Introduction:

Mixed Legal Systems and European Private Law

§ 1. Introduction

This book brings together a number of essays on the contribution that the so-called mixed legal systems can make to the emergence of a European private law. These essays were presented at the conference The Contribution of Mixed Legal Systems to European Private Law, held at Maastricht University on May 18, 2000. At this conference, different aspects of the law of Scotland, South Africa and Louisiana, as well as some general methodological aspects of mixing legal systems, were discussed in their relationship with the development of a new ius commune for Europe. In this introduction, I will give a brief sketch of this theme, thus providing a background to the contributions that follow.

§ 2. Some Themes of the Debate on European Private Law

Over the last decade, the interest in developing a common law for Europe has increased dramatically. The reasons for this are twofold. On the one hand, the competent institutions of the European Communities have come to recognise more and more that a truly internal market can only function if international trade is facilitated by a harmonised or uniform private law. This is in particular true for the law of contract and the law of security interests. From this, it can be explained why especially efforts have been made to come to harmonisation in these areas. Thus, to name but a few, European

1. The contribution of Reinhard Zimmerman to the conference under the title European Law as a Mixed Legal System was previously held as one of his Clarendon Lectures (delivered at the University of Oxford in 1999). It was published in Roman Law, Contemporary Law, European Law, the Civilian Tradition Today (Oxford 2001).
directives on unfair terms in consumer contracts, on protection of consumers in respect of distance contracts, on sale of consumer goods and associated guarantees and on combating late payment in commercial transactions have been made. This has led to a highly fragmentary European private law. On the other hand, there is an ever growing feeling among academics that the development of a new European ius commune is of great importance for scholarly reasons as well - although it must be admitted that some initiatives of academics are more of a political nature, providing the official European organs with drafts for a European Civil Code. Nonetheless, it is clear that national legal science, as it has existed for more than 150 years, is now rapidly changing into a truly European discipline.

The debate about the coming into being of a European private law can be divided into several themes. The first one is what method should be used to establish uniformity. Here, a helpful distinction can be made between centralist and non-centralist methods of creating a new ius commune. Over the last century, it has become quite clear that the traditional centralist method of achieving uniformity, i.e. through binding treaties, has not had much success in the field of private law. Most of the substance of private law is not covered by treaties, with of course one exception: the United Nations Convention on Contracts for the International Sale of Goods of 1980 has been a huge success, at least when looked at the number of countries that are party to it. On the European scale however, most has been reached by way of directives. This has led to a 'law of uniform results,' be it only in the field of rules deemed to be required for the establishment and functioning of the Single Market. Property law, the law of inheritance and family law are generally not regarded to be necessary for the development of this Single Market, meaning a competence does not exist. Likewise, the making of a complete European Civil Code does - according to most authors - not belong to the competence of the EU. Apart from other, more general, objections against the use of directives, Teubner has pointed out that using directives to harmonise private law may even very well lead to the introduction of Fremdkörper, by which not only the unification is not successful, but also the unity of the national private law system itself is endangered.

8. An overview of the parties to this treaty is provided by http://www.un.org/depts/treaty.
A third centralist method should be mentioned here. It is the contribution that the European courts may make to the development of a European private law. The contribution of the European Court of Justice in interpreting the directives has up till now been rather modest, its development of the concept of a ‘Euro-tort’ (liability of a Member State for not implementing a directive) is much more audacious. There is however an important remark to be made about the European Court of Human Rights. This Court’s contribution to private law issues is related first and foremost to family law (interpretation of art. 8 European Convention of Human Rights on family life) and procedural law (interpretation of art. 6 ECHR on fair trial). There are however other provisions of the ECHR that may become very important for the development of the rest of private law as well. Art. 1 of Protocol 1 of the ECHR, protecting every person’s ‘peaceful enjoyment of his possessions’ for instance has up till now had a rather unclear ambit, but can become a vehicle of change for Europe’s property laws if the Court wants to. Moreover, the fundamental idea underlying the ECHR – the protection of human dignity – has in some countries that recognise this idea in a national constitution been influential in private law relationships as well. Notorious examples are Germany and the two mixed legal systems of South Africa and Israel. It remains to be seen whether the EU Charter of Fundamental Rights will give new impetus to the importance of human rights in private law relationships.

Overlooking these attempts to create a European ius commune through a classic State oriented approach, the result is not encouraging for those who have put their hopes on the official State (or European) institutions. Leaving aside the very improbable unification by way of a treaty, the remaining methods can only be characterised as fragmentary. This problem could be overcome if there is competence to impose a complete European Civil Code, but then another problem arises. For even if a European Civil Code could be made, the question is to be raised whether it will be successful in the sense that it does really have a unifying effect. This is the point made by Pierre Legrand, that I will come back to after a brief discussion of the non-centralist methods that are in use now.

Of the non-centralist methods toward a European private law, mention should be made of both the Principles projects and the case method oriented projects. The first type of

19. See the contribution of Gerhard Lubbe to this volume for references.
20. See G. Shalev, Constitutionalization of Contract Law, in A. Gambaro and A. Rabello (eds), Towards a New European Ius Commune (Jerusalem 1999), 205.
projects aims at finding ‘European’ principles for specific areas of private law. These principles are presented as normal, Code-like, provisions. The two sets of principles in the field of contract law (the Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law) have been published now. Their most important function is that they serve as a model: they are soft law, representing an ideal to be reached. The Principles could inspire legislators, (arbitrary) courts and contracting parties because of their persuasive authority. It is however important to note that there is also a tendency to look at the PECL as a precursor to a European Code of Contracts, turning the scholarly purpose of trying to find the ‘best’ rules for Europe into a political one. Principles have also been published in the area of trust law and principles of European tort law will follow suit. Also to be seen as a way of establishing Principles, now in the field of both torts, contracts and the law of unjustified enrichment, is the so-called European Civil Code project. Again, like it is the case with the PECL, this project is not entirely unpolar: the idea that these principles can be part of a future European Civil Code is always present on the background.

The second important non-centralist method is more case oriented. It takes as a starting point that studying similar cases in the different European jurisdictions is the best way of uncovering the common law of Europe. Two important initiatives have to be mentioned. The first is the Jus Commune Casebooks for the Common Law of Europe project. The project's aim is ‘to help to uncover common roots (…) of the European legal systems with a view to strengthening the common legal heritage of Europe, not to stranguing its diversity’. This is done by presenting factual situations with their various solutions under different legal systems (mainly those of England, France and Germany) in casebooks inspired by the American model. After publication of the Tort Law volume in 2000, volumes on Contract Law, Restitution, Judicial Review and Corporate Law are envisaged.

The second project to be mentioned here is the Trento Common Core of European Private Law project, initiated by Ugo Mattei and Mauro Bussani. Inspired by the work

23. (Rome 1994).
of Schlesinger on formation of contract in the 1960’s, a rather large group of comparative lawyers from (mostly) European countries have united to seek the common core of European private law in the fields of contract, tort and property. National reporters from the different EU countries design their national reports on the basis of questionnaires, made by the general editors. Methodologically, the initiators have explicitly considered the problem of cultural diversity and a possible ‘culture killing’ effect of the results projects like these entail. ‘We do not wish to force the actual diverse reality of the law within a map to reach uniformity. (...) We are neutral in front of future developments. (...) While we believe that cultural diversity in the law is an asset, we do not wish to take a preservationist approach. Nor we wish to push in the direction of uniformity.’ These two attempts are much more of a scholarly nature than the Principles projects: the result of the comparative research is not laid down in concise rules, designed after the model of a Civil Code. Recently, the first volume within this project was published.

For the purpose of this book, it is important to refer to yet another non-centralist method. One of the failures of the methods that have been described in the above is that they do not take into account the experience that is already there with harmonising the law. In two different ways, it would be useful to benefit from this experience. Firstly, in trying to reconcile English law with the law of the European mainland, it is useful to benefit from those systems where there is already a mix of the civil law and the common law. Secondly, in predicting to what extent uniformity will actually come about in Europe, it may be useful to look at how legal systems or rules develop in general. I will come back to both points in paragraph 3.

A second theme of importance to this book is the extent to which the former, Roman law based, ius commune can serve as an example to the development of European private law in present time. Some argue that just like the ius commune of the 17th and 18th century was a legal system, primarily made at the universities, a new ius commune should find its origin there as well. Departing from that starting point, students could be raised in a European legal fashion and practitioners could benefit of the comparative legal material, made available to them by scholars. Thus, it would be by ‘reception’ that a ius commune Europaeum will emerge. Zimmermann can be regarded as the great proponent of this approach. He emphasises that:

’the essential prerequisite for a truly European private law would appear to be the emergence of an “organically progressive” legal science, which would have to transcend the national boundaries and to revitalise a common tradition’.

36. D. Carey Miller and R. Zimmermann (eds), The Civilian Tradition and Scots Law (Berlin 1997), 293.
It must however be clear from the outset that regarding the historical argument that a ius commune has existed in the past and can serve as a model to us now, legal historians are not unanimous. The argument is even more controversial that two schools of thought have developed. On the one hand, the adherents of 'Neohistorismus' claim that we should try to study the legal past with no other purpose than the pure pursuit of knowledge. Studying the long history of private law gives us no clue whatsoever as to its future development, even if a ius commune has existed in the past. On the other hand, the adherents of 'Neopandektismus' argue that there has been a ius commune and that it can serve as an example on the winding road to a European private law.

Secondly, it is worth noticing that in this view of legal science as a method toward a ius commune, the role of legal science in the common law should be very different from the role it has had in the past. Indeed, in European continental law, legal scholars have always been the forerunners, developing a dogmatic system where practice can benefit from. English law however has been much more practice oriented and not so willing to accept scholarly insights in the solving of cases. Although there are signs that in English law, one is more and more inclined to think along continental lines, a true change of mentalité has not taken place yet. With these differing mentalities of civil law and common law, it makes it difficult to believe that legal science can play the role in England it now plays on the Continent. This has however not prevented a European legal private law science from evolving. Several 'European' textbooks have been published now and at many European universities (also in England), these are used as teaching material in courses on European Contract, Tort and -- increasingly -- Property Law.


39. See, e.g., P. Birks (ed.), The Classification of Obligations (Oxford 1997), where it is argued that the more intuitively determined common law classification should make place for a taxonomy.


42. U. Mattei, Basic Principles of Private Law (Westport, Conn. 2000).
The third and final theme that is raised in this contribution is related to the feasibility of a uniform private law for Europe. This is a question that has been widely discussed over the last years. On the one hand, adherents of the 'convergence thesis' maintain that European legal systems have been converging over the last decades and are still growing toward each other. The adherents of this thesis seem to be in the majority. On the other hand, some critics have stated that socio-cultural backgrounds of the national legal systems stand in the way of creating uniformity. In particular Pierre Legrand has eloquently argued that a uniform European private law is not feasible.

Inspired by cultural studies and modern philosophy and sociology, Legrand\(^\text{43}\) takes as a starting point that merely drafting uniform rules does not result in uniform law. Law is, after all, much more than just formally uniformed rules: the meaning of a particular rule in a particular cultural and national context can only be established after studying that context. And this context, the legal mentalité, differs between the various cultures.\(^\text{44}\) According to Legrand, the mentalités are even irreconcilable in the case of continental and English law. Epistemologically, the reasoning in common law is inductive with an emphasis on facts and legal precedent; in civil law the focus is on systematisation.\(^\text{45}\) Whereas civilian lawyers try to fit a legal decision into a logical system, Anglo-American jurists abhor formal rules and consciously choose to counteract continental Civilian influence. According to Legrand, this choice derives from unbridgeable cultural differences. Legrand has put forward some other arguments as well: the whole idea of a European codification is arrogant in his view, because it imposes on common lawyers the supposedly superior worldview of continental lawyers. They each offer different accounts of reality and those preaching codification of private law consider the Anglo-American reality as without merit. A European Civil Code is only in the interest of the European economy and consequently cultural differences must disappear.\(^\text{46}\) Furthermore, the suggestion that Europe will return to a Golden Age of a true ius commune is misleading, because English law was never part of it. All this has led Legrand to the conclusion that 'legal systems (...) have not been converging, are not converging and will not be converging.'\(^\text{47}\) What the comparatist should do, is engage in activities to meet the 'contrarian challenge.' This approach\(^\text{48}\) commits the comparatist to a critical or subversive vocation through the denunciation of any impression suggesting that the law's precepts somehow have an autonomous existence in the sense that they would be


\(^{44}\) Legrand, European Legal Systems Are Not Converging, op cit, 60; cf. Against a European Civil Code, op cit, 59: 'jus is not reducible to lex'.

\(^{45}\) European Legal Systems Are Not Converging, op cit, 74; Against a European Civil Code, op cit, 46 ff.

\(^{46}\) Cf. P. Legrand, Comparative Legal Studies and Commitment to Theory, 58 Modern Law Review (1995), 262, 272: 'must we accept that legal culture be made subservient to the ethos of capital and technology in an instrumental and a historiographic-invention of Europe?'

\(^{47}\) Legrand, European Legal Systems Are Not Converging, op cit, 61-62.

self-constituting. No matter how much a text may project an image of completeness or definitiveness or intemporality or self-governance (and irrespective of how much this autonomy may be wanted by lawyers), in fact a text is always overdetermined, or constituted by, the culture or tradition which it inhabits.

Legrand can be criticised on the ground that his arguments are not so much directed against a European private law, but much more against a Code that is imposed by State authority. But the lion's share of Legrand's argumentation is to the point: it cannot be denied that a legal rule can only be understood as part of the culture it is part of and as long as there is no truly European (legal) culture, divergences will not disappear. Basedow has argued that, although there are differences between the various legal cultures, there also exists something of this European legal culture. What remains crystal clear, however, is that there are still characteristic differences between Europe's legal systems in the field of history, method, legal sources, ideology, judicial style, language, etc.

It can be argued that because of the methodological problems Legrand elaborates, we should abstain from making a European private law by imposition, but should concentrate on other methods. Some of these non-centralist methods were discussed in the above. The provisional conclusion was that it may be important to take into account two different experiences with harmonisation of law. The first of these experiences consists of the mixing of the civil law and the common law tradition in the mixed legal systems. The second one is related to the development of legal systems or rules in general. Both these points are taken up in the following paragraph.

§ 3. Mixed Legal Systems and their Contribution to the Emergence of a New Ius Commune

It is clear that one of the major problems in a future European ius commune is the 'mixing' of civil law and common law elements. An important question is whether we can draw inspiration from the legal systems where such a mix already exists. Generally

50. If a uniform European (legal) culture would exist, Legrand's objections could be overcome; in Legrand's view however, 'the understanding of diversity' is indispensable because of the incommensurability across legal traditions (Against a European Civil Code, op cit, 62).
52. P. Tesiato, Recht in einem meersprachigen Raum, 6 Zeitschrift für Europäisches Privatrecht (1998), 1. See however that in the end only two legal cultures (civil law and common law) exist.
regarded as the most important mixed legal systems are Scotland, South Africa, Quebec, and Louisiana. Among the legal systems that offer a less extensive mix of civil law and common law elements is Israel. As Quebec and Louisiana both have a codification and the chances of a Civil Code being made for Europe are not that great (leave alone that such a codification is useless without a European court that guarantees uniformity in interpreting its provisions) — especially the other mixed legal systems may provide inspiration. These legal systems owe their mixité mostly to legal transplants (i.e., the borrowing of legal institutions and rules by one country from another) initiated by the national courts. Some authors have indeed stated that the experience of South African and Scots law is of great importance for the future development of European private law. Reid and Zimmermann, in their Introduction to an important book on Scots law, state:

‘If, therefore, the establishment of an intellectual connection between civil law and common law is regarded as an important prerequisite for the emergence of a genuinely European legal scholarship, it should be of the greatest interest to see that such connection has already been established (...) in a number of “mixed” legal systems. Such systems provide a wealth of experience of how civil law and common law may be accommodated within one legal system.’


60. See A. Barak, The Tradition and Culture of the Israeli Legal System, in A. Rabello (ed), European Legal Traditions and Israel (Jerusalem 1994), 489.


62. Smits, Europese Privaatrecht in wording, op cit, passim.

63. H. MacQueen, Scots Law and the Road to the New Ius Commune (Ius Commune Lectures no. 1, 2000).


This statement is closely related to the idea that Scots and South African law are an optimal mix of the best that both the civil law and the common law have to offer. That Scots law is a good mix, rather than a muddle, is however controversial among Scots lawyers. If the results that South African law has come up with are so fruitful, has also been questioned. It seems however necessary to analyse the two legal systems in relationship with their European counterparts with much more detail than has been done up till now to make any well-founded conclusions. Moreover, it appears to be useful to make a rather sharp distinction between methodological and substantive aspects of these two mixed legal systems. On a methodological level, the courts of the two legal systems are (to a greater or lesser extent) able to make use of materials of both civil law and common law jurisdictions. Thus, for a South African court, it is not unusual to refer to English, American and civil law authority, all in one case. This was already so in the Roman-Dutch law, of which Wessels once stated that it "sweeps into its system all the legal learning accumulated by the great Italian, French and German jurists."

Derek van der Merwe says about the present day mixed legal systems: 

"the legal practitioner in a "mixed" (or "hybrid") legal system is an instinctive eclectic: he or she will seek authority in the grand manner, the process of distilling legal wisdom largely uninhibited by rigid doctrinal boundaries. Such a state of mind is conducive to an unfussy flexibility in the application of the law."

The same is true for Scots law. If one looks however at the substantive rules of Scots and South African law, one cannot deny that sometimes the wrong choices have been made by the courts and this may pose a threat to the consistency of these legal systems. Further research is necessary here, in pursuing this, it is in particular important to distinguish between the various areas of private law with a view to the mixedness of these areas. It may be so that for instance the law of torts and of contract are much more easy to harmonise than the law of property for reasons that have to do with the *internal structure* of these areas of the law. This internal structure may also


68. See Smits, Europese Privaatrecht in wording, op cit., 164 ff.


72. For an elaboration of this thesis for South African law, see Smits, Europese Privaatrecht in wording, op cit., 189 ff.

account for the greater mix in these areas. In his contribution to this book, Vernon Palmer makes a reference to this point, stating that the law of torts is more open to influence from both the civil law and the common law than other areas of private law.

Regardless how one assesses the way that Scots and South African law have managed to mix civil law and common law in practice, it is possible to place the legal transplants that took place in these legal systems in the same theoretical perspective that is of use to creating uniformity in Europe. This theoretical framework is inspired by the Law and Economics movement. It takes as a starting point the importance that transplants of legal rules and institutions have had for the development of private law. The so-called Comparative Law and Economics approach seeks the reason for these transplants in economic efficiency. Only efficient rules are then allegedly transplanted. Ugo Mattei\(^4\) for instance regards the reception of legal rules as the result of a competition, in which each legal system provides different rules for the solution of a specific problem. In a 'market of legal culture', where rule suppliers seek to satisfy demand, ultimately, the most efficient rule will prove to be the winner.\(^5\) History shows us many examples of the success of efficient legal transplants: e.g., rules on contract law have in the 19th century been exported by Germany to the common law world, nowadays many Anglo-American institutions (trust, lease, etc.) are borrowed by countries on the Continent.\(^6\) Eastern European countries borrow from both the American and the European systems.\(^7\) Likewise, in mixed legal systems one can expect the most efficient rules to be borrowed. Whether this has been really been the case, is a question still open for discussion. To make this theoretical framework applicable to the development of European private law, it even seems necessary first to define what is meant with 'efficiency' in the European context.

Given the usefulness of the analysis described above, one could leave it to the legislature to codify the most efficient rule (as is propagated by Mattei\(^8\)). My point of view however\(^9\) would be that it should be left to practice itself to find out what rule is to be used. If this rule has come out on top, it should be regarded as the best one for the cultural and socio-economic constellation of that time, leaving open the possibility that another rule could replace the previous one if practice would require so. This flexible approach would be impossible if the efficient rule was codified.

78. Mattei, Comparative Law and Economics, op cit, 123.
There is still a second type of experience that is of use to the development of European private law. It may also be useful to look at the development of legal systems and legal rules in general. It is after all quite clear that the coming into being of a new *ius commune* implies an important change in the legal rules of the present national legal systems. The question how legal systems change (and how legal rules develop) is therefore of importance to the venture of creating a European private law as well. If Alan Watson is right in stating — as I believe he is — that ‘most changes in most systems are the result of borrowing’, one need not only look at mixed legal systems, but also at what legal theory teaches us on the emergence of legal rules. In another publication, I have tried to apply evolutionary theory to the law in order to show that both the environment into which a foreign rule is imported, and the internal structure of the rule itself, should be taken into account to assess the success of the transplant.

It is within this framework that the discussion on the use of legal transplants to create uniform law should be placed: is it necessary for legal transplants to take place successfully that the exporting and the importing system are similar in (legal) culture (mentality)? Watson has denied this categorically: according to him, legal rules are equally at home in many places, surviving without any connection to a particular people. Legrand is at the other end of the spectrum, emphasising that all legal rules are embedded in a national environment. As Watson says that ‘the recipient system does not require any real knowledge of the social, economic, geographical and political context of the origin and growth of the original rule’, Legrand emphasises that legal transplants are actually impossible because of the always different meaning a rule begets in another legal system. The mere fact that the rule is imported into that other system makes it a different rule; its local meaning is an inevitable part of that rule. For this reason, according to Legrand rules cannot travel from one system to another.

The point Legrand is making is important. Without looking at the way the transplant is received in the importing country (in evolutionary terms: the ‘environment’), one cannot judge to what extent the transplant has been successful. This criticism of Legrand against Watson’s argument however probably stems from a different understanding of what a legal transplant actually is (Watson not being concerned with its effect, Legrand on the other hand emphasising it). In his contribution to this book, Watson discusses Legrand’s arguments against his thesis in more detail. His idea that a notion of law does not always coincide with national frontiers because ‘a small farmer in the Belgian Ardennes will be closer in his legal conceptions to a small farmer in neighbouring Germany than to a businessman from Brussels’ is related to the idea of

---

82. Legrand, *The Impossibility of Legal Transplants*, op cit, 111.
84. Legrand, *The Impossibility of Legal Transplants*, op cit, 117.
85. Oneli, *Critical Comparative Law*, op cit, 22 is standing midway between the two extremes where she introduces the concept of ‘harmony’, allowing a place for divergence even in a scheme of convergence.
Teubner that law is tied not to countries, but to 'social fragments' of a political, economic, cultural, scientific or technological nature.\textsuperscript{86}

It should be clear from the above that the question whether the experience of mixed legal systems can contribute to the development of a new \textit{ius commune} for Europe cannot be answered with sweeping statements. Not only careful analysis of the mixed legal systems' substance and methodology is necessary. There is also a need to develop a theoretical argument of how legal systems develop \textit{organically} (by proceeding bottom-up, instead of top-down), and what insights can be drawn from this for unifying the law of Europe. The authors of this volume try to contribute to both these aspects.

\textbf{§ 4. The Contributions to this Volume}

In the contributions to this volume, the authors take up the topics described in the above. The methodological aspect is emphasised in the first part of this book, whereas the second part looks at the substantive law of South Africa and Louisiana. In the first contribution, Alan Watson gives his reaction to Pierre Legrand's criticism on his idea of legal transplants.\textsuperscript{87} His contribution explicitly pays attention to the importance of borrowing from other legal systems in the context of European private law. Anthony Ogus unravels the general concept of legal culture by making use of economic analysis of the law. He shows how fruitful this is for an assessment of the mixed legal systems.

In the third contribution, Robin Evans-Jones returns to his evaluation of Scots law as a mixed legal system. He discusses the meaning of the term 'mixed legal system' and whether Scots law is suitable as a model for the unification of the laws in Europe.

In the part on substantive law, Gerhard Lubbe scrutinises the South African law of contract. His conclusion that 'the African sun has softened the discipline of civilian legal concepts and the rigid casuism of the common law' reveals that South African contract law has a truly mixed character. That at present there is not only still influence of both the civil law and the common law tradition on South African contract law, but also of constitutional law, makes this legal system all the more important as a source of inspiration for European private law. The two remaining contributions both address tort law. This is not coincidental: Vernon Palmer explains why tort law is the area \textit{par excellence} of the greatest exchanges between the two legal traditions. Johann Neethling elaborates on the mixed character of South African tort law, focusing on the mix of the general approach of the civil law and the casuistic one of the English common law. Finally, Palmer's contribution discusses the tort law of Louisiana in a historical perspective. His findings about the relationship between a general clause of liability and specific torts match well with Neethling's analysis.

\textsuperscript{86} Teubner, Legal Irritants, op cit, 11.
\textsuperscript{87} His contribution was published earlier as \textit{ius Commune} Lecture no. 2, 2000.