Preface

The idea behind this book was conceived at least a decade ago. At the time, the world seemed a much more predictable place to be, even though legal harmonisation scholars and political scientists were already raising grave concerns as to the viability of the European Union model, its democratic deficit(s) and the precise role of the West in Fukuyama’s world of liberal democracy. Typical themes in this respect were the deepening of legal integration of existing EU Member States (as opposed to the EU rapidly expanding, for political reasons, its legal remit to the Eastern part of Europe, without adequate and appropriate groundwork), and the West’s navel-gazing as to its precise standing in the world. Nonetheless, in terms of international law, politics and developments, a number of things seem to have changed to a considerable extent in the last decade. The world seems to have become a much more interesting place. The old Chinese curse and wish as to living a life in interesting times has come to materialise in all its glory.

The last 10 years or so have been unfolding in a rather dramatic way for markets, countries and citizens alike. The word ‘crisis’ is not merely common; it is everywhere. Globalisation seems to have lost certain of its shine and is not as appealing as it may once have been. Currencies have been shaken, whereas certain multinationals have failed tax systems, consumers and investors. Nationalisms and populisms are on the rise on both sides of the Atlantic. The naivety of the late 1990s and the early 2000s has given its place to considerable scepticism. Lethargic political elites apathetically look into the unknown, incapable of being able to turn the world’s ship around. The failure of the sub-prime mortgage market in the United States in 2007; the subsequent 2008 collapse of Lehmann Brothers, sending shockwaves around the world markets; the collapse of Greece in 2010, practically declaring itself bankrupt by invoking the International Monetary Fund’s intervention at the time, were only the beginning. Syria has been locked in civil war since 2011, whilst the Ukraine became destabilised in 2014. In 2015, the EU has been hit by the worst immigration crisis it has encountered in its history, with 1.8 million refugees and illegal immigrants entering its territory, whilst in the same year the world markets saw the collapse of the price of oil. Finally, in 2016, the United Kingdom’s
The electorate voted by a narrow margin to withdraw from the EU, otherwise the leading example of harmonisation efforts in the world to date.

And the question is: what has the legal harmonisation thesis done to thwart certain or all of the above? Or, even more provocatively, is this the right time for one to engage oneself with another legal harmonisation discussion? The author wishes to respond in the affirmative. It is exactly now that we must seize the golden historic opportunity to learn from the failings of harmonised instruments and realities (or even the absence of such instruments and realities) which may have contributed to the above state of affairs.

It is the case, of course, that bureaucratic and political elites have often used and abused the theme of legal harmonisation for their own specific needs and goals. Technocratic legal personnel may have followed suit by promoting political agendas. Thus, a lawyer advocating European federalism may not necessarily be in favour of European harmonisation of laws. Indeed, a pro-harmonisation legal scholar does not have to be a federalist, and so on. Thus, the political goals of elites ought not to be confused with the ideals and goals of the legal harmonisation thesis.

Equally, it may well be that the finest of harmonisation scholars may deteriorate into faceless technocrats, if the ideal behind the harmonisation thesis is neglected; if they become consumed and obsessed with the technocratic necessities and particularities of the harmonisation exercise, or, as the case may be, if they abuse the legal powers which they have been conferred in the first place. The deterioration of bureaucracies in Europe, indeed in the world, is, of course, nothing new. Nor is the democratic deficit in the EU, on which tons of ink and paper have been expended for many decades now.

Clearly, however, the ideal behind the harmonisation of legal systems is often sacrificed in the name of poor political leadership and poor administration. In recent times, for instance, in a display of profoundly poor political judgement, an appointed European Commissioner has issued a declaration stating that, whilst the European Commission does not intervene in the internal judicial operations and proceedings of Member States, the Commission deemed the operations of a given accused person in a Member State as appropriate, thereby effectively interfering in and intervening with the course of justice of a given Member State. This, of course, is only an indicative example, standing for a mere fraction of the damage which elites inflicted and inflict upon the cause of the legal harmonisation ideal. Indeed, the personnel we currently have do not seem to be up to the job. Politicians are governed by peculiar agendas. Technocrats are often-times poorly trained and equipped. At other times, peculiar phenomena occur: one person is placed at the top of a leading political organisation,
only for the same person to find himself acting for a leading world firm upon retirement (revolving door theory).

A politician can hardly be a good bureaucrat. A bureaucrat rarely becomes a good politician. Yet, the harmonisation scholar oftentimes observes bureaucrats wishing to act like politicians and politicians wishing to be more technocratic in their operations. Democracy is to them but a byword.

Indeed, when it comes to legal harmonisation initiatives and projects, there is something unpleasant about unelected and little-accountable bureaucracies: they do not inspire. On occasion, they do not seem to have what we lawyers call the necessary degree of legitimacy, the right ethos or, for that matter, the moral standing, to perform their functions. Add to this that the quality of the personnel in relevant organisations can be rather low, and then one has what might be called a perfect recipe for disaster.

However, we will observe in our thesis that the idea of harmonisation is actually based on principle. Principles are nothing else but common starting points which political forces sensu lato have agreed. The legal scholar must subscribe to such principles. Principles govern the thesis provided in this book. Efficacy, effectiveness, efficiency, democracy, social justice, transparency, subsidiarity, conferral of powers, margin of appreciation are only certain of the principles that support the analysis herein.

The harmonisation scholar must also proceed beyond the failings of those who instrumentally perform harmonisation functions and revert to an analysis which, for practical reasons, places legal systems at the centre. (S)he must also proceed on given principles and given realities. One must not sacrifice the harmonisation ideal at the altar of poor political elites and/or in the name of poorer administrative machineries. Furthermore, one is aware of the fact that nations are but narratives (even though it is for our colleagues in the department of history to draw their own conclusions as to whether the narratives in question are sound or not, as the case may be). Thus, the legal scholar is not concerned with the inherent fallacies of nations or the failings of bureaucracies in given States. This is the job of political scientists, administrators and historians.

This is a book about theoretical models and factors for the effective transposition and implementation of foreign harmonised legal norms into the domestic legal sphere. The proposed tools are two strategic models, which may be followed by two factors.

This, thus, is a book on strategic methods which the domestic legislator may follow to effectively address the necessities of bringing extra-national law into the national legal order. On a wider note, this thesis is based on democratic principle. Democracy presupposes dialogue. A continuous legal dialogue between the extra-national and the national before, during
and after transposition and implementation of foreign law into the domestic legal sphere is contemplated. Thus, it is taken for granted that before a harmonised norm reaches the national legal sphere, this has been agreed on democratic principle. The hypothesis is not always a most powerful one. For instance, smaller States agreeing to harmonised norms often do so, even if they have had little say in the process of creating harmonised norm. However, for the sake of argument, we will proceed by way of an epistemic via media: the idea that harmonised principle and norm is more-often-than-not a reality reached after genuine democratic deliberation.

Furthermore, the legal scholar is fundamentally concerned with the effectiveness of operations in the legal sphere. In this respect, we will also observe that the harmonisation thesis is relevant to the discipline of economics, even though the concerns there are mostly ones which relate to the degree of efficiency of harmonised norms. For instance, an economist could be predominantly concerned with the efficiency of economic laws. For lawyers, however, it may be that it is mainly the effectiveness of laws that matters from the discipline of economics (at least for the purposes of effecting a harmonised legal norm in the first instance). Moreover, speaking of economics, our book draws on Adam Smith’s division of labour thesis. Specialised tools are deployed for effecting specialised goals only for a general goal to be achieved. The more specific goals would have to do with giving effect to particular harmonised legal norms in the domestic legal sphere. The general goal would be related to a multiplicity of successful exercises of bringing harmonised norms into the domestic sphere, which, in turn, ought to result in wider legal harmonisation between the participants in the same circle of convergence.

Inference of conclusions herein is predominantly based on real-world analytical scenarios. In this sense, the theoretical but indicative models and factors proposed describe the real world only for them to prescribe a real-world-to-be. Accordingly, the reference to real legal scenarios relating to the transposition and implementation of harmonised law into the domestic sphere indicates that retroductive reasoning has been the analytical choice of preference (inference to the best explanation). Thus, the fact that the constituent prescribed analyticals herein are supported by real case scenarios does not necessarily guarantee their success in other, even similar, situations in the future. Yet, based on previous experience, similar situations may be sufficiently and effectively dealt with in the future. Correspondingly, the advantage of abduction (or retroduction) is the fact that it allows us to proceed with the description of real matter for the prescription of theoretical matter, to the point that the latter could be deployed in situations similar to the former.

Finally, the tools put forward in this analysis do not have to be followed
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by the national legislator (and/or the executive, administration and judiciary of a given nation), for, arguably, national legislators may have developed their own methods and strategies in transposing and implementing harmonised legal norms. The models are thus indicative, discretionary and modifiable, and so they should be perceived. Nonetheless, it is the case that the deployment of certain of the tools presented herein, with or without modification, may prove quite beneficial for the national legislator and, by extension, for the extra-national legislator’s goals and aspirations. At the very least, it is hoped that the prescribed matter herein will open up an academic discussion as to methods for the more successful transposition and implementation of foreign and extra-national law in the domestic national legal sphere in the future. After all, the process of harmonisation of legal systems represents the future of the discipline of law.

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