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X.E. KRAMER & C.H. VAN RHEE, EDS., *CIVIL LITIGATION IN A GLOBALISING WORLD* (T.M.C. Asser Press 2012)

*Reviewed by Thomas O. Main**

HARMONIZATION OF PROCEDURE: THEORY AND PRACTICE

This volume of essays is the product of a conference by the same name that took place in Rotterdam on July 17-18, 2010. The conference was a joint project of the Erasmus School of Law of the Erasmus University Rotterdam and the Faculty of Law of the University of Maastricht. With a couple of distinguished exceptions, the book's contributors are mid-career scholars from European universities and organizations.

This is an excellent book, though its title is misleading. The book is principally about the theory and practice of harmonization in Europe (p. 3).¹ The harmonization of procedure is a topic of particular importance in Europe, where different national and regional legal systems co-exist, cooperate, and compete with each other. But the insights and perspectives of these excellent scholars are relevant to procedure scholars everywhere. Indeed, harmonization—and more generally, uniformity—is a norm of universal and perpetual significance in the discourse of procedural reform.

The fundamental challenge presented, of course, is that we live in a world with territorial systems that must adjudicate disputes arising from trans-territorial phenomena. Businesses have foreign operations, suppliers, employees, or customers. Even our personal lives are increasingly transnational: consider vacationers, potential immigrants, expatriates, retirees, investors, and persons contemplating marriage to or adoption of foreigners. The result is a pluralistic system of rules embodying many contradictions. Viewed as a whole, this system is national, regional, and international. It is substance-specific and trans-substantive. Parts of it are organic and parts have been imposed. Some of the rules and practices are formal, some are informal and ad hoc. The rules are substantive and procedural, binding and advisory. The careful student can observe in the preceding list redundancy, inconsistency, and complexity, on the one hand and, on the other hand, complementarity, coherence, and a thoughtfully calibrated accommodation of multiple and divergent goals and interests.

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1. In chapter 1, the editors provide a comprehensive summary of each of the eighteen chapters that follows their introduction. In chapter 19, Marcel Storme's concluding thoughts include summaries and reactions to the eighteen chapters that precede his. I mention this in case anyone looking for a more traditional book review is disappointed that my essay does not methodically summarize each of the contributions. Persons looking for such a summary will find it in pages 1-16 and 379-87 of the book.

Globalization brings into relief differences in both substantive and procedural law across different legal systems. The harmonization of substantive law—whether in intellectual property, commercial law, or securities regulation, for example—is a topic of great contemporary significance. This book, however, focuses exclusively on the harmonization or approximation² of procedural law. Harmonization in this arena is a tall order. Differences in procedural law from country to country are “much greater” even than differences in substantive law.³ Moreover, “procedural systems [may be] too different and too deeply embedded in local political history and cultural tradition” to expect anything resembling harmonization.⁴ Yet harmonization reform efforts are ubiquitous and, to varying degrees, successful. The contributions of several of the book’s authors chronicle some harmonization reforms⁵ and advocate for others.⁶

2. The adoption or movement of words and ideas into a legal system is described with various terms: diffusion, transplantation, approximation, harmonization, evolution, hegemony, reception, and unification, among others. The labels suggest subtly different levels of intent and intensity. The importation of a word or idea can be deliberate, voluntary, and wise; or it might be none of these. See Thomas O. Main, *The Word Commons and Foreign Laws*, CORNELL INT’L L.J. (forthcoming 2013) (citing Nuno Garoupa & Anthony Ogus, *A Strategic Interpretation of Legal Transplants*, 35 J. LEGAL STUD. 339, 343 (2006); Pierre Legrand, *On the Unbearable Localness of the Law: Academic Fallacies and Unreasonable Observations*, 10 EUR. REV. PRIVATE L. 61, 68 (2002); David Nelken, *Towards a Sociology of Legal Adaptation*, in ADAPTING LEGAL CULTURES 15-20 (David Nelken & Johannes Fees eds., 2001); William Twining, *Diffusion and Globalization Discourse*, 47 HARV. J. INT’L L. 507, 510-12 (2006)).

3. See, e.g., Andreas F. Lowenfeld, *Introduction: The Elements of Procedure: Are They Separately Portable?*, 45 AM. J. COMP. L. 649, 652 (1997) (advocating comparative study and expressing optimism about the import and export of certain best practices).

4. See Geoffrey C. Hazard, Jr., *From Whom No Secrets are Hid*, 76 TEX. L. REV. 1665, 1667 (1998) (acknowledging the forces of resistance to harmonization, while advocating for the progressive approximation of procedures). See also Benoit Allemeersch & Els Vandensande, *Convergence of Civil Procedure Systems in Europe: Comments from a Belgian Perspective*, in CIVIL LITIGATION IN A GLOBALISING WORLD 325, 328 (2012); Oscar Chase, *Some Observations on the Cultural Dimension in Civil Procedure Reform*, 45 AM. J. COMP. L. 861 (1997); C.H. van Rhee, *Civil Procedure: a European Ius Commune?* 8 EUR. REV. PRIV. L. 589 (2000); Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 835-36 (2010).

5. Two contributions are especially worth noting in this regard. C.H. van Rhee (p. 39) presents a typology of harmonization reforms and offers historical examples of each type. C.H. van Rhee, *Harmonisation of Civil Procedure: An Historical and Comparative Perspective*. Xandra Kramer (p. 141) demonstrates how private international law rules initiated a gradual and spontaneous approximation of certain civil procedure concepts. She notes the irony that private international law would be inconsequential if systems were, in fact, uniform; yet it is private international law that precipitates unification. Xandra E. Kramer, *Harmonisation of Civil Procedure and the Interaction with Private International Law*.

6. Two particularly effective examples of advocacy bear mention. Gerhard Wagner (p. 93) argues for harmonization by subject-matter—an approach that the book refers to as “vertical harmonization.” See Gerhard Wagner, *Harmonisation of Civil Procedure: Policy Perspectives*. Benoit Allemeersch and Els Vandensande (p. 317) make the case for regional cooperation in the Benelux countries. Benoit Allemeersch & Els Vandensande, *Convergence of Civil Procedure Systems in Europe: Comments from a Belgian Perspective*.

The book's focus on procedure is, of course, artificial. As Matthias Storme exposes in one of my favorite chapters (p. 141), procedure cannot be viewed in isolation.⁷ Multilateral efforts that harmonize procedure change how or even whether substantive law is enforced. The idea here is that substantive law is drafted with a particular procedural platform in mind, whether consciously or subconsciously. Necessarily, then, the mandate of the substantive law will be over- or under-enforced if that substantive law is enforced in another procedural system.⁸ This relationship of substance and procedure does not prevent procedural harmonization, but it is something that, as Storme advises, must be "taken into account."⁹

Of course the successful implementation of any reform is multi-dimensional. As contributors to this volume demonstrate, actual procedural harmonization might be achieved only theoretically¹⁰ or polyphonically.¹¹ The engine of that reform can be formal,¹² or, as Paul Dubinsky argues (p. 223) in the context of the creation of the Federal Rules of Civil Procedure in the U.S. in the 1930s, it can be driven by elitism and economic factors.¹³ Naturally, the infrastructure for implementing any reform is no less significant to its ultimate success than is the content of the reform itself.

But let us assume that an isolated discussion of the harmonization of procedure is meaningful and that the objective is achievable. A simple metaphor can bring the basic issues of procedural harmoniza-

7. Matthias E. Storme, *Harmonisation of Civil Procedure and the Interaction with Substantive Private Law*. Gerhard Wagner (p. 93) also thoughtfully raises the importance of the substance-procedure relationship. Gerhard Wagner, *Harmonisation of Civil Procedure: Policy Perspectives*.

8. See generally Main, *supra* note 4.

9. Matthias E. Storme, *Harmonisation of Civil Procedure and the Interaction with Substantive Private Law*. Less clear, however, is exactly how this can be "taken into account," since it would require a simultaneous rewrite of substantive and procedural law. For my own struggle with this dilemma, see Main, *supra* note 4. See also Konstantinos D. Kerameus, *Some Reflections on Procedural Harmonisation: Reasons and Scope*, 8 UNIF. L. REV. 448 (2003) (characterizing procedure as *ordre public*).

10. See Neil Andrews, *Fundamental Principles of Civil Procedure: Order Out of Chaos*, p. 19 (distilling the essential principles of procedure and encouraging harmonization of these).

11. See Alan Uzelac, *Harmonised Civil Procedure in a World of Structural Divergences? Lessons Learned from the CEPEJ Evaluations*, pp. 175, 204 (distinguishing harmony achieved by "polyphonic voices" from "chanting in unison").

12. See, e.g., Burkhard Hess, *Procedural Harmonisation in a European Context*, p. 159 (suggesting that it is time to discuss the codification of a procedural law for Europe).

13. See Paul R. Dubinsky, *United States: Harmonisation and Voluntarism. The Role of Elites in Creating an Influential National Model, the Federal Rules of Civil Procedure*, (emphasizing the role that intellectual elites and large law firms have played in the harmonization of procedure in American state and federal courts); Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. 211, 219 (2005) ("The harmonization of procedural law [in the comparative law Congresses of the early twentieth century] was a project conceived and guided by elites"). See also Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules*, 46 VILL. L. REV. 311, 311 (2001) (demonstrating the role of a local legal culture in the assimilation of similar and dissimilar textual mandates).

tion into relief. The elements of that metaphor are a hedge and two adjoining plots of land. Specifically, I imagine a long hedgerow that was planted on the property line long before either of the two neighbors purchased their properties. The hedge may serve a variety of different purposes, such as ensuring privacy, improving the value of a house, keeping dogs in or out, clarifying the property line, producing berries for harvest, facilitating exercise or creativity or providing shade.

The shrubbery on each side of the hedgerow can be analogized to a system of procedural law. Each procedural system is designed to reflect certain values and achieve certain purposes. One system may elevate the importance of, say, expert decision-making and speed of resolution through written submissions. Another system might emphasize accuracy and oral advocacy. Each system is uniquely tailored to serve some combination of values and purposes—with some more significant than others in a hierarchy that can change over time and under different circumstances—just as the two plots of land in our analogy may be cultivated to make use of the hedgerow in specific ways.

I find the hedgerow metaphor useful because for most or perhaps even all of the purposes served by a hedge, coordination by the property owners may be unnecessary because the purpose(s) of each of them can be completely achieved with the half of the hedge that is on their own property. One half of the hedge may be meticulously cropped (to artfully frame the property for one neighbor, for example) while the other half is untended and overgrown (say, to corral the dog of the other neighbor); but a hedge can usually survive such dissonance. Indeed, a hedge is not a shared limited resource for which the use by each of these property owners inevitably leads to some tragic result, harming the other property owner. At the same time, however, in some circumstances it might also be true that some level of coordination between the two neighbors could be useful for one or both of them; a whole hedge might be more effective or efficient than a half. Whether a cooperative approach to the hedge is more effective or efficient depends upon the specific combination of purposes that the hedge serves for each of them.

Procedural systems face a similar inherent contradiction. On the one hand, a procedural system can fulfill all or many of the needs of its community without regard to the goals and operations of a neighboring procedural system. Neighboring systems need not coordinate or imitate. Indeed, the *distinctiveness* of a system may, in fact, be one of its purposes. For example, in the chapter of the book that was the most revelatory for me, Stefan Huber (p. 291) describes how the German courts actively promote themselves as a jurisdiction of choice for commercial litigation.¹⁴ Among the German initiatives, we learn, is the specialized training of a subset of the German judiciary so as to

14. Stefan Huber, *The German Approach to the Globalisation and Harmonisation of Civil Procedure: Balancing National Particularities and International Open-Mindedness* (2012).

be capable of conducting the entire proceedings in English.¹⁵ Germany is not looking for neighboring systems to imitate them; they are differentiating their product to gain a market advantage.

Yet, on the other hand, systems may have purposes and objectives that might be more effectively or efficiently achieved through some level of coordination. This is especially true in the context of transnational litigation. For example, states want the judgments of their courts to be enforceable elsewhere, and this may require a re-ordering of the system's goals and purposes so as to facilitate cooperation with other states. The engines for this sort of coordination (read: harmonization) are explained from a deep historical perspective in a chapter by C.H. van Rhee,¹⁶ from a theoretical law-and-economics perspective in a chapter by Louis Visscher,¹⁷ from empirical and contemporary accounts in chapters authored by Tanja Domej (writing about Switzerland),¹⁸ Peter Beaton (writing about Scotland),¹⁹ Paulien van der Grinten (writing about The Netherlands),²⁰ Benoit Allemeersch and Els Vandensande (writing about Belgium),²¹ Frederique Ferrand (writing about France),²² and Sebastian Spinei (writing about Romania).²³ As I read this book, I imagined myself speaking to a succession of neighbors—each of whose properties is separated by a hedgerow, and each in possession of ambitious ideas for landscaping (sometimes their own property; sometimes their neighbors' property).

The rhetoric of uniformity is powerful. So deeply is the idea of uniformity embedded in the field of comparative law that many proceduralists find it difficult or unnecessary to explain why uniformity is thought to be good.²⁴ Whether because of the lure of simplicity,²⁵ the appearance of neutrality,²⁶ the likeness to science,²⁷

15. *Id.*, 291, 305.

16. C.H. van Rhee, *Harmonisation of Civil Procedure: An Historical and Comparative Perspective*, at 39 (2012).

17. Louis Visscher, *A Law and Economics View on Harmonisation of Procedural Law*, p. 65.

18. Tanja Domej *Switzerland: Between Cosmopolitanism and Parochialism in Civil Litigation*, p. 247.

19. Peter Beaton, *Globalisation and Scottish Law*, p. 263.

20. Paulien van der Grinten, *A Dutch Perspective on Civil Litigation and its Harmonisation*, p. 277.

21. Benoit Allemeersch & Els Vandensande, *Convergence of Civil Procedure Systems in Europe: Comments from a Belgian Perspective*, p. 317.

22. Frederique Ferrand, *The French Approach to the Globalisation and Harmonisation of Civil Procedure*, p. 335.

23. Sebastian Spinei, *Romanian Civil Procedure: The Reform Cycles*, p. 363.

24. See generally Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules*, 46 VILL. L. REV. 311, 311 (2001). See also Benoit Allemeersch & Els Vandensande, *Convergence of Civil Procedure Systems in Europe: Comments from a Belgian Perspective*, at 325 ("Procedural scholars do not always offer a clear justification for [harmonization].").

25. See Janice Toran, *'Tis a Gift to Be Simple': Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352, 353-54 (1990) (discussing aesthetic appeal of simplicity in sociology, politics and economics). Professor Janice Toran has suggested that procedural reforms are drawn to simple, elegant solutions, not only because such solutions may prove especially workable, but also because they are more aesthetically pleasing than

the feel of efficiency,²⁸ the imprimatur of professionalism²⁹ or some combination of these, the goal of procedural law enjoys virtually universal approval.³⁰ Reformers are inclined to "speak of uniformity as if it were some excellence in itself, something transcendental and absolute; or at least as an undoubted blessing on a par with health, happiness or virtue."³¹

But one must appreciate that the term *uniformity* is not self-defining; something can only be uniform with respect to *something else*. This is as true for one side of a hedge as it is true for a procedural system: if we want uniformity, we must be clear—uniformity *with respect to what?* And herein lies the paradox of virtually all discussions of uniformity: there are many species of uniformity, and the

more complicated alternatives. See also HENRY SUMNER MAINE, *ANCIENT LAW* 13 (1873) (discussing origination of systems of code law).

26. See Thomas Wall Shelton, *An Efficient Judicial System*, 22 CASE & COMMENT 227, 230 (1915) ("There is a fixed notion that politics have no respectable place in the judicial department of government."). The professed ideal is one of procedural neutrality in which the system of adjective law provides the disputants a level playing field on which to resolve their disputes. See Paul Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2074 (1989) (discussing "political neutrality" as goal of federal rulemaking). It follows that the legal system ought to strive for uniform rules that treat similar cases in a similar manner. See Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1932 (1989) ("[Uniformity] must be a goal, however difficult to attain, of a system that aspires to equal justice . . .").

27. See Kenneth Graham, *The Persistence of Progressive Proceduralism*, 61 TEX. L. REV. 929, 945 (1983) (stating that "lack of uniformity is a threat to the claim that procedure is a value-free science"). Early in the twentieth century, Shelton wrote that procedural uniformity was the "key that [would] unlock the door to a new era of scientific juridical relations." Thomas Wall Shelton, *A New Era of Judicial Relations*, 23 CASE & COMMENT 388, 392 (1916). See also WERNER MENSKI, *COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA* 5 (2d ed. 2006) ("[M]ainstream legal science continues to behave as though globalization simply means uniformisation . . .").

28. See Benoit Allemeersch & Els Vandensande, *Convergence of Civil Procedure Systems in Europe: Comments from a Belgian Perspective*, at 325 (citing K. Kerameus, *Procedural Harmonization in Europe*, 43 AM. J. COMP. L. 401 (1995)).

29. Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2004-05 (1989) (discussing rationales for uniform system of procedural rules). In 1926, Edson Sunderland wrote that the legal profession is the most highly unified of all professional groups. See Edson Sunderland, *The English Struggle for Procedural Reform*, 39 HARV. L. REV. 725, 725 (1926) (discussing influence of legal profession and attorneys).

30. When there is fragmentation or lack of uniformity, scholars often see this as "the problematic issue of consistency." See, e.g., Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1003 n.17 (2004). See generally KONRAD ZWIEGERT & HEIN KOTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 61 (Tony Weir trans., 3d ed. 1998) (describing the lodestar of some comparative law inquiry as the science of a *droit commun législatif*).

31. Subrin, *supra* note 29, n.5 (referring to debates about the unification of federal procedure in early twentieth Century America) (quoting Connor Hall, *Uniform Law Procedure in Federal Courts*, 33 W. VA. L.Q. 131, 132 (1927)). See generally Marcel Storme, *Procedural Law and the Reform of Justice: From Regional to Universal Harmonisation*, 6 UNIF. L. REV. 765, 768 (2001) (discussing the compelling need for procedural uniformity).

pursuit of one type of uniformity invariably compromises another type of uniformity.

The well-intentioned property owner, who may be inspired by the rhetoric of uniformity to harmonize her side of the hedge has multiple but mutually-exclusive options: she can harmonize her side of the hedge with the side facing her neighbor's property. She can harmonize her side of the hedge with other hedges in the neighborhood. She can harmonize with other hedges on her own property or with hedges located elsewhere in the city or elsewhere. Even maintaining the status quo amidst changing uses all around her is another form of harmonization—harmonization with the past.” The virtues of uniformity encourage (and discourage!) each of these disparate pursuits.

Such is the rhetoric of uniformity in the context of procedural harmonization. And this dissonance percolates through all of the chapters in this book. One strong push for uniformity has been in the context of cases having some transnational dimensions. In these cases, advocates of uniformity maintain that it is important for transnational cases to be subject to the same procedures whether the case is adjudicated in country *X* or in country *Y*.³² Such advocates further maintain that ideally the outcome in such a case should not vary systematically from forum to forum. But this pursuit of uniformity, however well intentioned, creates disuniformity within each national system. Disuniformity results when claims are treated differently because in one case the fact pattern and party structure is wholly domestic and in another case, elements of the case are transnational.³³ The domestic or transnational nature of an injury may be through no choice, control, or even knowledge of the respective plaintiffs. Inter-territorial uniformity creates intra-territorial disuniformity.

Another species of uniformity focuses on the mechanics of processing certain substantive claims. The processing of consumer claims, for example, might be harmonized across a region.³⁴ The rhetoric of uniformity could be sufficiently persuasive for countries *X* and *Y* to adopt these procedures, not only for transnational cases involving this subject matter, but for domestic cases as well. But this uniformity is not without collateral damage to another species of uniformity. The harmonization of rules for a particular subject matter creates, for example, trans-substantive disuniformity. There are ad-

32. See Michele Taruffo, *Harmonisation in a Global Context: The ALI/UNIDROIT Principles*, p. 207.

33. But see Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT'L L. 301, 306 (2008) (“When American courts are confronted with disputes with a transnational dimension, they reach for a familiar toolbox, one with tools for fixing domestic problems. They extrapolate from their experience with familiar domestic litigation, especially interstate litigation.”).

34. Gerhard Wagner, *Harmonisation of Civil Procedure: Policy Perspectives* 93 (referring to this concept as “vertical uniformity”).

vocates of uniformity who believe rather passionately that the same procedural rules should apply to all types of cases.³⁵

There is also a temporal dimension to uniformity. In Tanja Domej's excellent chapter (p. 247) about the new Swiss Code of Civil Procedure, for example, she laments the comparatively little attention paid to international developments in the field of civil procedure.³⁶ To be sure, the comprehensive reform in Switzerland was a missed opportunity for one form of harmonization. Yet that missed opportunity was itself attributable to the pursuit of a different form of harmonization: the drafters of the new unified Code tried to harmonize as much as possible with the twenty-six cantonal codes that the new unified Code replaced.³⁷ The greater the effort to unify the new procedure with the past practice(s), the less able the new code of procedure was able to harmonize with modern European initiatives; these different visions of uniformity were mutually exclusive.

Uniformity is also a protean concept. Consider Germany's innovative effort to make its courts more hospitable to transnational disputes.³⁸ Is this anti-uniformity in the sense that Germany is distinguishing itself in a competition for dispute resolution business? Or is this pro-uniformity in the sense that it is a step in the direction of a unified system of global dispute resolution?

A hawkish view of uniformity regards what I have labeled the "disuniformity" that can result from uniformity initiatives as a transitory condition. In this view, there is something of a master narrative of uniformity that ultimately unifies everything: harmonizing the procedures for transnational cases will lead ultimately to the adoption of those procedures for domestic cases as well;³⁹ or, harmonizing the procedures in a region will then spread to a geographically larger region.⁴⁰ Some even perceive the harmonization process as somewhat inevitable.⁴¹

35. See generally David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 376 (2010) (defining trans-substantivity). See also Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2068 (1989) (offering a classic defense of trans-substantivity).

36. Tanja Domej, *Switzerland: Between Cosmopolitanism and Parochialism in Civil Litigation*.

37. *Id.*

38. Stefan Huber, *The German Approach to the Globalisation and Harmonisation of Civil Procedure: Balancing National Particularities and International Open-Mindedness*, p. 291.

39. See, e.g., Michele Taruffo, *Harmonisation in a Global Context: The ALI/UNIDROIT Principles*, p. 207. See also Frederique Ferrand, *The French Approach to the Globalisation and Harmonisation of Civil Procedure*, p. 335 (noting the adoption of foreign techniques, first, in the context of private international law, but thereafter in domestic contexts).

40. See, e.g., Benoit Allemeersch & Els Vandensande, *Convergence of Civil Procedure Systems in Europe: Comments from a Belgian Perspective*, p. 317.

41. See Paulien van der Grinten, *A Dutch Perspective on Civil Litigation and its Harmonisation*, p. 277.

Difference is often “an invitation for lawyers to unify, streamline, and harmonise.”⁴² But skepticism of reforms that are cloaked in the rhetoric of uniformity is warranted.⁴³ All of us should react to this rhetoric with self-conscious reflection as Professors Allemeersch and Vandensande do.⁴⁴ They ask whether—and why—we need new uniformity? Reforms that achieve uniformity may be worthwhile and important initiatives. But when one type of uniformity comes at the expense of some other type of uniformity, the rhetoric of uniformity itself cannot alone justify the reform.

Of course the standard narrative of harmonization reform is that the difference that is the target of the reform creates confusion or raises transaction costs. Empiricism can inform such discussions. For example, to supplement his law-and-economics perspective on harmonization,⁴⁵ Louis Visscher cites the results of the 2008 Oxford Civil Justice Survey of the Institute of European and Comparative Law, which suggest that differences in systems do not, in fact, generate significant problems or transactions costs.⁴⁶ The lack of uniformity can be anachronistic, inefficient, and/or unnecessary. But the burden of proof lies on the reformers; that burden is not satisfied merely by showing the lack of uniformity.

Let us return one final time to our adjacent neighbors who share the hedgerow. When one neighbor (X) approaches the other (Y) with

42. MENSKI, *supra* note 27. See also Martti Koskeniemi & Paivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 559 (2002) (“Systemic thinking has always been a preserve of academics,” JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 279 (1980) (“The lawyer is likely to become impatient when he hears that social arrangements can be *more or less* legal, that legal systems and the rule of law exist as a matter of degree . . . and so on.”); Main, *supra* note 2.

43. For my skepticism, see Main, *supra* note 2.

44. Benoit Allemeersch & Els Vandensande, *Convergence of Civil Procedure Systems in Europe: Comments from a Belgian Perspective*, at 325.

45. Louis Visscher, *A Law and Economics View on Harmonisation of Procedural Law*, at 88 (concluding that “there do not seem to be many arguments in favour of harmonization of procedural law”).

46. *Id.* In the 2008 Oxford Civil Justice Survey of the Institute of European and Comparative Law, it was examined “to what extent businesses in Europe were influenced by their perceptions of national civil justice systems and contract laws when choosing the applicable law and the forum of litigation for cross-border transactions.” From this Survey it becomes clear that many of the respondents find it very important (61 per cent) or important (36 per cent), when conducting cross-border transactions, to be able to choose the dispute resolution forum. With the statement that variations in European civil justice systems deter the respondent’s company from doing business in certain jurisdictions, 51 per cent disagree strongly, 25 per cent disagree mildly, 19 per cent agree mildly and 1 per cent agrees strongly. With the statement that such differences constitute, overall, a barrier to trade, 25 per cent disagree strongly, 35 per cent disagree mildly, 33 per cent agree mildly and 6 per cent agree strongly. . . . [T]he respondents are positive about the idea of a harmonized European civil justice system (36 per cent very favourably, 40 per cent favourably, 19 per cent not very favourably and 4 per cent not at all favourably), because it reduces costs. However, only 22 per cent would choose for the option of a European civil justice system which replaces national civil justice systems, while 25 per cent would choose for the European system to be an additional choice. Most respondents (37 per cent) would opt for a greater alignment of civil justice systems.”

an idea for how *Y* should change how she maintains her side of the hedge, we can expect the rhetoric of uniformity to be invoked. Neighbor *Y* should explore two related types of responses: (1) If uniformity is *X*'s primary objective, then *X* should be willing to allow *Y* to choose how both of them maintain the hedgerow. Of course, uniformity is likely not *X*'s primary objective; rather the rhetoric of uniformity is merely cloaking *X*'s true objective. But the neighbors' discussion should focus on *X*'s true objective, rather than on the rhetoric of uniformity. (2) When the rhetoric of uniformity sounds persuasive, neighbor *Y* need not contest or refute that uniformity; instead she need identify another dimension of uniformity that *X*'s reform would disturb. In these instances the debate is not uniformity versus disuniformity, but rather one type of uniformity as opposed to another type of uniformity.

Read as a compilation, the book brilliantly reveals the allure, paradox, and superficiality of uniformity rhetoric. I might have playfully titled this book "19 Meditations on Procedural Harmonisation in Europe." Each chapter encourages thoughtful engagement with core questions about procedural uniformity—the why, when, how, and which? Each contribution is thoughtful; and the compilation truly generative.