Are civilians educable? *

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All the efforts of human reason tend to the elimination of [the other]. The other does not exist: such is rational faith, the incurable belief of human reason. Identity = reality, as if, in the end, everything must absolutely and necessarily be one and the same. But, the other refuses to disappear: it subsists, it persists; it is the hard bone on which reason breaks its teeth. [There is] what might be called the incurable otherness from which oneness must always suffer.

Antonio Machado1

How is scholarship about law emanating from the European continent answering the demands of the historical moment? How are civilians addressing the matter of legal integration in Europe? How are ‘private law’ lawyers accommodating the presence of the common law tradition within the European Community? My answer to these three questions can be briefly stated: ‘not well’.

I have no intention of condemning the civil law tradition in toto. Disqualifying a legal tradition would be a little like predicating the superfluity of a language. I do not think that such claims can be profitable. Rather, I wish to examine the civil law tradition and assess it on its own terms.2 In my view, there is an important way, made apparent at this particular political juncture, in which the civil law is failing according to its own standard of rationality. I want to emphasise this civil law ‘deficit’, which seriously undermines the credibility of the contribution civilians are making to the ‘convergence agenda’ that animates a significant academic, bureaucratic and political constituency within the European Community. (For present purposes, I am prepared to assume that legal integration in Europe is both a practicable and desirable programme.)

I hold that civilians have long been proponents of the idea of ‘universalisation’ in law. My contention is that the values of rationalisation, systematisation and generalisation – the building blocks of mental processes whose aim is to banish

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1. A Machado ‘Juan de Mairena – Sentencias, donaires, apuntes y recuerdos de un profesor apócrifo’ in Poética y prosa (ed O Maci) t IV: Prosas completas (1936-39) (Madrid: Espasa-Calpe [1989]) II, p 1917 ['De lo uno a lo otro... Todo el trabajo de la razón humana tiende a la eliminación del segundo término. Lo otro no existe: tal es la fe racional, la incurable creencia de la razón humana. Identidad = realidad, como si, a fin de cuentas, todo hubiera de ser, absoluta y necesariamente, uno y lo mismo. Pero lo otro no se deja eliminar: subsiste, persiste; es el hueso duro de roer en que la razón se deja los dientes... como si dijéramos en la incurable otredad que padece lo uno.'; emphasis original].

2. For an argument explaining the necessity of evaluating the merits of a tradition in the light of its own ambitions, see A MacIntyre Three Rival Versions of Moral Enquiry (London: Duckworth, 1990) p 181.
particularised perceptions by ordering them into an exhaustive and categorical regulative framework – have seemingly always distinguished the civilian approach to the fashioning of the legal. Although 'Roman jurisprudence on the whole shows a disinclination to the process [of abstraction], this priority already mattered for jurisconsults like Q Mucius Scaevola, Gaius, especially, and Tribonian. In fact, 'from the end of the third century a tendency towards simplification of the law set in [in Rome], which is no less characteristic of the period up to Justinian than the tendencies towards classicism and stabilisation'. But, beyond a concern for ecumenicity in the law, there arose a preoccupation for the ecumenicity of the law. The Roman was conscious of 'a mission imperial and juristic in its nature'; his task consisted in 'organising and directing the World Empire by means of arms and laws'. Indeed, 'Justinian was fond of applying [the formula “Arms and Laws”] in the introductions to his decrees'. In sum, 'a practically uniform cultural standard was aimed at and attained'. The drive toward normalisation greatly intensified at the time of the medieval reception of Roman law. As Weber observed:

'in order for them to be received at all, the Roman legal institutions had to be cleansed of all remnants of national contextual association and to be elevated into the sphere of the logically abstract; and Roman law itself had to be absolutized as the very embodiment of right reason'.

In ways that demonstrate the bewitchment by a universal law to be derived from the power of the sacred and from a longing for transcendental unity and order translating itself into an infatuation with the natural sciences, a ‘craving for

4. For the intellectual affinity between Tribonian and Gaius, see T Honoré Tribonian (London: Duckworth, 1978) p 211: ‘Tribonian admired and did his best to copy Gaius' principle of setting the law in its historical context and of stating it in as simple and systematic a form as he could.’
6. Schulz (above n 3) pp 117, 116-17, and 118, respectively.
generality’ has continued to define the civil law mind across the ages.10 Some salient illustrations must suffice.

Coming in the wake of the sixteenth-century systematisers principally associated with Bourges,11 Leibniz wished to quell the controversies arising from the diversity of laws governing the regions of the German empire. In his Nova Methodus published in Frankfurt in 1667, he propounded an ‘outline of a rational jurisprudence reducing all the law in use to a few popular rules included in charts like geographical maps, three at the most, which would readily allow the resolution of all cases’.12 The German polymath further defended the idea of a ‘Theatrum Legale’ – a synthetical compilation of all the laws of all peoples of all places of all times (‘omnibus materiis omnium gentium, locorum, temporum’).13 Appearing in 1720, Vico’s Synopsi del diritto universale, the first embodiment of his ‘scienza nuova’, purported ‘to make Rome once again a political exemplar for the nations’.14 As Pollock reports, ‘Vico . . . put aside apparent exceptions to the universality of natural law with a certain impatience . . . Any tenderness for local variation, any too curious investigation of historical progress, would have been fatal to its cosmopolitan supremacy’.15 In the course of his argument, Vico expressly referred to Gaius as an important theoretical inspiration.16 In 1748, Montesquieu’s De l’esprit des lois – a title which can be traced to Domat’s systematic study – also offered ‘a set of variations, however remote and figurative, on Gaiian and Justinianian themes’.17 Throughout the nineteenth century, the advent of European civil codes marked the positivisation of natural law and a further decisive stage in the indigenisation of Roman sources.18 These codes were all written in abstract, general, and situation-transcending terms, and they all privileged an ascetic systematicity.

Seeking to move beyond the nationalisation of the posited law, Louis Josserand, in 1900, proposed a ‘common law of the universe’.19 Many other

11. For a brief overview, see D R Kelley ‘Gaius Noster: Substructures of Western Social Thought’ (1979) 84 American Historical Review 619 at 629-35.
13. Leibniz (above n 12) II § 28 p 314.
18. See Weber (above n 8) pp 873-75.
French jurists, such as Saleilles, Lambert, Lévy-Ullmann, Demoge, and Capitant concurred. Still today, Mireille Delmas-Marty argues for a ‘common law of mankind’. Meanwhile, in Germany, Jürgen Basedow and Reiner Schulze, along with such colleagues as Hein Kötz and Christian von Bar, are actively advocating the adoption of a European private law. More variations on the theme of universalisation could be drawn from Italy, Belgium, the Netherlands, and other civil law jurisdictions. Indeed, civilians have initiated a number of fully-fledged task forces in order to promote the idea of a common law of Europe. I have in mind, for instance, the work of Marcel Storme, Ole Lando, Giuseppe Gandolfi, Ugo Mattei, and Walter van Gerven. The distinguished American comparatist, John Merryman, links the contemporary manifestations of this totalising intellectual and moral strategy to the so-called ‘jus commune’: ‘The idealisation of . . . the jus commune is at the bottom of a special attitude which might be called “the nostalgia of the civil lawyer.” It refers to a desire to re-establish a jus commune – a common law of mankind – in the West. [A] similar nostalgia is not a part of the culture of the common law.‘

Merryman’s insight as regards the lack of interest in a universal law of mankind within the common law tradition corresponds to my own perception. Although I would not wish to suggest that all common law lawyers think alike, I maintain that the common law mind largely continues to eschew (and distrust)

the civilian brand of reification. In the process, it reveals ‘an instinctive . . . acceptance of genuine indeterminacy’.\(^{34}\) Common law lawyers are less impressed with the formalisation of the law or with the construction of an abstract space, and are more concerned with the matter of factual contiguity. Their preoccupation lies with fact-based analogies or disanalogies across cumulations of circumstances in reported judicial decisions – hence, the ‘persistence of detail’ in the common law tradition, to borrow from Tim Murphy’s apt depiction.\(^ {35}\) The texture of the common law is granular, full of individual events to be apprehended in their particulars.\(^ {36}\) Thus, Tony Weir’s characterisation of English law as epitomising a ‘tradition of working disorder’ remains current.\(^ {37}\) And Lord Goff’s approach to adjudication, as expressed in the case of White v Jones, is still representative of the way common law lawyers tend to think about the law. In the course of his judgment, Lord Goff observed how ‘it [was] open to [the] House [of Lords] . . . to fashion a remedy to fill a lacuna in the law and so prevent the injustice which would otherwise occur on the facts of cases such as the present’.\(^ {38}\) Lord Nolan approved: ‘[accepted principles of compensation] should not stand in the way of the simple justice of the respondents’ claim against the appellants’.\(^ {39}\) Common law lawyers are familiar with declarations such as the statement by Griffiths LJ in Ex parte King to the effect that ‘the common law of England has not always developed on strictly logical lines, and [that] where logic leads down a path that is beset with practical difficulties the courts have not been frightened to turn aside and seek the pragmatic solution that will best serve the needs of society’.\(^ {40}\) Another example of the idiosyncratic epistemological matrix within which the common law operates is afforded by the case of Read v J Lyons & Co, where Lord Macmillan remarked:

‘Your Lordships’ task in this House is to decide particular cases between litigants and your Lordships are not called upon to rationalise the law of England. That attractive if perilous field may well be left to other hands to cultivate . . . Arguments based on consistency are apt to mislead for the common law is a practical code adapted to deal with the manifold diversities of human life and as a great American judge has reminded us “the life of the law has not been logic; it has been experience”.’\(^ {41}\)

More recently, Waite LJ cautions us that ‘cases depend on their own facts and render generalisations – tempting though they may be to the legal or social analyst – wholly out of place’.42 Peter Stein’s anecdote further illustrates my contention and delineates nicely the fundamental difference I am trying to highlight:

‘An English barrister, arguing a case on the application of Value Added Tax before the Court of the European Communities at Luxembourg, where the civil-law ethos prevails, began by reciting the circumstances that had given rise to the case. The judges interrupted him, asking what rules were applicable and what was the issue. How can you understand the problem, he replied, until I have explained what the case is about?’43

To capture the magnitude of the epistemological chasm between the two traditions, consider how Grotius sought to reassure his readership: ‘[J]ust as mathematicians treat their figures as abstracted from bodies, so in treating law I have withdrawn my mind from every particular fact’.44 While one well appreciates how important it would have been for Grotius thus to stress his commitment to decontextualisation, no outlook on legal knowledge could be more alien to the common law tradition. Likewise, when Domat regards as problematic the fact that ‘judicial decisions are only made with respect to specific disputes and that they are not in the form of rules’ and suggests that ‘this kind of difficulty requires rules, [that] it is desirable that it should be addressed through fixed and uniform rules’,45 he stands athwart the common law’s profound commitment to community and common sense as inscribed in the practice of reporting narratives of common lives at length in judicial decisions. In the common law world a virtue is made of the manner in which cases stick to facts and facts to cases. Thus, common law lawyers are apt to chastise civilian discourse, at worst a game of juggling with legislated words, at best a desiccated species of mental arithmetic incapable of solving anything of importance to human beings. The common law mind obstinately refuses to proceed more mathematico.

Given that the conception of justice prevailing in the civil law world leads jurists to embrace a universally operational system of comprehensive and coherent rules so that ‘[d]isagreement on the application of the [law] to the facts of the case must be the result of faulty logic by somebody’ and since civilians take the view that it is ‘the duty of the sovereign law-maker . . . to provide his subjects with the best kind of law in the best possible form’,46 the civil law mind

42. Re T (a minor) [1997] 1 All ER 906 at 917, CA.
44. Grotius De jure belli ac pacis (trans F W Kelsey) t II (New York, 1964) proleg, § 58 p 30 [originally published in Latin in 1625].
45. Domat (above n 17) pref, p [4]. The original text reads as follows: ‘comme les Arrêts ne sont rendus que sur des différens particuliers, & qu’ils ne sont pas en forme de Règlements, on ne laisse pas de faire renaittre les mêmes questions, sous prétexte que les Arrêts peuvent être rendus dans des circonstances particulières . . . On ne fait ici cette remarque que par occasion . . . & seulement pour faire voir que ces sortes de difficultés ayant besoin d’autant de regles, il seroit à souhaiter qu’il y fût pourvu par des regles fixes & uniformes.’
46. Stein ‘Systematic Civil Law’ (above n 5) pp 162 and 159, respectively.
readily projects its way of thinking onto the European stage and pursues the enactment at European Community level of a universally operational system of comprehensive and coherent rules.\textsuperscript{47} A manifestation of this purposeful drive toward abstract universalism is the proposal in favour of a European civil code.\textsuperscript{48} Of course, if anything like a European civil code were to be adopted by the European Community, it would, in principle, follow that this body of rules would also apply to those member states hailing from the common law tradition. Since the common law mind, however, does not think in terms of systems, codes, categories and rules,\textsuperscript{49} the implementation of civilian assumptions in the common law world via the vehicle of European Community law would effectively call upon common law lawyers to transfer their basic epistemological loyalties to the civilian model – an intellectual formation which remains fundamentally inconsonant with their conception of justice. The communion assumed to be epitomised by a European civil code would in effect represent, beyond the sum of words, the excommunication of the common law way of understanding the world and the relegation to obsolescence of its particular insights. The repudiation of the common law would also leave common law lawyers at odds with the culture they inhabit which would continue to articulate its moral inquiry according to traditional standards of justification. In effect, common law lawyers would find themselves compelled to surrender cultural authority and to accept unprecedented effacement \textit{within their own culture}.

The following issue, therefore, arises: how can it be acceptable that civilians should be setting the universalising agenda for European Community law in specifically civilian terms, that is, in the language of rules and systems? How can a legal tradition legitimately be propounding a universal law for Europe according to its own epistemological assumptions when another legal tradition, dwelling in a different cognitive world, is also to be found within the European universe in question? I argue that the seemingly ‘universal’ message that the civilian programme enunciates rests in fact on its own particularised and localised perspective on legal knowledge. The civilian agenda is historically contingent. It follows that the universalisation which civilians are promoting for Europe is exclusionary in that it marginalises an alternative world-view \textit{from within}. The common law is co-opted into participation in an experience from which it is simultaneously excluded: it is asked, or expected, to adhere to the idea of a

\textsuperscript{47} In the process, ‘the Community [is presented] as a juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court as the disembodied voice of right reason and constitutional teleology’: M Shapiro ‘Comparative Law and Comparative Politics’ (1980) 53 Southern Calif LR 537 at 538 (commenting on A Barav ‘The Judicial Power of the European Economic Community’ (1980) 53 Southern Calif LR 461).


universal law for Europe that will apply to all constituencies within the European Community, but that will not be a law with which common law jurisdictions can identify themselves. Never having been disproved, the common law is none the less required to concur with a selfhood that defines itself in opposition to it. At the same time as civilians make no effort to articulate, clarify, and authenticate common law epistemology on its own terms, the common law is enjoined to identify against itself. Such, then, is the civilian’s paradox: while the civil law agitates in favour of the formalisation of law with a view to achieving the order of unity, its unwillingness to internalise the reality of an experience of law fundamentally at variance with its own horizon of possibilities and yet located within the universe over which it purports to rule can only be expected to generate discord.

But can one realistically hope to rescue the civil law mind from the autistic contemplation of its own experience and impel it to transgress its habitual forms of recognition in the light of the coexistence of the common law tradition within the European Community framework? After all, it is still the case that, everywhere in the civil law world, ‘modern legal practice – thinking, writing, deciding – is presented as a sort of hermetically sealed operation, formal logic without regard to “substance”; a world of its own entire of itself’ and that ‘it is the elimination of all concrete determinations from this process which is said to be central – the transformation of a dispute into simply or essentially or foundationally one between abstract (disembodied, anonymous) bearers of rights, legal subjects’? Moreover, comparative legal studies has historically played a very marginal role on the continent (of course, foreign law is not law from the point of view of the national lawyer) so that the common law tradition and its contrapuntal thinking remains largely unknown to the Spanish law professor teaching in Sevilla or to the French law professor lecturing in Grenoble. In this context – unsurprisingly, I should think – some civilians openly rejoice that the use by the British courts of ‘a typically common law phenomenon’ such as ‘contempt of court’ should have been repudiated ‘[i]n the European Court of Human Rights, a college of judges mostly of a continental-type professional mould’ and that law-making within the European Community, ‘largely the work of civil law trained jurists’, should ‘becom[e] directly part of British law’; what is effectively the countermanding of one experience of life in the law by another is termed ‘convergence’ and saluted without more ado as ‘an obvious and natural phenomenon’.

Other civilians ask bluntly: why can the common law not be civilian? Why, for instance, can the common law not be like the law in Germany where there prevails a ‘refined and liberal approach to statutory interpretation [which] constitutes a considerable advance in legal culture’? It is time for the common law to learn the ‘lesson [which] has been learnt in Germany [and] which explains the great success of the German Civil Code’. And, there is hope, because the

50. Murphy (above n 9) p 56.
common law is, after all, not unlike the Grundgesetz. These passages show how the author structures his argument on the assumption that the meandering course charted by the common law is to be apprehended as deviant. Thus, the author’s strategy illustrates some of the multifarious ways in which institutionalised forms of rationality and conceptual grids purport to violate singularity. Crucially, he does not acknowledge the incommensurable alterity of a legal tradition other than his own and makes no apparent effort to recognise the sense of radical plurality that defies any facile total reconciliation across the

52. R Zimmermann ‘Statuta sunt stricte interpretanda? Statutes and the Common Law: A Continental Perspective’ (1997) 56 CLJ 315 at 321, 326 and 328, respectively. As a German academic asserts such antiparticularism, he is giving effect to the nineteenth-century view that ‘[o]nly by transcending what distinguished Swabia from Prussia, or Bavaria from Schleswig-Holstein, could Germany become, in law as in ideology, one’. This quotation is from Murphy (above n 9) p 44, n 22. For a further illustration of strong German ethnocentrism, see R Zimmermann ‘Savigny’s Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science’ (1996) 112 LQR 576, where the author goes so far as to suggest as an inspirational model for European academics a law professor whose nationalistic historicism was always inimical to comparative legal studies, as underlined in E Landsberg Geschichte der Deutschen Rechtswissenschaft 111 vol 2 (Munich: Oldenbourg, 1910) pp 207-217, and whose abiding commitment lay with the institution of a Romanist Rechtsstaat in Germany, as shown in J Q Whitman The Legacy of Roman Law in the German Romantic Era (Princeton: Princeton University Press, 1990). For general evidence supporting the view that German academics tend to address European matters as if German history was repeating itself, see J Laughland The Tainted Source (London: Little, Brown, 1997) pp 22-23, 26, 31-33, 110-11, 116-17, 120 and 137.

53. Cultural totalitarianism need not be structured by the interactive dynamics of antagonism. It may be prompted, for instance, by the fear of a loss of identity. Anthony Giddens’s theory of subjectivity provides a helpful explanatory framework in this respect. For Giddens, action and interaction operate on three layers: discursive consciousness (what is verbalised or easily verbalisable), practical consciousness (the habitual, routinised background awareness on the fringe of consciousness and not itself the focus of discursive attention) and the ‘basic security system’ (the unconscious experience or motivation intervening at the basic level of identity security); see A Giddens The Constitution of Society (Cambridge: Polity, 1984). In my experience, most civilians do not vocally express the view that the civil law is ‘better’ than the common law and, for this reason, that the common law must be replaced by a civil-law logic within the European Community. The situation differs, however, at the other two levels and easily translates itself into condescending or avoidance behaviour on the part of civilians vis-à-vis common law lawyers as when a German colleague volunteers the opinion — a statement which I overheard on the occasion of a seminar at a Dutch university on 8 September 1997 — that the common law is only suited to rural conditions! Typically, such manifestation of impudence is experienced in silence by common law lawyers themselves and by comparatists-as-observers. ‘Good academic manners’ (at least on this side of the Atlantic) suggest that it is indecorous and tactless to call attention to this form of interaction. In fact, to bring to discursive consciousness a type of behaviour that is occurring at the level of practical consciousness or in terms of the basic security system — that is, to follow a strategy of consciousness raising — is liable to lead to accusations of overreaction and misperception of the situation, if not to attempts at silencing.
relational interplay of aversions and affections between traditions.\textsuperscript{54} I contend that these failures are capital, because '[w]ithout such acknowledgment and recognition no ethics [of legal integration] is possible'.\textsuperscript{55} And, while the author conducts a cursory assimilation of the common law's interpretive strategies to German law's own epistemological assumptions without doing justice to the defining fact that in the common law tradition 'interpretation [of legislation] is conducted with regard to the meaning of words and not the will of the sovereign',\textsuperscript{56} the crux of the matter is left in abeyance: why should the common law have to prove itself according to civil law norms given that these norms themselves are culturally and experientially specific?

When it comes to the matter of governing difference with particular reference to the European Union, I regard legal traditions as epistemic peers. The fact that the common law tradition happens to prevail in only a small minority of member states is strictly irrelevant. Both traditions serve equally well by catering to their respective communities' specific historical needs, and '[t]here is . . . no way to establish a claim to the effect that one idiom, conceptual or linguistic, permits a better grasp of the world than all others, or is a better instrument of communication'.\textsuperscript{7} The key to the success of the European venture simply cannot lie, therefore, in propounding a norm of uniformity which does not account for the very real epistemological discrepancies arising between the civil law and common law worlds. Now, the point is that these differences are not just superficial or technical distinctions, but that they are differences which play a constituting role in shaping national and cultural identity. The attachment to a familiar legal tradition (perhaps beneath awareness) must be apprehended as a legitimate and often vital aspect of social existence which, as it helps to define selfhood, deserves to be respected. Not to be prepared to accommodate this fact, not to give legal communities and individuals within these communities their historical due, is necessarily to assimilate the lawyers within one legal tradition to a different way of speaking and acting and to another notion of what makes sense; it is to expect these individuals to undergo a religious conversion—


\textsuperscript{57}B Herrnstein Smith Belief and Resistance (Cambridge, Mass: Harvard University Press, 1997) p 68.
something which may not even be possible. What is this approach to legal integration if not a variation on the theme of cultural imperialism? 58

The difficulty, of course, is that the civil law mind, given the effects of rigorous instruction and routine participation in a characteristic conceptual tradition and its related idiom, is reflexively imperialistic in the sense that, because of its penchant for universalisation, it spontaneously projects its own values, experience, and perspective as universal. When another legal tradition happens to be a constituting part of the universality at issue, it is thereby rendered largely invisible so that its particular perspective and community-specific interests are effectively denied. When that other legal tradition happens to be the common law, the problem of invisibilisation is, if anything, even more acute, because of the peculiar way in which there has developed over time an identification between the law and the people in the common law world. Making specific reference to the English situation, Gerald Postema writes as follows:

"The essential idea is that the laws and institutions of Common Law are not imposed upon citizens of England (either by some foreign power or by arbitrary parliamentary legislation) . . . The central idea here is . . . that of . . . identification. [T]he laws by which we are governed are ours, . . . because we feel entirely at home with [the law], see it as an integral part of daily life, and participate fully in it . . . To participate in a practice, on this view, is not merely to comply with its requirements, or even to do so thinking correctly that one ought to comply with them . . . ; it is further to see oneself in partnership with consociates in the practice, jointly regarding its norms as binding". 59

It is a mistake to underestimate the constitutive links between individual welfare — say, as regards self-identity and self-esteem — and implication in cultural forms, including law, which are recognisable by participants (and which are recognised by others) as being theirs. In other words, there is a meaningful sense in which any identity is supervenient upon common cultural forms so that the well-being of the English people, for instance, can not be dissociated from the flourishing of the common cultural forms to which they belong, including the common law tradition. For this reason, I find it at once frightening and sad to imagine a Europe in which there would be something like a European civil code or a 'Code civil

59. G J Postema Bentham and the Common Law Tradition (Oxford: Oxford University Press, 1986) pp 73–74 (emphasis original). Cf E Burke Reflections on the Revolution in France (ed C Cruise O’Brien) (London: Penguin, 1968) p 120: ‘[I]n what we improve we are never wholly new; in what we retain we are never wholly obsolete. By adhering in this manner and on those principles to our forefathers, we are guided not by the superstition of antiquarians, but by the spirit of philosophic analogy. In this choice of inheritance we have given to our frame of polity the image of a relation in blood; binding up the constitution of our country with our dearest domestic ties; adopting our fundamental laws into the bosom of our family affections; keeping inseparable, and cherishing with the warmth of all their combined and mutually reflected charities, our state, our hearths, our sepulchres, and our altars’ (originally published in 1790).
de tous les peuples’, a development which would come to occupy the entire European terrain although historically and epistemologically foreign to the common law tradition. How could one regard as an improvement a world in which the ideals which animate the common law mind have been completely subordinated to the civil law will? How could one regard as an improvement a world in which the common law is reduced to atomistic elements which are then disaggregated into modular units and reassembled through acts of calculation? How could one regard as an improvement a world in which one legal language has been erased? Merryman is very discerning when he remarks that ‘the problem of convergence is more accurately perceived as a problem of sensitivity, of preserving scope for that which is particular and special’.61

The common law mind must be heard in its own voice – a voice which, although it began life as a by-product of the civil law world itself, has long expressed resistance to the civilian way of being into the law, which gives precedence to facts over general rules, which has more affinity for practical experience than for conceptualism and systemics, and which adopts a traditioanal approach to the management of historical time rather than defining itself in terms of the ruptures associated with the creation of new rules. If communication is not to be robbed of its socially integrative meaning, civilians must not only listen to what the common law has to say as it tells them what it is and what it wants to be, but they must also listen to the way in which it says what it wishes to say. If I may be allowed some word-play, it is time for civilians to comprehend (in the sense of ‘understand’) the common law rather than always trying to comprehend (in the sense of ‘subsume’) the common law.63 A threshold

60. This designation was suggested in [F] d’Olivier De la réforme des lois civiles t 1 (Paris: Merigot, 1786) p 273, where the author defends the adoption of a universal civil code. Nowadays, the idea of a European codification is no longer limited to the realm of ‘private law’. For an argument supporting a European code of administrative law, see J Schwarze L’européanisation du droit administratif national’ in J Schwarze (ed) Le droit administratif sous l’influence de l’Europe (Baden-Baden: Nomos, 1996) p 844.
63. Although I am here focusing on scholarly attitudes in the civil law world, I would not wish to suggest that academics writing in common law jurisdictions can not also trivialise the specificity of another legal community’s experience by reducing it to their own cognitive categories. For a manifest expusion of the values of humility and deference from the relational framework between observer and observed showing the observer to be more interested in the assertion of his own author-fry than in the pursuit of ethical communicative action, see G Dannemann and B Markesinis ‘The Legacy of History on German Contract Law’ in R Cranston (ed) Making Commercial Law: Essays in Honour of Roy Goode (Oxford: Oxford University Press, 1997) p 2: ‘one must . . . “anglicize” German law in order to make it more palatable to an English readership’. For general reflections on the necessity of attending to alterity within the communicative and subsequent re-presentational process, see L Thomas ‘Moral Deference’ (1992) 24 Philosophical Forum 233; I Marion Young ‘Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought’ (1997) 3 Constellations 340 at 362, n 11. For a noteworthy attempt to combat the degradation of communication and elucidate a language of comparison suitably respectful of the rich texture of indigenous experiences of law which would avoid any assertion of ‘ownership’ over them by the comparatist, see J E Ainsworth ‘Categories and Culture: On the “Rectification of Names” in Comparative Law’ (1996) 82 Cornell LR 19.
interrogation, however, is whether civilians can free themselves from civilian thought—whether they can transcend ‘the system of selfmade concepts that serve . . . to cover up the living process of society’. 64 Can one ‘free oneself from oneself’? 65 Can civilians move away from civilian-thought-as-universal-thought and espouse a brand of synoptical thought which would allow for a significant presence of common law thought within the relevant universality? Naturally, any reversal or abjuration of a world-view is fantastically difficult, especially when it involves suppressing an overweening sense of superiority. 66 In fact, the philosopher, Michael Oakeshott, argues that rationalists are ‘essentially ineducable’, because they are wedded to formal models of truth and cognition and could only be trained out of them by ‘an inspiration which [they] regard[d] as the great enemy of mankind’. 67 If this is so, the task of common law lawyers is formidable indeed. Yet, it remains a compelling enterprise.

An initial step—and here is where comparatists find themselves challenged to assume a leading role—is to encourage the participation of civil law and common law lawyers alike in a genuine intercultural dialogue, the kind of unceasing and unceasingly stimulating exchange which nurtures a reflective awareness of diversity and fosters an important measure of empathic understanding, if not (benign) admiration. (Tolerance is not enough, for one can only tolerate what one does not regard as true, that is, one can tolerate otherness only to the extent that it is understood as an untruth moving toward one’s discursivity or, more accurately, toward the re-presentation of the true on which one’s tolerance rests.) The aim of this conversation must be to show the participants in one legal tradition how the other takes a different view of the value of the ideal of formal-reason-as-impartiality and privileges a different type of engagement with the particular parties in a given situation, that is, how it favours a different moral orientation. Incidentally, as such interaction provides enhanced understanding of alterity, it can be expected to prompt a progressive realisation that understanding otherness is, literally, an impossible task (even if I had a complete description of another person’s experiences, I would none the

66. Merryman notes that the attitude of the civilian believing (and needing to believe) in his superiority vis-à-vis other legal traditions has ‘itself become part of the civil law tradition’: J H Merryman The Civil Law Tradition (Stanford: Stanford University Press, 2nd edn, 1985) p 3.
67. M Oakeshott Rationalism in Politics (London: Methuen, 1962) p 32. For a recent observation to the same effect, see Smith, (above n 57) p 119: ‘For those who conduct their intellectual lives primarily or exclusively through transcendental rationalism, that set of densely interconnected, mutually reinforcing ideas (claims, concepts, definitions, and so forth) operates as a virtually unbreachable cognitive and rhetorical system, or, one might say, as a continuously self-spinning, self-repairing, self-enclosing web . . .Everything in the system fits together tightly and securely. Whatever does not fit into the system is identified by the system as irrelevant or unauthentic . . . The rigorous, unremitting work of Reason creates a tight, taut web, intertextual and interconceptual’ (emphasis original).
less not have been the subject of these experiences). The heightened sense of awareness that one cannot, ultimately, be another or imagine oneself as being another, should in turn promote greater respect for difference-as-specificity.

Coming to the matter as a comparatist – and, therefore, as someone who values diversity as a good and who is prepared to affirm it as a good – it is my fond hope that as this discussion across legal traditions takes shape, common law lawyers will want to resist the drive toward cultural uniformity by emphasising, explaining and justifying their particularity, thus claiming for themselves the power to transform the negative meanings associated with difference into positive ones. Above all, common law lawyers must overcome the inclination to fall for a devaluation of their own experience of life in the law in the face of ever more ponderous intimations emanating from various European universities and capitals that 'good Europeans' cannot oppose harmonisation of the laws across the European Community, because to contest harmonisation is supposedly to negate the merits of harmony. In fact, it must be appreciated that to master, absorb and finally reduce difference to sameness just can not make for a 'good Europe'. Let us recall the words of the political philosopher, James Tully, who observes that '[t]he suppression of cultural difference in the name of uniformity and unity is one of the leading causes of civil strife, disunity and dissolution today'. The law of the European Community can only possibly prove itself to be a workable amelioration over the extant variety of national and infra-national laws if it is prepared to draw upon the two legal traditions, that is, upon the two discrepant historical reservoirs of ideas, which between them allow all communities and individuals across Europe to recognise the comforting legal-cultural forms established over the long term that resonate with their sense of identity.

To stress difference as a value is not to subvert the Enlightenment commitments to human emancipation and liberty and is not a fortiori to insist upon a return to a pre-Enlightenment cast of mind which denied parity for all before the law and favoured exclusion based on status. Nor is it to promote indifferentist relativism. My argument lies elsewhere. Given that the diversity of legal traditions and the diversity of forms of life in the law they embody remain the expression of the human capacity for choice and self-creation, I seek affirmatively to encourage oppositional discourse in the face of a strategic and totalitarian rationality which, while claiming to pursue the ideal of impartiality by reducing differences in the lifeworld to calculative and instrumental unity, effectively privileges a situated standpoint which it allows to project as universal. I contend that this exercise must be apprehended for the fiction that it is and that one must accept, therefore, that a universalisation can only prove persuasive if it will work through difference, rather than against it, by acknowledging as equally meaningful each legal tradition's characteristic discursive formation. Only in deferring to the non-identical can the claim to justice be redeemed.

Today's comparatists in law faculties throughout Europe are expected to subscribe to a script of underlying European unity and ultimate European transcendence where particularism is assumed to be epiphenomenal and fated

68. Eg T Nagel 'What Is It Like to Be a Bat' in T Nagel (ed) Mortal Questions (Cambridge: Cambridge University Press, 1979) p 169, where the author distinguishes between 'what it would be like for me' to behave as a bat behaves' and 'what it is like for a bat to be a bat' (emphasis original).
to play but a peripheral role in the future of human affairs. It is easy to sympathise
with the desire for a more orderly, circumscribed world. The obsession to find
and impose order possibly answers a most basic human drive (in fact, the
common law is an order too – as is the alphabet). But, it is quite another thing to
underwrite the search for a monistic unifying pattern not unlike the Platonic belief
in a final rational harmony, that is, to endorse reason acting as the corrosive
solvent of custom and allegiance. And, lest anyone should conclude that to
militate in favour of the recognition, respect and implementation of difference
in all its complex ramifications is somehow to travel an uncompromising via
negativa, I commend this reflection from Pollock:

‘[H]ad English law been in its infancy drawn, as at one time it seemed likely to
be drawn, within the masterful attraction of Rome, the range of legal discussion
and of the analysis of legal ideas would have been dangerously limited. Roman
conceptions, Roman classification, the Roman understanding of legal reason and
authority, would have dominated men’s minds without a rival. It is hardly too
much to say that the possibility of comparative jurisprudence would have been
in extreme danger. I am not now considering whether English law, in its
mediaeval or its modern stage, be better or worse than Roman law. The point is
that it is different and independent; that it provokes comparison and furnishes a
holding-ground for criticism. In its absence nothing but some surpassing effort
of genius could have enabled us to view the Corpus Juris from the outside.
Broadly speaking, whatever is not of England in the forms of modern jurisprudence is of Rome or of Roman mould. In law, as in politics, the severance
of Britain by a world’s breadth from the world of Rome has fostered a new birth
which mankind could ill have spared.70

70.F Pollock ‘English Opportunities in Historical and Comparative Jurisprudence’, in
an interesting and topical application of Pollock’s ideas, see S Goldstein ‘On Comparing
and Unifying Civil Procedural Systems’ in R Cotterrell (ed) Process and Substance