing its wide coverage of legal practice areas, the volume presents little variety in the theory relevant to legal harmonisation. It seems "old-fashioned" to talk about harmonisation – law's more global operation – without including recent reflections on governance, legal pluralism or similar articulations about multiple jurisdictional claims to legitimacy.[5] And, where harmonisation touches on topics in economics, politics, and culture, in the very least, it demands consideration of the advantages and pitfalls of interdisciplinary engagements and exchanges. In other words, what are the possibilities and challenges posed by these regulatory spaces which "escape a straight-forward depiction from a single discipline's vantage point"?[6]

Most noticeably absent is Comparative Law theory. Several chapters acknowledge the importance of a comparative method.[7] But, other than superficial mention in a handful of chapters, the volume misses out on Comparative Law's contributions and debates, for example, in terms of whether particular legal legacies are better choices than others,[8] whether

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[5] Paul Schiff Berman, *The New Legal Pluralism*, 5 Ann. Rev. L. & Soc. Sci. 225 (2009); Ralf Michaels, *Global Legal Pluralism*, 5 Ann. Rev. L. & Soc. Sci. 243 (2009); and Grainne De Burca, Robert O. Keohane & Charles F. Sabel, *New Modes of Pluralist Global Governance*, 45 N.Y.U. J. Int'l L. & Pol. (forthcoming 2013); NYU Public Law Research Paper No. 13-08; Columbia Law and Economics Working Paper No. 448.

[6] Peer Zumbansen, *Knowledge in Development, Law and Regulation, or How are We to Distinguish between the Economic and the Non-Economic?*, in Gráinne de Búrca, Claire Kilpatrick & Joanne Scott, eds., Critical Legal Perspectives on Global Governance, Liber Amicorum David M. Trubek, 6 (Forthcoming 2013); Osgoode CLPE Research Paper NO. 21/2013.

[7] Ross Ashcroft suggests that the "prudent methodological approach" "would be a comparative analysis of the present institutions which exist amongst the jurisdictions which one seeks to harmonise" in order to identify common characteristics and best practices. (p. 91) Similarly, Henschel observes that, as it relates to unification or harmonizing legal rules, the comparative method "appears destined to play an important role as an integrated part of legal method and not only as an academic research discipline." (p. 218)

[8] Compare Rafael La Porta, Forencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. Econ. Literature 285, 290 (2008) with Ronald J. Daniels, Michael J. Trebilcock & Lindsey D. Carson, *The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies*, 59 Am. J. Comp. L. 111, 126 (2011).

certain areas of law harmonise more easily, whether and how laws move transnationally,[9] and what are the obstacles to reception of foreign law.[10] In their concluding chapter, Andenas, Baasch Andersen, and Ashcroft write that understanding other jurisdictions' laws is integral to harmonising legal phenomenon and that "overly ambitious uniform laws" tend to fail "because domestic states will not compromise certain principles when applying shared law." (p. 592-93) But they do not theorize about why this would be the case. Similarly, debates in Comparative Law literature about the connection between law and social culture or national identity[11] would have provided context to Arai's discussion of a *margin of appreciation* doctrine that takes national values "and other distinct factors woven into the fabric of local laws and practice" (p. 102) into account.

Another contribution from Comparative Law that would have provided context to this edited volume is its discussions on methodology; in other words, how to think about sameness and difference and how deep to go in a comparative analysis. Most of the chapters do not question a functional approach,[12] but this is hardly a given in Comparative Law scholarship. Ralf Michaels identifies three other approaches,[13] and more significantly, Michaels

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[9] Toby Goldbach, Benjamin Brake and Peter Katzenstein, *The Movement of U.S. Criminal and Administrative Law: Processes of Transplanting and Translating*, 20 Ind. J. Global Legal Stud. 141 (2013).

[10] Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *Economic Development, Legality, and the Transplant Effect*, 47 Eur. Econ. Rev. 165 (2003) and Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 Harv. Int'l L.J. 1 (2004).

[11] Compare Pierre Legrand, *The Impossibility of 'Legal Transplants,'* 4 Maastricht J. Eur. & Comp. L. 111 (1997) and James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 Yale L.J. 1279 (2000) and with Alan Watson, *Legal Transplants: An Approach to Comparative Law* (1974).

[12] Konrad Zweigert and Hans Kötz, *Introduction to Comparative Law* (Oxford: Clarendon Press, 1998): "Incomparables cannot be compared and in law the only things which are comparable are those which fulfil the same function."

[13] Ralf Michaels, *The Functional Method of Comparative Law*, in Reinhard Zimmermann and Mathias Reimann, eds., The Oxford Handbook of Comparative Law 341 (Oxford: Oxford University Press, 2006): comparative legal history, the study of legal transplants, and the comparative study of legal cultures. Even attributing "a functional method" to comparing laws is problematic since there is not one but many functional methods and not all are "functional".

shows that functional equivalence does *not* make convergence easier.[14] In some cases of functional equivalence, such as person jurisdiction in private law, unification will actually be harder because of the presence of different and entrenched "legal paradigms."

Thus decisions about what to compare affects the outcome of a comparative analysis, including whether one finds convergence or not. And so many Comparative Law scholars urge moving beyond rule-comparison and advocate conscious, explicit thinking about the objects of comparison.[15]

The volume portrays the complicated and heterogeneous processes of harmonisation and paints an intricate picture of the challenges practitioners face navigating the world of convergence. However many opportunities for deepening the theory of harmonisation have been missed. A volume on the theory and practice of harmonisation might consider whether harmonisation looks different in different circumstances and why. Or it might look at whether context relates to the types of legal techniques used and whether, for example, institutions are harmonised when the goals are political versus standardized terms and clauses when goals are purely economic. How does context impact on what is in and what is out in harmonisation? Who are the actors in harmonisation and why? Despite a wealth of detail and information, the volume ultimately misses its goal of deepening the theory of legal harmonisation.

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[14] Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 Mich. J. Int'l L. 1003 (2005-2006).

[15] Ralf Michaels, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law*, 57 Am. J. Comp. L. 765 (2009). Pierre Legrand argues that "rules and concepts alone actually tell one very little about a given legal system and reveal even less about whether two legal systems are converging or not; Pierre Legrand, *European Legal Systems are Not Converging*, 45 Int'l & Comp. L.Q. 52 (1996).