

## **LOOKING AT CONVERGENCE THROUGH THE EYES OF A COMPARATIVE LAWYER<sup>1</sup>**

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### **1. Introduction**

In 1982, nearly two years after my appointment to the Chair of Comparative Law in this University (Erasmus University Rotterdam), I stood in the ‘Aula’ to give my inaugural speech. Some of the faces I see here today were also present then. They do not seem to have changed much, but of course we have all changed. In our profession, as the number of one’s grey hairs increases, so does one’s *gravitas* and status. So, looking around I must say we are all more important now than we were then.

Those who were there that day will remember how I told them that my field was considered by some to be non-existent and defied definition. Others saw it as giving me privileges and freedom, making me the envy of my colleagues. Yet the burdens I had to carry should evoke sympathy. At that time, comparative law was popular or even fashionable, though of marginal importance. As a comparatist, I was first bewildered and then exhilarated and excited.

Some people say nothing much has changed in the past twenty-five years. For me, however, at Erasmus there have been quite a number of changes. For example, I moved venue eight times. I started on the 15th floor of the main building, ‘Hoogbouw’, and soon moved to another floor. Then we moved to the ‘barrakken’ and even there moved rooms twice. Later we moved into the new L Building, in which we moved up and down a number of times as well as horizontally.

The courses we taught have changed too. From teaching one course, we have now, as I leave, six courses.

The teaching staff has changed as well, including the number involved in comparative law teaching. Comparative law courses are also on offer now in other departments in Erasmus.

I started on my own, and was soon joined by dear good old Rob Jagtenberg, as a student assistant. In our department, the number of colleagues increased from these modest

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beginnings, once even up to five, then reduced to three, then two - being a department in deficit - and now, with my departure, to one, at least for a couple of weeks - and then? Oblivion? I sincerely hope not, especially not at a time when comparative law and comparative law theory have taken an immense turn for the better. The future of comparative law is bright indeed.

The constancy has mainly been in friendships. The Ten Raa, D'Hane and Umar families have become my life-long friends. The staunch support of Dr Rob Jagtenberg, Dr Annie de Roo and Tineke van de Pas through thick and thin has been invaluable. And I must say, we have been through more thick than thin! Fruitful friendships with colleagues from Leiden and Utrecht have added to the enjoyment of my work. These friendships will go on.

For me, yet another constant factor is my enthusiasm for what I am doing - research and teaching. As the saying goes, 'old professors never retire, they only lose their faculties'. Only time will tell!

Some still say that nothing much has changed in comparative law in the past one hundred years. In fact, there have been some very important changes resulting in comparative law now being referred to as the science of the 21st century. For example, the legal systems in Europe are getting progressively closer together within the ambit of the EU and, as time passes, the number of EU members increases, and thus comparative law is more and more seen as indispensable. The role of comparative law is now acknowledged in understanding diversities and commonalities; in transpositions from system to system and from systems to the EC and from the EC to the systems, and in harmonisation. Today, comparatists are sought-after members of academia. Comparatists of all kinds work in Commissions set up in various fields of law to prepare general principles, common core studies and even European Codes.

Most 'theoretical comparativism' today is dominated by the 'sameness and difference' debate. It may even be legitimately questioned whether comparative law has indeed become just an instrument of integration. Comparative lawyers are seen by many not as neutral observers, but as workers for convergence.

Obviously, some stress cultural identity, mentality, difference and 'living apart together' as important tenets of nation states within which cultural pluralism and even legal pluralism are discussed. Although they would not deny the existence of a historic *ius commune* in continental Europe, they do not acknowledge the existence of a *ius commune* involving both the common law and the civil law in the past and are totally opposed to attempts at the creation of one now, even for the members of the civilian tradition, considering this to be impossible. For example, a researcher involved in the Scottish nationalist movement might prefer to stress differences between the English and the Scottish legal systems - and there are many - in order to prove that they are insurmountable, even for a partial harmonisation of the two legal systems. Whereas a Scottish researcher believing in the unity of the UK and perhaps also wanting to pave the way for European unity might focus on the similarities between the English and the Scottish legal systems - and again there are many - in the hope of generating a unification movement at home as a first step in the direction of a harmonisation movement within Europe. Thus it is possible to claim, according to this type of political choice, that the Dutch and the English legal systems, for example, are quite different in their approaches to and their use of law, and 'never the twain shall meet'. However, it is also possible to stress the similarities between the two if there is the will to facilitate

European co-operation within the European Union. These are all legitimate research strategies as long as the strategy is clearly laid down at the start of the project. Which strategy is chosen depends on the political and theoretical orientation of the researcher.

Thus, comparativism can be seen as a threat or as a panacea depending on the stance taken. For me, it is a panacea, although I do recognise that nothing seems to be able to cure all the ills of our times. The best on offer is to have a conviction and work towards one's goals.

The most striking development over the years has been in the rhetoric of 'convergence'. Here, I would like to look at the reality of convergence. I want to do this by dealing with two separate but interlinked issues under four subtitles. The first issue involves looking again at legal systems to illustrate the thesis of 'original convergence' and make a case for the overlaps of legal systems within and across the classically accepted legal families. This is an area in which I am actively engaged. The second issue involves looking at the reality of convergence itself, occurring in front of our very eyes. This will be dealt with as 'ongoing convergence', within the context of an ever-enlarging Europe. Of course, I have a certain personal interest in this field as I watch the enlargement of the EU towards Turkey. 'Ongoing convergence' can be assessed at a number of levels. We should also look at 'past convergence' and, finally, consider 'future convergence'.<sup>3</sup>

## **2. The reality of convergence**

### **2.1 'Original convergence'**

If we take a fresh look at the classification of legal systems and reassess their positions in relation to each other according to their parentage, their constituent elements and the resulting blend, and then re-group them on the principle of predominance, we quickly see that what at first looked like individually distinctive legal systems which sometimes even appeared irreconcilable are in fact members of intertwined and overlapping family trees. Identity, difference and uniqueness all seem to fade away when viewed in this way. This perspective reflects reality and I believe that all the rhetoric to do with convergence and non-convergence can be defeated in the face of the 'original convergence'.

Deconstruction and re-construction of legal systems reveals that, although parts of the new landscape resemble the old, other parts and the whole look different. Grouping legal systems into legal families separates the members of one grouping from another. Although the significantly similar are put together, even in that similarity one is also highlighting the difference to make them distinctive. There is a definite difference and even irreconcilability between the groups, and yet, within the groups difference is still of value although there is similarity. Originality, derivation and common elements surface behind the efforts of classifications. However, in the 'original convergence' thesis, relationships are of the utmost importance, and yet, this is not a claim at 'derivation'. All legal systems are related historically, and today more closely than ever. The relationship between a legal system and its

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<sup>3</sup> This author has also dealt with some of these issues elsewhere; see E. Örüçü, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century* (Leiden/Boston, Martinus Nijhoff Publishers, 2004).

socio-cultural context does not stand in the way of its relationship with other legal systems or even with other socio-cultural contexts.

In addition, legal systems that may appear not to be converging in one area of law may be converging in another. Legal systems, which may be grouped together for the purposes of one subject matter, may be regrouped differently with others for the purposes of another subject matter. Legal systems, which belonged together at a certain time, may shift their positions at another time. Borders are constantly changing and legal systems remain in one position for only a limited period of time, though this time span may be quite long. All this shows, firstly, that legal systems can never be placed in fixed positions for all time and in all areas of law. Furthermore, the above, coupled with the overlaps to be exposed through the deconstruction of legal systems into their original components, can only strengthen the 'original convergence' thesis.

When we look beyond rules, substance and structure towards legal tradition and legal culture, the interrelationships become even more obvious. This may sound like the reverse of what is usually claimed. It is said that rules and solutions may look alike but that legal cultures and traditions differ. The 'original convergence' thesis claims that in essence rules and structures may have developed differently over time but that the legal traditions and cultures overlap. This does not amount to claiming that there is an emerging 'European legal family' as a monolithic centralised model. Neither is this a suggestion that there is one 'Western legal family' - another centralised monolithic approach. What is being claimed here is that though one can see a picture of systems 'united in diversity', deconstruction of legal systems may portray yet another aspect of these so-called diverse legal systems - the overlap.

If, for example, the legal systems in Europe, whose borders are ever changing, are reassessed according to the old and the new overlaps and blends and to how the existing constituent elements have mingled and are mingling with new elements entering these legal systems, we find an 'original convergence' as well as an 'ongoing convergence'. Thus we see that English common law was an overlap of Roman law, civilian ideas, canon law, equity and domestic common law. Some continental systems in Europe are combinations of Roman law, French law, German law and indigenous law such as the Dutch, some of canon law, Roman law, French law and German law such as the Italian, some of customary law, neo-canon law, German law, French law, Swiss law, Greek law and Roman law (and even Ottoman law) such as the Greek and some of ancient Greek, Roman, Byzantine, Franco-Venetian, Ottoman and British laws such as the Cypriot. Roman law itself has elements of the laws of Hammurabi and ancient Greek laws. French law and German law are themselves outcomes of overlaps of different ingredients.

There are new overlaps on the continent with elements of common law, British or American. English law is becoming more and more an overlapping of common law, various civilian systems and European law.

All legal systems are crosses,<sup>4</sup> and this is the basis of the 'original convergence' thesis.

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<sup>4</sup> For more on this, see E. Örüciü, 'Family Trees for Legal Systems: Towards a Contemporary Approach', Chapter 18 in M. van Hoecke (ed.), *Epistemology and Methodology of Comparative Law* (Oxford, Hart Publishing, 2004), pp. 359-375.

## 2.2 'Past convergence'

It may be true that in the past *ius commune* was mainly private law based and was originally seen to be in the field of obligations. In fact, it was more extensive than that. Although, when we speak of Roman law today, we tend to think of private law, 'this restriction dates only from the 19th century; it is not true of the *ius commune*. The *ius commune* was universal in the sense that it included all fields of law: criminal law, procedure and, to a certain extent, even public law.'<sup>5</sup> The main sources of the *ius commune* were Roman law in the form given to it by Justinian (in the Middle Ages dubbed the *Corpus Iuris*), canon law (forming the second *Corpus*, the *Corpus Iuris Canonici*) and some medieval institutions such as feudal law, rules developed by jurists and commercial law as developed during the Middle Ages. Furthermore, the moral theology of the Middle Ages and, from the middle of the 17th century onwards, rationalistic natural law and the *ius commune* were mutually influential. 'The *ius commune* was in force in all countries west of a line drawn from Venice to the Baltic sea, including Hungary and Poland.'<sup>6</sup>

So, in the past, there was a *ius commune* and England was part of it, as part of 'European culture'.<sup>7</sup> As pointed out by Luigi Moccia, whose working hypothesis is that 'Continental (Civil) law and English (Common) law stood together in past centuries as component parts of a same cultural context not yet affected by legal nationalism and positivism',<sup>8</sup> these are two traditions on a path of convergence. In many parts of the world, as well as at home, English law met the civilian tradition and happily lived with it: the two have never been strangers.<sup>9</sup> English law borrowed from the civilian tradition, internalised various Roman law concepts into equity and common law, and thus enriched its common law. It had no problems with Codes, and indeed it introduced common law to some of its colonies in an already codified form. In addition, in the fields of contract law, commercial law and criminal law there were attempts at home to codify the law in the 19th and 20th centuries. So it is clear that, common law and codification can coexist. Examples can be found in other common law jurisdictions such as the United States where there is a variety of Codes such as the Uniform Commercial Code and the Californian Civil Code and in Australia, where one speaks of Code States with codified Criminal Law.

In the early part of the previous century, the utopian idea of 'one law for the civilised nations' if not 'one law for the world' was expressed from time to time. Feelings of fairness and justice were seen to demand uniform laws for all. That this was a dream was soon

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<sup>5</sup> H. Coing, 'Sources and Characteristics of the Ius Commune', (1986) 19 *Comparative and International Law Journal of South Africa*, 483-489, at p. 488.

<sup>6</sup> *Ibid.*

<sup>7</sup> R. Zimmermann, 'Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science', (1996) 112 *Law Quarterly Review*, 575-605, at p. 602.

<sup>8</sup> L. Moccia, 'Historical Overview on the Origins and Attitudes of Comparative Law', in B. de Witte and C. Forder (eds), *The Common Law of Europe and the Future of Legal Education* (Deventer, Kluwer/Metro, 1992), pp. 609-620, p. 609.

<sup>9</sup> Zimmermann, above note 7.

realised, but still there were many who aspired to it. In times of peace it is commonplace to wish to get closer together and the reverse is true in times of conflict. Variations of this dream came to life in certain regions such as in the Nordic Union and the Benelux countries in harmonising the laws. Convention law, model laws and the like were all attempts to create uniform standards, maybe for the sake of convenience and to ease the way for economic integration, and also as part of a political agenda.

Let us now move to ‘ongoing convergence’.

### 2.3 ‘Ongoing convergence’

Today, the growing *ius commune novum* certainly includes England. The path leads towards an integrated Europe. Integration will be in many fields. It will extend far beyond the limited number of fields of private law. Therefore, to speak of a *ius commune* only in private law is inappropriate and does not do justice to the vision. Integration will surely extend beyond private law, commercial law and procedural law. To start with, the mere existence of the European Union itself implies an active role for comparative lawyers in the development of general principles. The number of ‘common core’ projects and Commissions set up to prepare European Codes, General European Principles, European Case Books, Restatements and to develop theories of ‘competing legal systems’, in addition to regulations, directives and conventions of the European Union and the Council of Europe, and the European Convention of Human Rights bear witness to a plethora of activity in building the groundwork for convergence. We see also the development of a *communis opinio doctorum novum*, to supply answers to shared problems from this new pool of ‘rule of reason’.

Starting with a quotation from the Opinion of Advocate General Warner of the European Court of Justice, indicating the existence of a common ‘legal heritage’, we read:

. . . this Court, in developing the general principles of Community law, draws on what has been termed ‘the legal heritage’ of all the Member States. It seems to me that, if one considers, for instance, the Danish law as to ‘*siltende afkald*’, the English law as to estoppel, the German law as to ‘*Rechtsverwirkung*’, the Italian law as to ‘*legittimo affidamento*’ and the Scots law as to personal bar, as well as the French law as to ‘*renonciation implicite*’, there emerges a general principle . . . that one who, having legal relations with another, by his conduct misleads that other as to a material fact . . . cannot thereafter base on that fact a claim against him if he (that other) has acted in a relevant way in reliance on what he was led by that conduct to believe. What matters here, of course, is the existence of the principle, not the scope or mode of its application in the law of any particular Member State. The principle exists also in public international law where, although it is generally given its English name of ‘estoppel’, it is considered to have its origin in Roman law.<sup>10</sup>

Let us continue with a more recent statement of Advocate General Geelhoed, specifically mentioning the resort to *ius commune*:

Regard must be had to the changes which have occurred in the legal systems of Western

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<sup>10</sup> *Boizard v Commission* 63+64/79 [1080] ECR 3002 (Advocate General Warner).

Europe over the last 50 years. Those changes are characterised by the almost continual attention which legislatures have paid to protecting interests which in social terms have been shown to be vulnerable . . . Individuals and interests not included in the scope of the legislation may not rely on the special protection provided by it. Therefore, they must rely on general rules of private law, such as *ius commune*.<sup>11</sup>

In the context of Europe today, there is an effort to create an ‘ever closer union’, and although some see this only as a means of facilitating economic ties, others regard legal and cultural integration as the ultimate goal. World-wide unification is no longer discussed and, at a time when there is even talk of a ‘clash of cultures’, it is not the dream of our century. The ‘new *ius commune* seekers’ are mainly interested in private law, but the boundaries of private law have been widened.

Now, in the search for a closer integration in Europe a number of hitherto neglected areas are being looked at. For instance, although as yet there is no uniform family law for Europe, efforts are being made to create standardisation in some aspects of family law through European law and Conventions related to respect for family life, the equal treatment of men and women, the equal treatment of legitimate and illegitimate children and the recognition of divorce, maintenance and custody judgments. There is lively comparative law research activity in this field. The belief that family law, being culture bound, does not lend itself to comparison, let alone harmonisation, has long been refuted.<sup>12</sup> Obviously, some of these efforts are academic but European norms enunciated through the European Convention on Human Rights in relation to Article 8 on the right to family life, for example, have had a substantial impact on the legislation of countries such as the UK, France and the Netherlands. This is apparent in areas such as parental authority in marriage and after divorce. A number of Council of Europe Conventions such as the 1967 Convention on adoption and the 1975 Convention on the legal status of illegitimate children are among other harmonising agents. In addition, the rights of the child and the protection of minors have been specifically targeted at the European level.

Today, an increasing number of areas of law are designated as ‘European’, including areas such as European competition law, European contract law, European tort law and European family law with European Commissions of academics working to produce general principles in these fields either using the ‘common core’ or the ‘better law’ approach. Treaty law also brings together rules in various branches of substantive law and private international law.

To date, many areas such as commercial law, trade and labour law, transport by rail, sea and air, copyright and industrial law and procedural law have been brought closer together and in some cases been unified. Moreover, there are moves to create a ‘common law of human rights’ as well as a criminal law for Europe, particularly for crimes that extend beyond

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<sup>11</sup> The Advocate General’s opinion concerns both *Gonzalez Sanchez v Medicina Asturiana SA* Case C-185/00, paras 66 and 67, and *Commission of the European Communities v French Republic* Case C-52/00.

<sup>12</sup> See P. de Cruz, ‘Legal Transplants: Principles and Pragmatism in Comparative Family Law’, in A. Harding and E. Örüçü (eds), *Comparative Law in the 21st Century* (London, Kluwer Law International, 2002), 101-120, and K. Boele-Woelki (ed.), *Perspectives for Unification and Harmonisation of Family Law in Europe* (Antwerp/Oxford/New York, Intersentia, 2003).

the borders of a single nation State. Such entities as the European Union and the Council of Europe are regarded as facilitators for the realisation of such aspirations. 'I submit', says Thijmen Koopmans, 'that a new *ius commune* for Europe is taking shape before our eyes.'<sup>13</sup>

Now that so many harmonisation and unification projects have been successfully completed and a European private law is being developed, the questions of necessity, feasibility or even desirability do not need further discussion.

#### 2.4 'Future convergence'

What is now needed is discussion on how best to achieve the end of further convergence and on what is the right course of action.

To wait for a gradual development of a *ius commune* may not be practical. One way forward towards uniformity would be through codifying basic principles in these fields, and thus attaining uniformity.

Indeed, in 1989 and 1994 the European Parliament adopted Resolutions calling for the codification of European Private Law, the call being based on the belief that unification can be carried out in branches of private law which are highly important for the development of a Single Market, such as contract law. Since then, the study of private law has faced a new challenge. Whether at present a European Civil Code is practicable, or even desirable, is under debate, though the project has found support in some quarters.

Short of a European Civil Code, however, there are other options. Firstly, a European Code of Contracts might be a slightly watered down version of a European Civil Code. Another possibility was to unify the General Principles of Contract Law and this has in fact been achieved. The Commission set up in 1980 for this purpose has completed its work, which can be seen as the first step towards the production of a future Code. Such projects on unifying General Principles which can then be used as Restatements, are being undertaken in other fields as well, thus another way forward is in American-style Restatements. The case-books approach has already produced its first fruits and 'law and economics' scholars suggest that when legal systems are in competition in a 'market of solutions', the 'best solution' will always win the day.

In addition, an 'evolutionary theory' has been suggested, as a variation of the 'law and economics' approach, whereby gradual and organic convergence could take place based on spontaneous 'cultural evolution' without any compulsory principles.<sup>14</sup> At worst, transnational rules could function alongside national rules and eventually become congruent with them. At the level of private law at least, legal education embracing both European and national principles should become compulsory and textbooks be produced to this end. Today, European Law Schools are being set up and new links between universities forged.

All the above approaches indicate that convergence is inevitable and the end result will be a wide *ius commune novum*, as analysis reveals that convergence does not stop at

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<sup>13</sup> T. Koopmans, 'Towards a New "Ius Commune" 2', in B. de Witte and C. Forder (eds), *The Common Law of Europe and the Future of Legal Education* (Deventer, Kluwer/Metro, 1992), pp. 43-51, at p.49.

<sup>14</sup> J.M. Smits, 'The Harmonisation of Private Law in Europe: Some Insights from Evolutionary Theory', (2002) 31 *Georgia Journal of International & Comparative Law*, 79-99.

private law. For instance, administrative law systems in Europe are also converging and common rules, common principles and a common mentality are emerging. However, we have not yet reached the stage where we can talk of a *ius commune* of public law.

Let us now widen our field of vision. The UK straddles two worlds. It has one foot in the *ius commune novum* with the legal systems of Continental Europe and the other in the 'unity of common law' with the legal systems in the Commonwealth and the USA. The UK, which also comprises Scotland, a mixed jurisdiction, can be regarded as a point of confluence. This position can best be illustrated by recent cases. In the *Fairchild* case,<sup>15</sup> for example, inspiration was drawn from other common law jurisdictions such as those of Australia, New Zealand, Canada and the USA, from Scotland, a mixed jurisdiction, from civilian jurisdictions such as France, Germany, the Netherlands, Greece, Spain and Norway, as well as from Roman law. Lord Bingham, delivering his Opinion in *Fairchild*, made this most pertinent observation:

This survey shows, as would be expected, that though the problem underlying the cases such as the present is universal the response to it is not. . . . But . . . most jurisdictions would, it seems, afford a remedy to the plaintiff. Development of the law in this country cannot of course depend on a head-count of decisions and codes adopted in other countries around the world, often against a background of different rules and traditions. The law must be developed coherently, in accordance with principle, so as to serve, even-handedly, the ends of justice. If, however, a decision is given in this country which offends one's basic sense of justice, and if consideration of international sources suggests that a different and more acceptable decision would be given in most other jurisdictions, whatever their legal tradition, this must prompt anxious review of the decision in question. In a shrinking world (in which the employees of asbestos companies may work for those companies in any one or more of several countries) there must be some virtue in uniformity of outcome whatever the diversity of approach in reaching that outcome.<sup>16</sup>

This might be regarded as a 'convergence of policy', and thereby a convergence of solutions. This might also indicate that a spontaneous convergence, embracing a common intellectual framework for the consideration and resolution of current problems, is developing.<sup>17</sup> Obviously, it is easier to show a convergence of solutions but more difficult to claim that there is clear convergence of reasoning. If this also develops, then we can talk of true convergence by '*rapprochement* in reasoning'.<sup>18</sup> This also requires the 'repositioning' of comparative law. In this process, much falls on the shoulders of comparatists in persuading judges that foreign law could be better, in searching for common roots, common principles

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<sup>15</sup> Joined Cases of *Fairchild v Glenhaven Funeral Services Ltd and others; Fox v Spousal (Midlands) Ltd*, and *Mathews v Associated Portland Cement Manufacturers (1978) Ltd and others* [2002] KHL 22, [2002] 3 All ER 305.

<sup>16</sup> *Ibid.*, 334.

<sup>17</sup> See G. Canivet, 'La convergence des systèmes juridiques du point de vue du droit privé français', 1 (2003) *R.I.D.C.*, 7-22.

<sup>18</sup> *Ibid.*

and common solutions and in bringing about *rapprochement*.

It is true that the circle in which English law predominantly lives is the ‘unity of common law’ born of a process of colonial expansion with English common law rivalling the Roman-law-based civilian tradition in the creation of a legal Empire. English law laid the foundation stones of most of the legal systems in North America, Australia, New Zealand, India and large parts of Africa and South East Asia. English common law also played a crucial role as the basis of harmony in the common law world maintaining this harmony by laying down paths of cross-fertilisation, the Privy Council on many occasions bringing the laws of the individual jurisdictions of the Commonwealth into line with others within their specific regions. For instance, in *Cheali v Equiticorp Finance Group Ltd and another*, Lord Browne-Wilkinson stated: ‘It is manifestly desirable that the law on this subject should be the same in all common law jurisdictions.’<sup>19</sup>

The different socio-cultures within this circle face the same legal culture - the common law. Specific to this circle, there is still a consciousness that common law is a whole and provides a real tie between the several jurisdictions within the ‘unity of common law’. ‘Whatever differences there may be between the legal systems of South Africa, the United States, New Zealand and this country, many of the basic principles to which they seek to give effect stem from common roots.’<sup>20</sup> Judges use cases from other jurisdictions within this unity, attributing to them persuasive effect and sometimes preferring one such decision over the domestic one: the citing being sometimes for ‘help’ or ‘comfort’ but at times as authority. It is most striking that ‘the feeling of oneness is so strong that in one case the [British] judge found it difficult to refer to New Zealand as foreign and apologised to his New Zealand friends for using the word “foreign”.’<sup>21</sup>

Now, beyond these two circles there are of course other worlds some of which also live in unity. For instance, such a ‘commonality’ exists in the Islamic world, where Moslems living in many of the jurisdictions in the Islamic world are first and foremost members of ‘*ummet*’ (*ummah*)<sup>22</sup> rather than ‘nationals’ or ‘citizens’ of their respective States since Islam has no national boundaries. Though Islamic law has never been applied as a uniform code of law and does not aim at uniformity in spite of its being comprehensive, similar to the unity of the common law, there is a ‘unity of Islamic law’. The reception of Islamic law was the spreading of a global doctrine which, in historical terms, had a wider catchment area than that of Roman law in Europe.

It follows from the foregoing that this unity of the Islamic world is another circle in overlapping relationship with the ‘*ius commune*’ and the ‘unity of common law’ in the Western world and, more poignantly, in those parts of the world where the post-colonial independent States with inherent cultural and religious pluralism have accepted legal pluralism.

It has also been suggested that it is possible to talk of an emerging convergence in

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<sup>19</sup> [1991] 4 All ER 989 PC.

<sup>20</sup> *Bennet v Horseferry Road Magistrates’ Court and another* [1993] 3 All ER 138 HL.

<sup>21</sup> *Attorney General of New Zealand v Ortiz and other* [1982] 3 All ER 432.

<sup>22</sup> Community of the same religion.

African law. Maybe what we see here is more a possibility of convergence of laws, a natural and spontaneous process, rather than the harmonisation of the law, which is a plan and an applied technique. As Gardiol van Niekerk points out, Africa presents a more complex case than Europe in this regard.<sup>23</sup> The first obstacle is that legal pluralism prevails in most of the African continent and therefore the achievement of convergence is much more difficult. The second obstacle is that in some countries such as Cameroon, Mauretania and Somalia, the colonial heritage has meant that there was not one single overarching colonial legal system but there were two: a complex and multifaceted indigenous underlay with two overlays conjoined. Nevertheless, in Southern Africa there is convergence with regard to private law, the focus so far being 'on the unification of the imposed Western law and the indigenous laws within individual African countries'. Two groups of countries have been considered by Gardiol van Niekerk: countries belonging to the South African Law Association and the States belonging to the Southern African Development Community (SADC). His analysis of developments reveals that the focus is 'not only on economic integration and the facilitation of free trade in the region'. Programmes are sectorial and include 'environment and wildlife, energy, illicit drug trafficking, transport, education and training, health care, law enforcement and legal affairs, and matters pertaining to "gender and development"'.<sup>24</sup> What is striking here is that there is room for both convergence and divergence, thus hope for congruous development. Natural convergence must be the ultimate aim. A loosely connected unity may be developing in Africa, which may lead to the formation of another circle.

The ultimate vision may be represented as a number of overlapping circles of various sizes sitting within an all-encompassing circle of human rights. Human rights is yet another area where a 'common law' is forming. Many concepts developed on the basis of the European Convention of Human Rights have seeped into domestic legal systems in Europe either directly or by way of European Community law. Mentalities, cultures and legal constructions are mixing to bring about such a common law. This is extremely significant. For example, within the European Union, both the European Court of Justice (ECJ) and the Court of First Instance (CFI) have jurisdiction - limited though it may be - to ensure respect for fundamental rights arising 'from the constitutional traditions common to the Member States, as general principles of Community law'. Human rights or fundamental rights are constitutive elements of European integration, part of a pre-existing 'common heritage'. These general principles now extend to the relevant rights arising under the European Convention on Human Rights. According to Advocate General De Lamothe, these principles:

. . . contribute to forming that philosophical, political and legal substratum common to the Member States from which through the case law an unwritten Community law emerges, one of the essential aims of which is precisely to ensure the respect for the fundamental rights of the individual. In that sense, the fundamental principles of the national legal systems contribute to enabling Community law to find in itself the resources necessary for ensuring, where needed, respect for the fundamental rights which form the common heritage of the

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<sup>23</sup> G. van Niekerk, 'The Convergence of Legal Systems in Southern Africa' (2002) XXXV *Comparative and International Law Journal of Southern Africa*, 308-318.

<sup>24</sup> *Ibid.*, p. 308.

Member States.<sup>25</sup>

A 'common law of human rights' is developing fast and this *ius commune* of human rights is intended to cover all the circles mentioned above as an outer shell. It is an all-embracing circle. There is already such a unity within the context of Europe between both the Member States of the European Union and the jurisdictions subject to the Council of Europe Conventions. However, the repercussions are wider. Today it is commonplace to talk of the 'globalisation' of human rights.

In addition, as part of globalisation another outer circle has formed created by international corporate power. This development is even drawing systems as far apart as Chinese and the USA closer together.

Overlapping circles of four or more worlds living in interrelationship, congruous with each other if not interlocking and surrounded by an outer circle of human rights and the offshoot of a globalised economy, is the ideal to be worked towards in this globalising world of ours, in which people are constantly on the move.

### 3. Concluding remarks

Returning to our Continent, one of the most important roles that comparative law plays is in the harmonisation and unification of activities, and comparative lawyers are involved in the preparation of the many projects to achieve these ends. Such activity is of ever-increasing significance. Whether the starting point be 'common core' studies or 'better law' studies, the areas prepared for harmonisation and unification are on the increase.

The place of comparative law in all this is crucial. Firstly, comparative law is a fundamental source for any Europe-wide project, in fact, of European law itself. It is the main tool for working towards European integration. It aids in overcoming exclusive nationalism and shows how the *ius commune novum* must be based on intercultural communication while leaving room for diversity. This can be called, with William Twining, 'rooted cosmopolitanism'.<sup>26</sup> The mere existence of the European Union implies that comparative law has a serious role in the developing of principles. Secondly, the kind of comparative law that facilitates intercultural communication is the one which goes beyond juxtaposing, contrasting and comparing. This strengthens the call for comparative lawyers to be trained in interdisciplinary research problems, to have knowledge of and familiarity with different legal cultures, to have a good command of languages, knowledge of history, economics and politics, and also to receive training in methodology. Thirdly, the work of comparative lawyers in facilitating the achievement of the interrelationship between the overlapping circles to bring about intercultural understanding is vital.

The fact that there are few overt references to comparative law in the judgments of the courts of the European Community in no way reflects the true position. This work is undertaken primarily by the Advocates-General, the Commission, national courts, academics

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<sup>25</sup> Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, at 1146-1147.

<sup>26</sup> W. Twining, *Globalisation and Legal Theory* (London, Butterworths, 2000), pp. 47, 50, 88.

and practicing lawyers. In fact, both the ECJ and the CFI are the laboratories of comparative law, and the comparative approach in the activities of the Community judge has been hailed as ‘a “quasi-compelling” method of interpretation of Community law intrinsically linked to the continuous integration process which characterises the European construction’.<sup>27</sup> As stated by Koen Lenaerts, the European Union,

. . . has its own variant of *E pluribus unum*, that is a set of interlocking legal orders, showing mutual respect for each other based on equivalent levels of judicial protection of the rule of law. That constitutes the common platform for the legal underpinnings of European integration, a *ius commune* built with the bricks of the comparative law method.<sup>28</sup>

Within Europe today, ‘common core’ projects regard legal systems as being multi-level and consider comparative law as an ‘integrative’ enterprise.<sup>29</sup> Regarding cultural diversity in law as an asset while not taking a preservationist approach for its own sake, the aim must be to build European culture on a map of multi-level legal systems. This building of a common culture puts strong emphasis on legal education - education that recognises the crucial place of comparative law teaching.

One important such project at the level of university education aims to forge links between European universities in order to integrate qualifications, and to create a European Higher Education Area (EHEA) by 2010. This project is supported by thirty-eight countries, which have agreed to adopt a common pattern distinguishing undergraduate and postgraduate courses, systems of credits and credit transfer, diploma supplements that enable each qualification to be ‘readable’ in all parts of the EHEA, a structure for quality assurance, joint degrees and integrated programmes for training and research. This movement is obviously not exclusive to law but has the potential for having an impact on the education of future lawyers. The project which started in Bologna in 1998 covers the greater Europe of the EHEA comprising the European Union countries, the remaining European Free Trade Area countries, the European Union accession States and the Balkan nations. The overall theme is convergence in research and quality assessment. The most remarkable aspect of this development is that, despite the entrenched autonomy and traditions of disparate universities and national sensitivities, the universities have arrived at the principled acceptance of convergence and persuaded governments and the European Commission to back them. The challenge is to collaborate so as to match and surpass the quality of American universities and play as effective a role in the international arena. The European Commission, through its Erasmus Mundus programme is poised to spread its Erasmus programme model worldwide, while at the same time developing ‘Knowledge Europe’, working towards the European Union’s European Research Area (ERA) in parallel with the EHEA. These are most welcome developments.

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<sup>27</sup> K. Lenaerts, ‘Interlocking Legal Orders in the European Union and Comparative Law’ (2003) 52 *International and Comparative Law Quarterly*, 873-906, at pp. 878-879.

<sup>28</sup> *Ibid.*, p. 906.

<sup>29</sup> M. Bussani, ‘Current Trends in European Comparative Law: The Common Core Approach’ (1998) 21 *Hastings International and Comparative Law Review*, 785.

Let me reiterate. Any ‘unification’ project is integrationist and based on the search for ‘common cores’, that is, common roots, common principles, common solutions and even common reasoning. The drive should be towards a common ‘European identity’, which is achievable by massive cross-border import and export of ideas and collaboration to create a *ius commune novum* in the widest sense.

However, such a *ius commune* cannot materialise if Europeanisation is restricted to new legislation and scholarly works only. Can we go so far as to say that the rules of national legal systems should be regarded as local variations of uniform European subject matter? If not, as all comparative lawyers know, when the point of departure is national legal systems and national rules, the outcome is always biased. The European nation States can only be rescued from decline by further integration in Europe.

Erasmus University, by expanding its Master’s and LL.M. programmes and widening teaching and research in comparative law, as well as in European law, international law and the law of human rights, will be in the forefront of such movements. I will be here in spirit to celebrate such developments in this University.