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EUROPEAN LEGAL SYSTEMS ARE NOT CONVERGING

PIERRE LEGRAND*

SINCE the late 1940s, economic considerations relating to the globalisation of world markets have led an ever larger group of Western European countries to unite in the quest for a supra-national legal order which, in time, generated the European Community. Most of these countries' legal orders claim allegiance to what anglophones are fond of labelling the "civil law" tradition,¹ although two common law jurisdictions joined the Community in the early 1970s. The European Community's early decision to promote economic integration (and, later, other types of integration) through harmonisation or unification has involved, at both Community and national levels (for the implementation of Community rules in the member States carries the adoption of *national* rules in all member States), a process of relentless "juridification"; law, in the guise of legislatively or judicially enacted rules, has assumed the role of a "steering medium".² This development was foreseeable: once the interaction among European legal systems had acted as a catalyst for the creation of a supra-system,³ the need to achieve reciprocal compatibility between the infra-systems and the supra-system naturally fostered the development of an extended network of interconnections (such as regulations and directives) which eventually raised the question of further legal integration in the form of a common law of Europe.⁴

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1. For a helpful definition of the "civil law" tradition allowing for a differentiation between those legal systems that belong to it and those that do not, see Alan Watson, *The Making of the Civil Law System* (1981), p.4. Although Watson's criterion of "civility" is narrower, it is arguable that the Scandinavian countries form part of the civil law world, if as peripheral constituents: see Jacob W. F. Sundberg, "Civil Law, Common Law and the Scandinavians" (1969) 13 *Scandinavian Studies in Law* 179.

2. Jürgen Habermas, *The Theory of Communicative Action*, Vol.II: *Lifeworld and System: A Critique of Functionalist Reason* (trans. by Thomas McCarthy, 1987), p.365.

3. I refer to the notion of "systematicity" in its dynamic or relative sense. A system is a complex amalgam where order and disorder—or determinacy and indeterminacy—constantly interact. The system is but the continually reinvented product of that interaction. Although largely self-referential, it is neither normatively nor cognitively closed. It is porous. See generally Michel van de Kerchove and François Ost, *Le système juridique entre ordre et désordre* (1988). An English translation has appeared: *Legal System Between Order and Disorder* (trans. by Iain Stewart, 1994). Cf. Charles Sampford, *The Disorder of Law* (1994), who argues that law cannot be understood as a system because it is inherently disorderly.

4. For a useful reflection on autocatalytic sets, see M. Mitchell Waldrop, *Complexity* (1992), pp.125–126.

Today one can safely predict that if a body of law common to all member States within the European Community—a *corpus juris Europaeum*—is to emerge, it will perforce consist of a compendium of enacted propositions. Indeed, the only way to develop a *jus Europaeum* is on the basis of propositional rather than practical knowledge.⁵ Given the prevalence of such a centrifugal force as nationalistic legal positivism, it is illusory to think that a common law of Europe can arise otherwise, such as through legal education or legal science.⁶ Rather, legal education or legal science will broaden its range *in response* to the enactment of a common body of propositions. Whether, if it should emerge, this *droit commun légiféré* would materialise under the designation of a “code” or not, it would consist of a systematic collection of provisions akin to that found in the familiar Continental codes, although the formulations presumably would not be as detailed. What propositions would be advanced, if they were to aim to be respectful of national (that is, local) legal cultures—which, of course, they would *not* have to be—would probably “succeed only in framing extremely vague and abstract rules”.⁷ The European Parliament itself adopted a resolution in May 1989 “[requesting] that a start be made on the necessary preparatory work on drawing up a common European Code of Private Law”.⁸ Five years later it carried a further resolution reiterating its call for work towards a “Common European Code of Private Law”.⁹ (It remains unclear whether the capitalisation of the word “common” on this occasion indicates heightened concern on the part of European parliamentarians.) Others have similarly promoted the idea of a European codification of private law.¹⁰ Lately, a commission has been engaged in the preparation of a European restatement of contract

5. Wolfgang Mincke, “Practical and Propositional Knowledge as the Basis of European Legal Education”, in Bruno De Witte and Caroline Forder (Eds), *The Common Law of Europe and the Future of Legal Education* (1992), p.285. Cf. the arrangement of cognitive models by Rom Harré into “sentential” and “iconic”: *The Principles of Scientific Thinking* (1970).

6. But cf. Reinhard Zimmermann, “Roman Law and European Legal Unity”, in A. S. Hartkamp *et al.* (Eds), *Towards a European Civil Code* (1994), p.65.

7. Lawrence M. Friedman and Gunther Teubner, “Legal Education and Legal Integration: European Hopes and American Experience”, in Mauro Cappelletti, Monica Secombe and Joseph Weiler (Eds), *Integration Through Law*, Vol.I: *Methods, Tools and Institutions*, Bk.3: *Forces and Potential for a European Identity* (1986), p.374.

8. Resolution (of the European Parliament) on Action to Bring into Line the Private Law of the Member States (1989) O.J. C158/400 (26 May 1989).

9. Resolution (of the European Parliament) on the Harmonisation of Certain Sectors of the Private Law of the Member States (1994) O.J. C205/518 (6 May 1994).

10. E.g. Hartkamp *et al.*, *op. cit. supra* n.6; Giuseppe Gandolfi, “Pour un code européen des contrats” (1992) *Rev. trim. dr. civ.* 707. See also Antonino Cella, “Un codice dei contratti per l’Europa: il colloquio di Pavia” (1991) *Rivista di diritto civile* 779; G. Cordini, “Colloquio sur la future codification européenne en matière d’obligations et de contrats” (1991) *Rev.*

law.¹¹ Meanwhile, a 30-year-old proposal for the codification of English contract law is being revived.¹²

I. ON THE SURFACE

It is hardly surprising, given this context, that students of the law, whenever they have engaged in feasibility studies around the idea of European legal integration, have tended to insist on the posited framework. A typical view, taking stock of recent legislative developments, is offered by René de Groot, who asserts that "it is likely that the legal systems of the European States will form one great legal family with uniform or strongly similar rules in many areas".¹³ On that basis, he is led to remark as follows: "To observe that the legal systems of Europe are converging states the obvious."¹⁴ He concludes by calling for the production of textbooks on the model of the American *Restatements* and of statutory collections.¹⁵ For his part, H. Patrick Glenn, looking at Europe from overseas, refers to "a continual *rapprochement*" between the civil law and common law worlds.¹⁶ Glenn also writes that "the idea of a new European *jus commune* will accelerate this tendency towards a *rapprochement*".¹⁷ The essays by de Groot and Glenn have much in common: they both focus on rules, concepts, substantive and adjectival law, and institutional bodies. They are not alone in so doing. For example, Basil Markesinis, concluding an examination of the European legal scene, opines that:¹⁸

the reader [should be left] in no doubt that convergence is taking place . . . There is thus a convergence of solutions in the area of private law as the problems faced by courts and legislators acquire a common and international flavour; there is a convergence in the sources of our law since nowadays case law *de facto* if not *de jure* forms a major source of law in both

int. dr. comp. 894, where the authors summarise various interventions in favour of codification in Europe made at a colloquium devoted to an examination of the question.

11. See Ole Lando, "Principles of European Contract Law" (1992) 56 *RabelsZ.* 261.

12. Harvey McGregor, *Contract Code* (1993). Cf. Law Reform Commission of Victoria, *An Australian Contract Code* (1992), Discussion Paper No.27, where the whole of contract law is reduced to 27 (brief) provisions.

13. Gerard-René de Groot, "European Education in the 21st Century", in De Witte and Forder, *op. cit. supra* n.5, at p.11.

14. *Idem*, p.7.

15. *Idem*, pp.24-25.

16. H. Patrick Glenn, "La civilisation de la *common law*" (1993) *Rev. int. dr. comp.* 559, 567 ("un *rapprochement* de plus en plus constant").

17. *Ibid* ("L'idée d'un nouveau *jus commune* européen va accélérer cette tendance vers le *rapprochement*").

18. B. S. Markesinis, "Learning from Europe and Learning in Europe", in his (Ed.), *The Gradual Convergence* (1994), p.30.

common and civil law countries; there is a slow convergence in procedural matters as the oral and written types of trials borrow from each other and are slowly moving to occupy a middle position; there may be a greater convergence in drafting techniques than has commonly been appreciated ...; there is a growing rapprochement in judicial views.

These words, too, revolve around rules, concepts, substantive and adjectival law, and institutional bodies.¹⁹ They reflect a belief that conflict situations across different legal cultures can be effaced through legal developments at the propositional level.²⁰

Authors like de Groot, Glenn and Markesinis defend the “convergence” thesis. Their argument is that the civil law and common law traditions are drawing progressively closer in Western Europe, “[i]n short [that] a new *ius commune* is thus in the making”.²¹ Their evidence is derived from an increasing reservoir of common rules, common concepts, common substantive and adjectival law, and common institutional bodies—most of these commonalities having arisen within the context of the European Community. If one confines oneself to this data, it may well be that the convergence argument is, in fact, supported. The view propounded by these writers is reminiscent of the general proposition already advanced by Konrad Zweigert and Hein Kötz which claims that, while there may be distinctions between legal systems at the level of problem conceptualisation, the functional solutions to problems tend to be similar, which, the argument goes, is what ultimately matters for the comparatist. For this reason Zweigert and Kötz advocate the recognition of a *praesumptio similitudinis* across (Western) legal systems as regards solutions to given legal problems.²²

There are, however, serious difficulties with an approach which focuses on posited law in order to draw conclusions regarding the convergence of legal systems. In my view, neither rules nor concepts reveal as much about a legal system as appears to be assumed. Rules, for example, are largely ephemeral and inevitably contingent. They are brittle.²³ For this reason

19. Other illustrations include Xavier Lewis, “L’européanisation du *common law*”, in Pierre Legrand (Ed.), *Common law d’un siècle l’autre* (1992), p.275; Jonathan E. Levitsky, “The Europeanization of the British Legal Style” (1994) 42 A.J.Comp.L. 347.

20. Volkmar Gessner and Angelika Schade, “Conflicts of Culture in Cross-Border Legal Relations: The Conception of a Research Topic in the Sociology of Law”, in Mike Featherstone (Ed.), *Global Culture* (1990), p.265.

21. B. S. Markesinis, “Bridging Legal Cultures” (1993) 27 Israel L.R. 363, 382.

22. Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (2nd rev. edn trans. by Tony Weir, 1992), p.36.

23. The notion of “brittleness” is applied to rules in William Bechtel and Adele Abrahamson, *Connectionism and the Mind* (1991), pp.17 and 208. I am grateful to my colleague, Geoffrey Samuel, for bringing this book to my attention.

there is relatively little in law-as-rules that has universal merit or that transcends jurisdictional boundaries. Therefore, whether they be legislative or judicial in origin, rules are pernicious to the extent that they present but a surface image of a legal system. Likewise, concepts are deficient for they are peremptory instruments used by lawyers in order to “know” a reality which, in any respect apart from its ontological existence, is inevitably a consequence of their own representations and may not, therefore, coincide with them: a concept must of necessity be relative and, therefore, subjective because every concept, by being a concept, implies a derivation.²⁴ Accordingly, rules and concepts alone actually tell one very little about a given legal system and reveal even less about whether two legal systems are converging or not. They may provide one with much information about what is apparently happening, but they indicate nothing about the deep structures of legal systems. Specifically, rules and concepts do little to disclose that legal systems are but the surface manifestation of legal cultures and, indeed, of culture *tout court*. In other words, they limit the observer to a “thin description” and foreclose the possibility of the “thick description” that the analyst ought to regard as desirable.²⁵

II. BEYOND SEMBLANCE

To explain: there are at least two problems with gauging the convergence of legal systems by focusing on propositions. First, the “ruleness” of the “rule” is a more intricate notion than it appears in that a rule embodies a whole culture. But what is culture? Suffice it to say, within the present context, that “culture” concerns frameworks of intangibles within which interpretive communities operate and which have normative force for these communities. It occupies a middle ground between what is common to all human beings (if, indeed, there be such commonality) and what is unique to each individual. Culture refers to features that are not universal but that transcend the individual. It is about collective mental programmes, that is, *Weltanschauungen*, that have formed not on account of the fact that we live on this planet or because of our uniqueness, but as a function of the community to which we belong. The notion of “community” can itself be constituted along ethnic, linguistic, or other lines. It can, for example, be formed on the basis of the legal system or the legal tradition of which an individual partakes.²⁶

Culture, thus, derives from historical experience—so do the forms that culture embraces, such as legal rules. It would be absurdly reductionist to

24. Isabelle Stengers, “Le pouvoir des concepts”, in Stengers and Judith Schlenger, *Les concepts scientifiques* (1991), pp.63–64.

25. Clifford Geertz, *The Interpretation of Cultures* (1993), p.7. The author borrows the terms from Gilbert Ryle, “The Thinking of Thoughts: What is ‘Le Penseur’ Doing?”, in his *Collected Papers*, Vol.II: *Collected Essays: 1929–1968* (1971), p.480.

26. See Geert Hofstede, *Culture’s Consequences* (1984), pp.14–16.

see a rule simply as a rule. Indeed, a rule is not a mere act of accumulation and acquisition that would have taken place over the years or centuries and resolved itself into a formulaic phrasing of a legal problem and of its solution. What accretion of elements one sees is necessarily supported by impressive ideological formations. A legal rule is an incorporative cultural form. Just as culture is a source of identity, rules, for instance, are a source of identity. Rules help constitute legal—that is, political—identity (which, in one of these recurrent loops, helps constitute rules in its turn). Rules encode experiences. Because rules are but the outward manifestation of an implicit structure of attitude and reference, they are a reflection of a given legal culture. This is true of all rules, even the most innocuous ones. This is, therefore, also true of what one can refer to as “meta-rules”, that is, the rules developed by a legal system (or, more accurately, by the actors within a legal system) in order to help it manage its body of rules. I have in mind, for example, rules about the hierarchy of sources of law or rules of interpretation. Even the conventions which progressively harden into rules of citation in a given jurisdiction can possibly be regarded as “management” rules. And they, too, reveal much beneath the surface; they, too, have deep cultural significance. For instance, the English way of designating cases by parties’ names quietly reflects the view, going back to the earliest days of the common law, of English courts as arbitrators of disputes between “real-life” litigants. For its part, the French approach, which consists in ignoring parties’ names but in highlighting the name of the court rendering the decision and the date of the judgment, stresses the official, dogmatic and resolute nature of the normative utterance being generated: an organ of the State is speaking!²⁷

The rules that the European Community and the member States present to their respective constituencies similarly capture a legal culture. These rules are not simple reflections of some natural order. Rather, they are produced by human agency through institutional structures and legal processes. Hence, they inevitably contain a social component: they are not *wertfrei*. Legal statements achieve the status of “rules” only if they are generated and implemented in accordance with prior agreements about the appropriateness of particular policies, the merits of given intervention techniques, compliance procedures, review processes, and so on. These agreements, in turn, are socially derived through continuous negotiation and renegotiation among relevant bodies of law-makers consisting of culturally determined individuals. This is the sense in which there is more to rules than it appears: there exists a socio-cultural dimension which, although it is largely concealed, remains inherent to rules.

27. See Pierre Legrand, “Sigla Law”, in John W. Bridge *et al.* (Eds), *Common Law Studies for the XIVth International Congress of Comparative Law*, Vol.II (1994), p.518.

Second, rules are not the whole of law. The conception of law as a discrete subsystem of (legal) rules within society, operating independently from society, must be abandoned.²⁸ It has to be understood that the “legal” cannot be analytically separated from the “non-legal” reality of society because the two worlds are inextricably linked. More accurately, law is a social subsystem. In other words, the “legal” can never be perceived on its own terms; to penetrate the “legal” one must appreciate the “social” that underpins it, otherwise the “legal” literally does not make sense. In the words of Christian Atias, “to isolate a legal provision may be the way to allow for its analysis; above all, it is to dissolve its real meaning”.²⁹ The legal community must, accordingly, reconsider its adhesion to the formal rationality of law (as Weber introduced the notion)³⁰ and move away from legocentrism—that is, in Clifford Geertz’s telling imagery, distance itself from “an overautonomous view of law as a separate and self-contained ‘legal system’ struggling to defend its analytic integrity in the face of the conceptual and moral sloppiness of ordinary life”.³¹ It must learn to overcome the distillation and purification process which creates entirely discrete ontological zones between law and the outside world and produces the autonomisation of an allegedly internally consistent “legal” sphere of meaning.³² The legal community has to move beyond the artificial, if carefully demarcated, divisions between law and the other human sciences, that is, reverse a process of aestheticisation of the legal which finds its early manifestation in Emperor Justinian’s *Digest*.³³ If the legal community stops seeing law as seeking, in the dynamic mutuality of all its internal relations, a totalisation excluding everything else, it will possibly acknowledge that law is a (legitimate) hybrid—that it is, for instance, both technical reasoning and political power. If the traditional academic and professional need for disciplinary security will allow it, the legal community can advance towards a recognition of hybridisation and see that law is indeed a monster, an “outrageous and heterogeneous collag[e]”.³⁴

28. E.g. Friedman and Teubner, *op. cit. supra* n.7, at pp.372–374; Robert W. Gordon, “Critical Legal Histories” (1984) 36 *Stanford L.R.* 57, 90. See also Algirdas Julien Greimas, *Sémiotique et sciences sociales* (1976), p.80.

29. Christian Atias, *Épistémologie du droit* (1994), p.31 (“Isoler une disposition légale, c’est peut-être le moyen d’en permettre l’analyse; c’est surtout en dissoudre la signification réelle”).

30. Max Weber, *Economy and Society* (Guenther Roth and Claus Wittich (Eds), Vol.II 1978), pp.784–792.

31. Clifford Geertz, “Local Knowledge: Fact and Law in Comparative Perspective”, in his *Local Knowledge: Further Essays in Interpretive Anthropology* (1983), p.214.

32. I draw on Bruno Latour, *We Have Never Been Modern* (trans. by Catherine Porter, 1993).

33. A similar phenomenon is at work within law itself (that is, *en abyme*) where it takes the form of the departmentalisation of the legal mind.

34. John Law, “Introduction: Monsters, Machines and Sociotechnical Relations”, in his (Ed.), *A Sociology of Monsters: Essays on Power, Technology and Domination* (1991), p.18.

If there are signs that a movement away from the monism of “law-as-rules” is effectively taking place,³⁵ the large bulk of academic writing about law reminds us that a lot more must be done. It is still the case that rather superficial manifestations of culture such as rules and concepts are often taken for all there is; the deeper, underlying level of values is overlooked. Much of the problem, of course, arises from what I will call the apparent “out-there-ness” of the law. The use of the linguistic term “law”, which directly names a definite and straightforward “something” which is named by it, connotes an objective entity which both corresponds to this name and to which this name refers. This mystification is the illusion that must be resisted. An observation from the French anthropologist, Claude Lévi-Strauss, is apposite:³⁶

we have put into people’s heads that society is a creature of abstract thought when it is constituted by habits and customs. When you submit habits and customs to the grindstone of reason, you pulverize ways of life based on longstanding traditions and reduce human beings to the state of anonymous and interchangeable atoms.

Possibly the greatest intellectual challenge for the comparatist is to accept the fact that because one wants to account for a legal form and because one rightly begins one’s investigation in legal materials does not mean that the discourse that is initially perceived as discrete from those legal materials—such as the cultural, historical, social or economic discourse—must, therefore, be regarded as peripheral or irrelevant to legal analysis. Rather, the comparatist needs to acknowledge that the exclusive focus on rules, concepts and categories will produce a persistent miscognition of the experiences of legal order under scrutiny and of the symbolic modes and interpretive performances through which these legal orders are expressed, perceived and accomplished by members of the legal and lay worlds. As Gadamer notes, the challenge is especially compelling since: “Things that change [such as rules] force themselves on our attention far more than those that remain the same [such as epistemological assumptions] . . . Hence the perspectives that result from the experience of historical change are always in danger of being exaggerated because they forget what persists unseen.”³⁷

My contention is, therefore, that law simply cannot be captured by a set of neatly organised rules, that “the law” and “the rules” do not coexist,

35. Friedman and Teubner, *op. cit. supra* n.7, at p.373.

36. Claude Lévi-Strauss and Didier Eribon, *De près et de loin* (1988), p.165 (“on a mis dans la tête des gens que la société relevait de la pensée abstraite alors qu’elle est faite d’habitudes, d’usages, et qu’en broyant ceux-ci sous les meules de la raison, on pulvérise des genres de vie fondés sur une longue tradition, on réduit les individus à l’état d’atomes interchangeables et anonymes”).

37. Hans-Georg Gadamer, *Truth and Method* (2nd edn, trans. by Joel Weinsheimer and Donald G. Marshall, 1993), p.xxiv.

and that there is indeed much “law” to be found beyond the rules. By adhering to a “law-as-rules” representation of the legal world, much comparative work has effectively become an epistemological barrier to legal knowledge.³⁸ In other words, comparative legal studies leads the lawyer astray by suggesting that to have knowledge of the law is to have knowledge of the rules (and that to have knowledge of the rules is to have knowledge of the law!). In its quest for rationality, foreseeability, certainty, coherence and clarity, much comparative work, therefore, strikes a profoundly anti-humanist note.

Lévi-Strauss’s message is opportune: if one wants to understand societies and the legal cultures they have produced (and that have produced them), one must move away from rules and concepts and embrace habits and customs. One has to reach beyond a synecdochic view of the law, that is, one must refute a view of the law where the part (the rules and concepts) is allowed to stand for the whole. If one does so, and if one reflects on the case of the European Community, one will have to accept that the possibility of European legal integration becomes as problematic as the idea of integration of European societies itself. Indeed, to integrate a group of “legal cultures” does not appear any more feasible than would the integration of the different world-views privileged by a wide range of societies. Once one moves away from rules and concepts, it is no longer at all clear that the civil law and common law worlds are converging. But let me say more about the object of my comparative enterprise. If one takes the view, as I do, that rules and concepts tell one relatively little about a given legal culture and even less about the possible convergence of different legal cultures, what, then, ought to be the focus of one’s analysis?

III. *MENTALITÉS*

THE essential key for an appreciation of a legal culture lies in an unravelling of the cognitive structure that characterises that culture. The aim must be to try to define the frame of perception and understanding of a legal community so as to explicate how a community thinks about the law and why it thinks about the law in the way it does. The comparatist must, therefore, focus on the cognitive structure of a given legal culture and, more specifically, on the epistemological foundations of that cognitive structure. It is this epistemological substratum which best epitomises what I wish to refer to as the legal *mentalité* (the collective mental programme), or the interiorised legal culture, within a given legal culture. Returning to language closer to Lévi-Strauss’s, one must focus on assumptions, atti-

38. See, on the concept of “epistemological barrier” (“*obstacle épistémologique*”), Gaston Bachelard, *La formation de l’esprit scientifique* (14th edn, 1989), *passim*. For an application to law, see generally Michel Miaille, *Une introduction critique au droit* (1976), pp.37–68.

tudes, aspirations and antipathies. Only in this way can one bring to light the deep structures of legal rationality. One simply cannot engage in a “thick description” of a rule, principle or category unless one possesses the essential epistemological keys. Such an understanding of the discursive structures that organise cognition in a given legal tradition ensures erudite (as opposed to ingenuous) comparative legal studies. A privileged approach to capture the (denotative and connotative) epistemological network within a given legal culture is to focus on myth. It is mythology which performs the mediation between the objective conditions in which a legal community lives and the manner in which it tells itself and others about the way it lives. It is also mythology that captures the symbolic and symbolising attributes with which a legal community describes itself. This means that the comparatist must illuminate the stories (or narratives) a legal culture tells about itself, both to others and to itself. In the words of John Merryman, writing with respect to the civil law tradition: “To understand a contemporary civil law system you have to know where it comes from and what its image of itself is.”³⁹

My argument is that if one insists on the cognitive structure of the common law world as it differs from that of the civil law world—both legal traditions being represented within Western Europe and, more particularly, within the European Community—one must see that, in addition to being rudimentary, the analysis of European legal integration at the level of posited law suggesting a convergence of legal systems is misleading. Indeed, if one forgoes a surface examination at the level of rules and concepts to conduct a deep examination in terms of legal *mentalités*, one must come to the conclusion that legal systems, despite their adjacency within the European Community, have not been converging,⁴⁰ are not converg-

39. John Merryman (1987) 35 A.J.Comp.L. 438, 441 (letter to the editor).

40. As is appropriately remarked by Donald Kelley—and in contradistinction to scholars, such as Helmut Coing and Reinhard Zimmermann, advocating a second *jus commune*—there never was a *jus* that was truly *commune*: “In terms of civil science Common Law was not only the *ius proprium* of England; it had in effect seceded from the *ius commune* of the European Community”: *The Human Measure: Social Thought in the Western Legal Tradition* (1990), p.182. See also A. W. B. Simpson, “The Survival of the Common Law System”, in his *Legal Theory and Legal History: Essays on the Common Law* (1987), p.394: “University law, with th[e] exception [of equity], never had any profound influence upon the common law system, and to say this is the same as to say that there was never a reception”; David Ibbetson and Andrew Lewis, “The Roman Law Tradition”, in Lewis and Ibbetson (Eds), *The Roman Law Tradition* (1994), p.9. But see Helmut Coing, “European Common Law: Historical Foundations”, in Mauro Cappelletti (Ed.), *New Perspectives for a Common Law of Europe* (1978), p.31; Zimmermann, *op. cit. supra* n.6, at pp.68–69. Cf. John Henry Merryman and David S. Clark, *Comparative Law: Western European and Latin American Legal Systems: Cases and Materials* (1978), pp.104–105: “The idealization 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 reestablish 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.”

It is worth noting, incidentally, that the use of the expression “*jus commune*” is not free from controversy. See generally Harold J. Berman and Charles J. Reid, “Roman Law in

ing and will not be converging. It is a mistake to suggest otherwise.⁴¹ Moreover, I wish to argue that such convergence, even if it were thought desirable (which, in my view, it is *not*), is impossible on account of the fact that the differences arising between the common law and civil law *mentalités* at the epistemological level are irreducible.

Ought this conclusion to surprise us? I do not think so. After all, law-as-rules must have a sense of its limits: cultural integration or convergence is a promise that law is simply ontologically incapable of fulfilling.⁴² One of the great lessons of Montesquieu's *De l'esprit des lois*, written in 1748, is precisely that the law-maker must show an awareness of the ultimate constraints posed by human experience and the human condition, and that one must accordingly appreciate the failings of social engineering: manners and customs cannot be changed by law, but have to undergo change themselves. This process takes time: "Societies . . . have ways of conserving and passing on mental programs from generation to generation with an obstinacy which many people tend to underestimate."⁴³ Only later can the laws and institutions of a nation, through experience, learning and reason, be accommodated to the new manners and customs.

Returning to my theme of the difference between the common law and civil law *mentalités* arising at the epistemological level (not, I hope, another contribution to the explosion of specialised and separatist knowledge), I wish to say more about the nature of this particular claim. To argue that there is an epistemological difference between the common law and civil law traditions is to assert that these two traditions do not give the same answer to the question "what is it to have knowledge of the law?" or, which is another way of making the same point, to the question "what

Europe and the *jus commune*", in *Scintillae iuris: Studi in memoria di Gino Gorla*, Vol.II (1994), p.1008, where the authors discern, from the 11th century onwards, three "*jus commune*" in European legal history.

41. I am not denying the existence of a long-standing and important influence of the civil law tradition on English law. Clearly, English law did not develop in the insular way in which it continues to be represented by an important current of English legal scholarship. This question has benefited from much scholarly interest in recent years. See, for an effective demonstration of the argument, Michele Graziadei, "Changing Images of the Law in XIXth Century English Legal Thought (The Continental Impulse)", in Mathias Reimann (Ed.), *The Reception of Continental Ideas in the Common Law World 1820-1920* (1994). See also e.g. Gino Gorla and Luigi Moccia, "A 'Revisiting' of the Comparison Between 'Continental Law' and 'English Law' (16th-19th Century)" (1981) 2 J. Leg. Hist. 143; Luigi Moccia, "English Law Attitudes to the 'Civil Law' " (1981) 2 J. Leg. Hist. 157. But to say that there has been an influence of the civil law tradition on English law at the level of rules, concepts, substantive and adjectival law, and institutional bodies (which is the point effectively made by authors like Graziadei) says nothing as regards an eventual epistemological convergence.

42. See, for a general reflection on why law is an unsatisfactory tool of European integration, Christian Mouly, "Le droit peut-il favoriser l'intégration européenne?" (1985) Rev. int. dr. comp. 895.

43. Hofstede, *op. cit. supra* n.26, at p.16.

counts as legal knowledge?" More specifically, one is here concerned with such issues as the nature of legal reasoning, the significance of systematisation, the character of rules, the role of facts and the meaning of rights. One is also preoccupied, perhaps most fundamentally, with the presence of the past.⁴⁴ These are the topics to which I will turn—not to rules, concepts, substantive or adjectival law, or institutional bodies—in order to collect the evidence that will allow me to support my contention, which is, once again, that the common law *mentalité* is not only different, but is actually *irreducibly* different, from the civil law *mentalité* as found in Continental Europe. These two legal traditions reflect two modes of experiencing the world. My strategy, of course, is not to lump together the Italian, French and Dutch legal cultures. I am aware of how the legal cultures from these civilian jurisdictions differ *inter se*. Indeed, the opposite view would be untenable if one accepts, as I have suggested one must, the interconnectedness between law and society, between law and culture. Moreover, there are clearly differences at the level of legal cultures within the same jurisdiction: Holland is not Limburg and the Trentino is not Sicily. None of this is in doubt. But none of these differences is fundamental or irreducible in the manner of the epistemological difference between the civil law and common law traditions. It is between these legal traditions that the *primordial* cleavage—the *summa differentia*—lies. The civilian legal systems represent diverse states of equilibrium (or different stable solutions) on the theme of the Gaian institutional system—a condition which differentiates them, as a group, from common law jurisdictions which, as a group, do not offer any variation on the Gaian institutional theme.⁴⁵ Apart from what I regard as the theoretical or cultural interest of this cognitive differentiation, I argue that it should have very concrete implications for the feasibility of European legal integration if, by this, one means genuine legal integration, that is, integration reaching down to the level of legal *mentalités*.

To focus on *mentalité* is to insist, within the *spatium historicum*, on *longue durée* (as opposed to *événement* or *conjecture*). One is interested in the phenomenon of interiorisation of culture which can be measured only over a long period of time. The dangers are that the *mentalité* that will be presented as emerging from the investigation will be unduly holistic, monolithic or over-consensual. Obviously, such stereotypical inflection should be avoided for the shared meanings, attitudes and values that form a *mentalité* are simply not shared by everyone. One must make due allowance for sub-*mentalités* or para-*mentalités*. Indeed, "all industrial societies are pluralistic"; moreover, they can be so pluralistic that "often within-

44. See Martin Krygier, "Law as Tradition" (1986) 5 *Law and Philosophy* 237; "The Traditionality of Statutes" (1988) 1 *Ratio Juris* 20.

45. Cf. James Gleick, *Chaos* (1987), pp.169–170.

country differences are larger than between-country differences".⁴⁶ One is thus, ideally, looking for a representative common core—always bearing in mind, however, that one may have to settle for an imperfect approximation thereof.

IV. TWO EPISTEMOLOGICAL TRAJECTORIES

I appreciate that to focus exclusively on English law in order to introduce the common law *mentalité* is, in an important sense, inadequate. English law is but one of the many common law legal cultures to be found today. Because a legal culture is a method of enquiry for the purpose of realising social values, the relationship between a law and a society is always to be regarded as a culture-specific mode of dialectic. Indeed, according to Ugo Mattei, it is the American legal culture which has now become paradigmatic within the common law tradition.⁴⁷ Yet it remains that, within the Western European context, focus on English common law, as opposed to other common law cultures, seems easily justified. Moreover, it is arguable that, as much as common law cultures have progressively sought to dissociate themselves from their English roots, English law and English legal culture remain the common historical reservoir for the whole of the common law world.⁴⁸ Countless customs, habits, attitudes, and so on that one finds in the United States, Canada or Australia can be traced to an English ancestry whether as copies of the English model or as reactions against it. The significance of an examination of the English legal *mentalité* is thus enhanced.⁴⁹

I argue that the common law *mentalité*, specifically as it is expressed in England, is irreducibly different from the civil law's, notably on account of the following factors.

A. *The Nature of Legal Reasoning*

The common law has not left the inductive stage of methodological development.⁵⁰ The isomorphs used by common law lawyers were, and are, too

46. Erwin K. Scheuch, "The Development of Comparative Research: Towards Causal Explanations", in Else Øyen (Ed.), *Comparative Methodology* (1990), pp.29–30.

47. Ugo Mattei, *Common Law: Il diritto anglo-americano* (1992), p.302.

48. English law is indeed presented as such in *idem*, p.19.

49. It is important to stress that not all the conclusions that follow would apply equally forcefully to the US, notably on account of a greater measure of constitutionalisation of private law and of the existence of a stronger culture of rights in American law. See e.g. James Gordley, "'Common Law' v. 'Civil Law': una distinzione che va scomparendo?", in Paolo Cendon (Ed.), *Scritti in onore di Rodolfo Sacco*, Vol.I (1994), p.559, where the author argues that American private law, at least in terms of its basic structure, is more systematic than is generally acknowledged.

50. See Robert Blanché *L'épistémologie* (3rd edn, 1983), p.65, who argues that every science obligatorily passes through descriptive, inductive and deductive phases before finally reaching an axiomatic stage.

descriptive to function as an abstract system of thought divorced from particular sets of facts. One cannot axiomatise English legal thought, for common law lawyers use discrete inductive ideas capable of functioning only within limited factual spheres. It is empirical (and often metaphorical) notions such as “neighbour” and “life in being”, “proximity” and “frustration”, and “the officious bystander” and “remedy” which underpin much of the case law. New developments are secured by way of analogies rather than through the application of a system of *jura in personam*. On the contrary, the civil law—imbued with the Roman legacy—offers an intellectual scheme that goes beyond the raw classification of case law decisions around salient facts to become a system of *institutiones* capable of transcending disputes by moving away from factual immediacies. Common law reasoning is analogical, civil law reasoning is institutional.⁵¹ As Geoffrey Samuel shows, in English law:⁵²

Legal development is not a matter of inducing rules, terms or institutions out of a number of factual situations and applying these rules, terms or institutions to new factual situations. Rather it is a matter of pushing outwards from within the facts themselves. It is a matter of moving from one *res*, say a public highway, to another *res* like private property.

This is why a law of obligations, a law of property or a public law can never mean in England what it does on the Continent. The difference between civil law and common law approaches to legal reasoning is usefully captured by Gilbert Ryle’s contrast between “knowing-that” and “knowing-how” knowledge.⁵³ Weber’s distinction between “law as science” and “law as craft” is similarly relevant.⁵⁴

B. The Significance of Systematisation

The common law was never systematised nor has it ever aspired to be. Indeed, for Brian Simpson, “the common law mind . . . is repelled by brevity, lucidity and system”.⁵⁵ In this sense, the links between the legal subculture and the surrounding culture *tout court* in which it operates are verified, for: “The Englishman is naturally pragmatic, more concerned with result than method, function than shape, effectiveness than style; he has little talent for producing intellectual order and little interest in the finer points of taxonomy.”⁵⁶ In England law is seen as a technique of dis-

51. See generally Geoffrey Samuel, *The Foundations of Legal Reasoning* (1994), pp.171–207.

52. *Idem*, p.195.

53. Gilbert Ryle, “Knowing How and Knowing That”, in his *op. cit. supra* n.25, at p.212.

54. Weber, *op. cit. supra* n.30, at pp.656–657.

55. Simpson, “The Common Law and Legal Theory”, in his *op. cit. supra* n.40, at p.381.

56. Tony Weir, “The Common Law System”, in *International Encyclopedia of Comparative Law*, Vol.II: *The Legal Systems of the World: Their Comparison and Unification*, Chap.2: “Structure and the Divisions of the Law” (René David (Ed.) n.d.), No.82, p.77.

pute resolution. In other words, the role of the law, and therefore of the courts, is to solve the problem presented to it by litigants. This judicial attitude is well expressed by Lord Diplock in *Roberts Petroleum Ltd v. Bernard Kenny Ltd*: “The primary duty of the Court of Appeal on an appeal in any case is to determine the matter actually in dispute between the parties.”⁵⁷ Unlike the civil law, which seeks to *apprehend* the dispute through a complex categorial design of hierarchical norms purportedly comprehending all eventualities, the common law awaits the interpretive occasion. It is reactive and not, like the civil law, proactive or projective. Similarly, if commentators purport to discuss a judicial decision, they will traditionally tend to focus on the practical implications of the case and consider alternative techniques that might have been resorted to by the court to reach the same, or a different, conclusion. This approach by English writers has given rise to a very peculiar brand of legal doctrine, which has little in common with that found on the Continent. As Tony Weir underlines, many of the “great contributions to English law are in the form of notes to decided cases, a thing quite antagonistic to any scheme”.⁵⁸ The English aversion to (explicit) theory is highlighted by Neil MacCormick: “By and large English lawyers and writers have tended to think of it as almost a virtue to be illogical, and have ascribed that virtue freely to their law; ‘being logical’ is an eccentric continental practice, in which common-sensical Englishmen indulge at their peril.”⁵⁹

The courts have made it clear, for their part, that systematisation is associated with useless theorising. There are many illustrations of the judicial reluctance to organise the law systematically or logically. For instance, Griffiths LJ, in *Ex parte King*, says as follows: “the common law of England has not always developed on strictly logical lines, and 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”.⁶⁰ Another example can be offered from the case of *Reads v. J. Lyons & Co.*, where Lord Macmillan remarked:⁶¹

Your Lordships’ task in this House is to decide particular cases between litigants and your Lordships are not called upon to rationalize the law of

57. [1983] 2 A.C. 192, 201 (HL). See also e.g. *Miliangos v. George Frank (Textiles) Ltd* [1976] A.C. 443, 481 (HL) (per Lord Simon): “the training and qualification of a judge is to elucidate the problem immediately before him, so that its features stand out in stereoscopic clarity”.

58. Weir, *op. cit. supra* n.56, at No.83, p.78.

59. Neil MacCormick, *Legal Reasoning and Legal Theory* (1978), p.40.

60. [1984] 3 All E.R. 897, 903 (CA).

61. [1947] A.C. 156, 175 (HL). The reference is, of course, to Oliver Wendell Holmes, *The Common Law* (1881), p.1.

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”.

Writing about the judicial attitude towards systematisation, Weir is caustic: “Judges of general jurisdiction whose task is to resolve disputes by the application of any relevant rule of law wherever it is to be found have nothing to do with, and have done nothing for, the creation or maintenance of divisions of law.”⁶² As Bernard Rudden wryly observes, “the alphabet is virtually the only instrument of intellectual order of which the common law makes use”.⁶³ Indeed, the 1648 Code of Massachusetts ranges from “Abilitie”, “Actions”, “Age” and “Ana-Baptists” to “Wolves”, “Wood”, “Workmen” and “Wrecks of the Sea”.⁶⁴ Still today, *Halsbury’s Laws*, the leading English legal abridgement, follows suit and operates alphabetically. As a result, if one excepts the idiosyncratic delineation between common law and equity, “the only distinction of real importance is that between the civil and the criminal process”.⁶⁵ Needless to say, therefore, that the common law does not know of the differentiation between real and personal rights (*jus in rem* and *jus in personam*) so central to the civil law tradition. Thus, for example, the person who loses money in the bank account of another may recover by bringing an action *in personam* on the basis of a *jus in rem* against the debt in the bank!⁶⁶ This pragmatism stands in contrast to the formalism of code-based legal systems, such as are found on the Continent, which emphasise a schematic pattern where the normative coherence and consistency of a given body of *regulae juris* are key. “The instinct of the civilian is to systematize. The working rule of the common lawyer is *solvitur ambulando*.”⁶⁷

C. *The Character of Rules*

The common law does not consist of “rules” in the orthodox sense of the term, say, according to the meaning which civilians attach to the notion.⁶⁸ In other words, the common law does not generate canonical texts or for-

62. Weir, *op. cit. supra* n.56, at No.84, p.79.

63. Bernard Rudden, “Torticles” (1991–92) 6/7 *Tulane Civ.L. Forum* 105, 110. See also Alan Watson, *Legal Transplants* (2nd edn, 1993), p.70.

64. Thomas G. Barnes (Ed.), *The Book of the General Lawes and Libertyes Concerning the Inhabitants of the Massachusetts* (1975; reprint from the 1648 edn). For Watson, *idem*, p.66, this is “the earliest code of the modern Western legal world”.

65. Samuel, *op. cit. supra* n.51, at p.192.

66. *Lipkin Gorman v. Karpnale Ltd* [1991] 2 A.C. 548 (HL).

67. Thomas Mackay Cooper, “The Common and the Civil Law—A Scot’s View” (1950) 63 *Harv.L.R.* 468, 470.

68. See Frederick Schauer, *Playing by the Rules* (1991), pp.174–187; Simpson, *op. cit. supra* n.55, at pp.362–382.

mulations. To represent the common law as a set of rules is to inflict an "alien conception" on it.⁶⁹ Judicial decisions may, in time, produce what *appears* like a set of rules; yet "the rules of judge-made law are never authentically promulgated as rules, but are left to be inferred from cases".⁷⁰ Specifically, nowhere can an authoritative repository of the "rules" ever be found. The "rules" are, therefore, no more than renditions by later judges of patterns which they perceive as having emerged from discrete and particularistic judicial interventions.⁷¹ As W. T. Murphy observes, the common law is preoccupied with "the apprehension of regularities rather than the knowledge of rules".⁷² The absence of canonicity means that, while a judicial proposition is valid and binding in a formal sense, it need not constrain as a common law "rule". Because they have no effective coercive effect, the "rules" are subject to legitimate change by judges in the course of their application. Common law "rules" having minimal prescriptive impact, the courts effectively make and unmake the law at will. "The common law appears consequently to be decision according to justification rather than decision according to rule."⁷³ A judgment exemplifying this pragmatic approach is Lord Nottingham's in the famous *Duke of Norfolk's* case where the judge, upon being questioned as to the extent to which he proposed to take a given doctrine, replied as follows: "I will stop everywhere when any inconvenience appears, no where before."⁷⁴ Bentham drew his own conclusion: "As a system of general rules, the Common Law is a thing merely imaginary."⁷⁵

D. The Role of Facts

The "common law . . . consisteth upon so many, and almost infinite particulars", wrote Coke.⁷⁶ English law's emphasis on the facts of legal cases reflects the common law's assumption that legal knowledge emerges from facts (*ex facto jus oritur*) rather than from rules (*ex regula jus oritur*),⁷⁷ that

69. Roger Cotterrell, *The Politics of Jurisprudence* (1989), p.22.

70. O. W. Holmes, "Codes, and the Arrangement of the Law" (1931) 44 Harv.L.R. 725, 728 (reprint from the 1870 publication).

71. Schauer, *op. cit. supra* n.68, at p.175.

72. W. T. Murphy, "The Oldest Social Science? The Epistemic Properties of the Common Law Tradition" (1991) 54 M.L.R. 182, 205.

73. Schauer, *op. cit. supra* n.68, at p.178. See also Joseph Vining, *The Authoritative and the Authoritarian* (1986), p.45: "What are called 'the rules laid down by a decision' are verbal formulations of the reasons relied upon by a decision maker in making the decision. Those reasons are values, importances; any decision maker acting in a particular role necessarily gives relative weights to them in making a particular decision."

74. *Howard v. Duke of Norfolk* (1681) 2 Swans. 454, 468; 36 E.R. 690, 695 (*per* Nottingham LC).

75. Jeremy Bentham, *A Comment on the Commentaries* (1928; reprint. 1976), p.125.

76. Edward Coke, "The Preface to the Reader", 1 Co.Rep. 1 at xxvii (being the preface to the first of a collection of reports published between 1600 and 1616).

77. Cf. Samuel, *op. cit. supra* n.51, at p.146.

it is derived from the localised and the heterogeneous at least as much as it is from a rationalised body of normative propositions. For the common law lawyer, any construction of an ordered account of the law firmly rests on the disorder of fragmented and dispersed facts. In the words of Lord Diplock:⁷⁸

Such propositions of law as members of the court find it necessary to state and previous authorities to which they find it convenient to refer in order to justify the disposition of the actual proceedings before them will be tailored to the facts of the particular case. Accordingly propositions of law may well be stated in terms either more general or more specific than would have been used if he who gave the judgment had had in mind somewhat different facts.

In the civil law tradition, on the contrary, the aim is rapidly to eliminate any trace of the circumstances and to establish an idea or a concept. Accordingly, the facts are immediately inscribed within a pre-existing theoretical order where they soon vanish. It is that order itself—and certainly not the facts—which is regarded as the fount of legal knowledge; the emphasis is on universals. The contrast can be introduced thus: where, as in Continental legal systems, a propositional logic prevails, the question put by the courts (and by the interpretive community at large) is: “*Quid juris?*”; however, where, as in English law, a situational logic governs, the relevant question to ask is: “*Quid facti?*” In this way the sources of credibility are seen to differ in the two legal traditions. While the *Cour de cassation* devotes but a few lines to facts and while the *Tatbestand* of a German decision also tends to be rather short, an English court will, through its different judges, who may each enter their own statement of facts, continue for pages. The aim is a description of facts that is as thorough as possible. The importance of facts in the decision-making process is confirmed by the insistence on certain facts which may differ from one judge to another. Indeed, the statement of facts plays a rhetorical function for it is made in the light of the judgment rendered and seeks to make this judgment persuasive. Two of the different strategies used by the courts in search of emergent factual patterns involve “paint[ing] a picture from the accumulation of detail”—the point being to focus on the overall effect rather than on individual details—and producing a play, that is, judicially re-enacting, by extrapolation, a factual situation.⁷⁹ The empirical approach privileged by the common law inevitably favours an idiosyncratic frame of thinking focusing on experience, casuistry and description, which reflects itself into, and conditions, legal education (a point which is

78. *Roberts Petroleum Ltd v. Bernard Kenny Ltd*, *supra* n.57, at p.201.

79. See Samuel, *op. cit. supra* n.51, at pp.147–151 referring to *Hall v. Lorimer* [1992] 1 W.L.R. 939, 944 (Mummery J) and *Re Rowland* [1963] Ch. 1, 10–11 (Lord Denning MR), respectively.

also true of subjects that are organised largely by reference to legislation). The English lawyer is taught to remember factual situations, for: "Every decision must be read in light of the facts on which it is based."⁸⁰ While Lord Goff acknowledges that the focus on facts may lead to the judicial vision being "fragmented", he nonetheless concludes that "the factual influence is almost wholly beneficial".⁸¹

E. The Meaning of Rights

As Samuel observes, "in England the law is not seen as a body of well-organised rights carefully classified so as to reflect an order that was once thought to be natural".⁸² This is not to say that English courts do not make use of the language of "rights". They do. However, their use of the term is popular.⁸³ It does not reveal any rational adherence to a legal philosophy that would locate in the legal subject a legally authoritative form of sovereignty so that he would be invested with the power to frame a legal claim in the language of "individual prerogatives".⁸⁴ The implications are as follows:⁸⁵

the litigant in the English legal system . . . can certainly assert that [he] ha[s] in such or such a situation an action against some public or private body—and [he] can probably assert that [he] ha[s] a "legitimate interest" or "expectation". What [he] cannot claim is a right to the actual substance, or object, of the action itself—[he] cannot claim a right, as a citizen, to succeed.

Liability, therefore, depends on establishing a cause of action.⁸⁶ The notion of "cause of action", which was again canvassed in *Letang v. Cooper*,⁸⁷ is roughly captured by this idea: the assemblage of those facts that are necessary for supporting a claim in a court of law. Thus, one has no "rights" unless one is protected by a cause of action. The courts continue to emphasise this point: "In the pragmatic way in which English law has developed, a man's legal rights are in fact those which are protected by a cause of action . . . in the ordinary case to establish a legal or equitable right you have to show that all the necessary elements of the cause of action are either present or threatened."⁸⁸ Accordingly, a mother cannot claim dam-

80. *Masterson v. Holden* [1986] 3 All E.R. 39, 43 (Glidewell LJ).

81. Robert Goff, "The Search for Principle" (1983) 59 Proc. British Academy 169, 183.

82. Samuel, *op. cit. supra* n.51, at p.192.

83. F. H. Lawson, " 'Das subjektive Recht' in the English Law of Torts", in his *Selected Essays*, Vol.1: *Many Laws* (1977), p.180.

84. Jacques Ghestin and Gilles Goubeaux, *Traité de droit civil: Introduction générale* (3rd edn, 1990), No.163, p.122 ("prérogatives individuelles").

85. Geoffrey Samuel " 'Le droit subjectif' and English Law" (1987) Camb.L.J. 264, 286.

86. *Durham v. Spence* (1870) L.R. 6 Ex. 46, 48 (Pigott B).

87. [1965] 1 Q.B. 232, 242–243 (Diplock LJ).

88. *Kingdom of Spain v. Christie, Manson & Woods Ltd* [1986] 1 W.L.R. 1120, 1129 (Browne-Wilkinson V.C.).

ages for invasion of her parental “right” unless she shows that the facts disclose a cause of action.⁸⁹ In other words, the point of departure for any legal action is the existence of a wrong, not that of a right.⁹⁰ It must be said that the absence of a culture of rights suffuses the whole of English legal life.⁹¹ There is, for instance, no *effective* written Bill or Charter of Rights in England.⁹² For Colin Turpin, “the ‘rights’ of the citizen are often no more than the residue of liberty which is beyond the limits of lawfully exercised public power”.⁹³ Against that background, one understands better how it is nowadays asserted that the tradition of English jurisprudence “cannot say anything convincing about . . . rights”.⁹⁴ Specifically, it is “inconceivable that sweeping changes in civil rights could *originate* in the British courts”⁹⁵—nor is this situation regretted by orthodox constitutional doctrine. Mainstream constitutionalists would no doubt still agree with Dicey, who took the view that English law’s apparatus was “for practical purposes worth a hundred constitutional articles guaranteeing individual liberty”.⁹⁶ In the civil law tradition, on the contrary, the object of legal science is the right, in particular the subjective right. Referring to subjective rights as “one of the creations of a reflective legal conscience”,⁹⁷ civilian authors note “the daily use of the term and the role it plays in most reasonings”.⁹⁸ The focus of the national civil codes is indeed on rights with the law of actions having been confined to “technical” (and, in the legal community’s mind, secondary) codes of procedure.

F. *The Presence of the Past*

The common law does not have a beginning: it dates from time immemorial. In Coke’s words, “the grounds of our common laws at this day were beyond the memory or register of any beginning”.⁹⁹ The explanation lies

89. *F. v. Wirral Metropolitan Borough Council* [1991] 2 W.L.R. 1132 (CA).

90. Rudden, *op. cit. supra* n.63, at p.123, refers to the “futility of relying at common law on a right rather than a wrong”.

91. See P. S. Atiyah, *Pragmatism and Theory in English Law* (1987), pp.18–26.

92. See Alan Ryan, “The British, the Americans, and Rights”, in Michael J. Lacey and Knud Haakonssen (Eds), *A Culture of Rights* (1991), p.366. In the course of his argument, this author explains the obsolescence of the Declaration of Rights of 1689 and the limited impact of the European Convention on Human Rights of 1951. See also, on the latter point, Ronald Dworkin, *A Bill of Rights for Britain* (1990), *passim*.

93. Colin Turpin, *British Government and the Constitution* (2nd edn, 1990), p.59.

94. Ryan, *op. cit. supra* n.92, at p.391.

95. *Idem*, p.370 (emphasis original).

96. A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, 1959), p.199.

97. Jean-Louis Souriou, *Introduction au droit* (1987), No.27, p.34 (“l’une des créations de la conscience juridique réfléchie”).

98. Ghestin and Goubeaux, *loc. cit. supra* n.84 (“l’usage quotidien du terme [et] le rôle qu’il joue dans la plupart des raisonnements”). See generally e.g. Jean Dabin, *Le droit subjectif* (1952).

99. Edward Coke, “Deo, Patriae, Tibi”, 8 Co.Rep. IV at iv (being the preface to the eighth

in the fact that “the common law of England had been time out of mind before the conquest, and was not altered or changed by the Conqueror”.¹⁰⁰ One is unwittingly reminded of Montesquieu’s epigraph in his *De l’esprit des lois*: “Prolem sine matrem creatam”!¹⁰¹ The common law is there: it was never “made”, it has only to be “found”.¹⁰² This task inures to the judge. In *R. v. Almer*, for instance, the judge addresses the notion of “contempt of court” in these words: “I have examined very carefully to see if I could find out any vestiges or traces of its introduction, but can find none. It is as ancient as any other part of the common law, there is no priority or posteriority to be discovered about it.”¹⁰³ The well-known doctrine of precedent thus becomes clearer: a precedent is not only the antecedent of a judicial decision but also the consequence of a political decision to make custom the pre-eminent value in a given legal culture. Two important implications follow from this position.

First, the common law is “a tacit knowledge”.¹⁰⁴ It is posited as “established and unchallengeable”.¹⁰⁵ The common law is, “given and indisputable”, “first and unquestionable”.¹⁰⁶ To assert that the common law rests on a body of unexpressed presuppositions which the judge is competent to discover—to say, therefore, that the common law is enthymemic¹⁰⁷—is effectively to argue the case for the common law as an elitist or initiate knowledge. The position is that the practice developed by the community pre-exists the dispute at hand and that the judge must go in quest of that practice so as to relate it to the facts of the case. Thus, the judge does not “decide” for the community. Rather, he remembers the community to itself. In this sense, common law adjudication is the pre-eminent act of instantiation. As they watch the judge on his intellectual peregrinations, the people remain on the outside; they are witnessing a phenomenon from which they are excluded, specifically on account of the judicial techniques and opacity of the language used. Peter Goodrich observes that, in effect,

of a collection of reports published between 1600 and 1616). See also e.g. William Blackstone, *Commentaries on the Laws of England* Vol.I (1979), p.67: “in our law the goodness of a custom depends upon it’s having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it it’s weight and authority; and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this kingdom” (reprint from the 1765 edn).

100. Edward Coke, “To the Reader”, 3 Co.Rep. II at xii (being the preface to the third *idem*).

101. Montesquieu, *De l’esprit des lois*, in *Oeuvres complètes* (Roger Caillois (Ed.) 1951), Vol.II, p.227 (“born without a mother”) (reprint from the 1748 edn).

102. Kelley, *op. cit. supra* n.40, at p.167.

103. *R. v. Almon* [1765] Wilm. 243, 254; 97 E.R. 94, 99 (*per* Wilmot J.).

104. Peter Goodrich, *Languages of Law* (1990), p.215.

105. *Idem*, p.229.

106. *Idem*, p.217.

107. For the “enthymeme” as a rhetorical device, see Peter Goodrich, *Reading the Law* (1986), pp.190–191.

the common law is not at all common; that it is, rather, a law of exclusion.¹⁰⁸ This point can be made in another way. While judicial decisions appear to rest on common sense and purport to reflect (and foster) a sense of community by providing an “abridgement of intimations relating to a concrete manner of living”,¹⁰⁹ by bringing to light the practice of the community derived from an examination of the collective wisdom collected over time (through judicial decisions), it is clear that the only “community” on behalf of which judges could ever legitimately claim to speak in a representative capacity is an unrepresentative body of professional elites. The contemporary clash between a pluralist society and a homogeneous judicial class has exacerbated the problem. By contrast, the civil law, even though initially imposed on the people by legislative fiat, purports to be made readily accessible to the uninitiated as the commodification of the civil code well illustrates (whether the transmission of information is effective raises a different matter). A civil code is more than a “book of rights” and acts as a teaching manual which explains why it can readily be bought at Italian railway stations or at the local bookshop in a Swiss village.

Second, the promotion of common law-as-custom has nurtured a static approach to English law.¹¹⁰ Contrary, say, to Roman law which, being written, could be identified with a definite past, something which might imply the need to build a present (such as happened with the nineteenth-century codes), custom was always as much of the past as of the present: there never was, accordingly, any imperative need to invent a present. Indeed, as early as 1342 it was said by English judges: “We will not and can not change the ancient usages.”¹¹¹ As a result, the English common law is today as it always was. In the words of Hale: “tho’ those particular Variations and Accessions have happened in the Laws, yet they being only partial and successive, we may with just Reason say, They are the same English Laws now, that they were 600 Years since in the general”.¹¹² The common law position was succinctly stated by Coke: “we are but of yesterday”.¹¹³ This cognitive framework accounts for the outcome in a case like *In re Harrison’s Share Under a Settlement*, where it was held that the lower court decision had been based on the erroneous supposition that an ear-

108. Goodrich, *op. cit. supra* n.104, at p.226.

109. Murphy, *op. cit. supra* n.72, at p.202.

110. See J. G. A. Pocock, *The Ancient Constitution and the Feudal Law* (1987), p.19.

111. *The Prior of Bermondsey v. The Parson of Fivehead* (1342) Y.B. 16 Edw. III, 1, 86, 90 (No.25). The law-French version reads: “Nous ne voloms ne ne pooms changer les auncienes usages” (at 91). An interesting point of etymology arises from a note which indicates that one of the five extant manuscripts on which the report is based records “chalanger” as the second verb of the sentence.

112. Matthew Hale, *The History of the Common Law of England* (Charles M. Gray (Ed.) 1971), p.40 (reprint from the 1713 edn).

113. *Calvin’s Case* (1608) 7 Co.Rep., IV, 1a, 3b; 77 E.R. 377, 381 (*per* Lord Coke).

lier case had altered the law whereas that case, so said the court, had merely declared the law as it always had been.¹¹⁴

Anterior decisions, far from appearing quixotic, play a central and cogent role in defining the legal sensibility of the interpretive community in England which never feels the need to take its distance from the past, which always experiences the past as contemporary. The common law “makes everything it values simultaneous” and “constitutes itself as historical at the same time”.¹¹⁵ English law can be contrasted with the civil law stance where everything turns on the authority of texts, themselves seen as depending on reason. The civil law has always insisted “upon the concepts of will, command and the legislator, and tended therefore to encourage the already existing idea that each institution had originated at a particular time in the will of a particular individual who had established it in substantially its present form”.¹¹⁶ The common law and civilian perspectives on historical time are thus seen to be incommensurable.

V. IRREDUCIBLE DIFFERENCES

MY presentation is assuredly too schematic to do justice to the richness of the available materials and the complexity of the stories they tell. But it should show the reader how a pursuit of the trajectory of epistemological explication can contribute to a better understanding of the culture of English common law and to a deeper appreciation of its irreducible difference from Continental legal cultures.¹¹⁷ It is always dangerous to try to link the various strands of an argument to a common cause, but it seems that the six points that I have made, in the way they help constitute the identity of the common law contrapuntally to that of the civil law, can be related to one crucial difference of historico-political character between the two epistemological worlds. This differentiation was aptly described by Kahn-Freund. In all Continental countries there is to be found the notion that the government has the inherent power to govern. In England, however, the executive cannot justify any course of action unless it can rely on the conferment of a power by the legislature. Meanwhile, English law knows of the inherent power of the judiciary to adjudicate—a notion which civil law systems reject. As Kahn-Freund notes: “That which is true of administrative action under the common law—that it must be based on a statutory grant of power—is true of judicial action under the ‘civil law’ systems.”¹¹⁸ It may help to represent the position graphically, as in Figure 1.

114. *In re Harrison's Share Under a Settlement* [1955] Ch. 260, 283 (Roxburgh J).

115. Gadamer, *op. cit. supra* n.37, at p.86.

116. Pocock, *op. cit. supra* n.110, at p.18.

117. *Contra*: Reinhard Zimmermann, “Der europäische Charakter des englischen Rechts” (1993) 1 *Zeitschrift für Europäisches Privatrecht* 4. The argument is summarised in his *op. cit. supra* n.6, at pp.75–80. See also Ibbetson and Lewis, *op. cit. supra* n.40, at pp.10–11.

118. Otto Kahn-Freund, “Common Law and Civil Law—Imaginary and Real Obstacles to Assimilation”, in Cappelletti, *op. cit. supra* n.40, at p.160.

Figure 1

	Administrative action	Judicial action
Common law	Statutory grant of power	Inherent power
Civil law	Inherent power	Statutory grant of power

Whether one is referring to legal reasoning, systematisation, rules, facts, rights or the importance of the past, the different cognitive structures of the common law and civil law worlds—which are also different governmentalities or “govern-*mentalités*”¹¹⁹—can be explained in terms of the distinction introduced by Kahn-Freund (as, indeed, can a range of manifestations arising from these cognitive structures such as the measure of institutionalisation of law in universities). Specifically, it is because they hold an inherent power to adjudicate that common law courts reason inductively, thus ascribing much importance to facts and past decisions. In this, they differ from the civil law courts which, because their power of adjudication is derivative, must operate within a predetermined, legislated, conceptualised system. Asked to intervene within rule-bound and right-conferring parameters, civilian judges naturally engage in an act of replication and similarly adjudicate in terms of rules and rights.

Against this background, I wish to argue the further point that the common law and the civil law cannot ever reach perfect understanding between each other. The most obvious proposition in support of this contention appears to belong to the ontological realm: clearly, one can never be an other so that understanding of others is necessarily mediated and, therefore, inevitably inadequate. Second-order knowledge can never be first-order knowledge. “Anyone, lawyer, professor of law, law student, may, like an actor, imitate a judge, but he will not be a judge, or know what it is really like to be a judge unless he has been one, and that will have been in the past. He will know himself to be an imitation judge when he speaks and there will thus be a constant difficulty in meaning what he says.”¹²⁰ The situation is similar as regards the act of comparison. Greimas postulates the situation of a foreigner who learns to speak Italian as an adult. The fact that the foreign speaker receives compliments on the quality of his spoken Italian should not lead him to forget the mental restrictions that accompany them: the foreigner speaks Italian well *precisely because he is a*

119. See, for the use of “gouvernementalité”, Daniel Defert and François Ewald (Eds), *Michel Foucault: Dits et écrits 1954–1988*, Vol.III: 1976–1979 (1994), p.655.

120. Vining, *op. cit. supra* n.73, at pp.54–55.

foreigner.¹²¹ There is, therefore, no way in which the comparatist can aspire to becoming a native nor should he want to. This point is beautifully made by the French linguist and ethnographer, Georges Dumézil: “If I were to visit the cannibals, I would try to know as much as possible about them, but I would stay away from the cauldron.”¹²² In other words, even if the merger of the-comparatist-as-observer with an-other-as-observed were not a futile attempt, it should be resisted for then the comparatist would no longer be in a dialogical situation; he would not have the possibility to translate the others’ experience into the language of his own culture: “an analysis of a tribe couched entirely in the concepts and language of the tribe would be both incomprehensible and unhelpful to all non-members of the tribe”.¹²³ A further point can be made regarding the limits of understanding between the two legal traditions. There can be no conversation among people unless they are bound by shared presuppositions, that is, common assumptions (something which, of course, has little to do with the truth or falsity of their beliefs).¹²⁴ Prior to understanding, there must exist (cognitive) commensurability. In the absence of shared epistemological premises, the common law and civil law worlds cannot, therefore, engage in an exchange that would lead one to an understanding of the other, if only to a virtual understanding.

At least two significant implications follow from the constraints on reciprocal understanding between the two legal traditions. A first consequence is the failure of legal communities within the common law and civil law traditions to appreciate how fundamentally different these traditions are from each other. In the words of Alasdair MacIntyre: “A precondition of the adherents of two different traditions understanding those traditions as rival and competing is of course that in some significant measure they understand each other.”¹²⁵ Without this understanding, the awareness of difference is dimmed. Close observation and thorough study remain inadequate without a receptivity to “otherness”.¹²⁶ A second consequence is that an English lawyer can never step into the shoes of a German or Dutch or Spanish lawyer: all he can do is *imaginatively* step into his shoes. This process itself assumes an ability to express *empathic imagination*, a notion which Richard Sennett defines in this way: “it is oneself imagined in the body or circumstances of another”.¹²⁷ Indeed, such empathy—which, as

121. Greimas, *op. cit. supra* n.28, at p.74.

122. Didier Eribon, *Faut-il brûler Dumézil?* (1992), p.291 (“Si j’allais chez les anthropophages, je tâcherais d’en savoir le plus possible sur eux, mais je resterais loin de la marmite”).

123. Bruno Latour and Steve Woolgar, *Laboratory Life: The Construction of Scientific Facts* (2nd edn, 1986), pp.38–39. See also Mondher Kilani, *L’invention de l’autre* (1994), pp.40–41.

124. Gadamer, *loc. cit. supra* n.37. See also Roy Wagner, *The Invention of Culture* (2nd edn, 1981), pp.39–40.

125. Alasdair MacIntyre, *Whose Justice? Which Rationality?* (1988), p.370.

126. Gadamer, *op. cit. supra* n.37, at p.17.

127. Richard Sennett, *Authority* (1980), p.143.

Sennett underlines, means a greater involvement than “sympathy” to the extent that it pursues appreciation rather than merely shows concern¹²⁸—appears as a necessary ingredient of a meaningful, critical comparison: “The outsider can become a *social* critic only if he manages to get himself inside, enters imaginatively into local practices and arrangements.”¹²⁹

In my attempt to discern some of the complications to which the act of comparison gives rise, I have implicitly asked the question whether one can understand the experience of others hermeneutically or whether a legal culture is the expression of an essentialism. Of course, it can be argued that “the character of each people can only be familiar to a native”.¹³⁰ Pierre Legendre makes the point, for example, that “an American, even though very learned, cannot enter inside the institutional discourse in use in Continental Europe without running the risk of all experts; this discourse remains as closed to him as would have been, to colonial ears, the Negro discourse”.¹³¹ And Feyerabend can aptly write as follows:¹³²

Not everybody lives in the same world. The events that surround a forest ranger differ from the events that surround a city dweller lost in a wood. They are different events, not just different appearances of the same events. The differences become evident when we move to an alien culture or a distant historical period . . . Bafflement increases when the objects encountered by the explorers are not just unfamiliar, but inaccessible to their ways of thinking . . . The worlds in which cultures unfold not only contain different events, they also contain them in different ways.

Yet it is important to stress that I am not advocating, through my insistence on a heightened sense of differentiation in comparative legal studies, an essentialisation of, say, English law as “basically, irrecusably, and congenitally ‘Other’ ”.¹³³ Nor do I wish to “demote the different experience of others to a lesser status”.¹³⁴

Essentialism is, in any event, logically flawed as has been convincingly shown with particular respect to feminism. In this context a binary logic is created pursuant to which men are described as solipsistic, aggressive and excessively rational. Fertility, as a celebration of women’s difference,

128. *Ibid.*

129. Michael Walzer, *Interpretation and Social Criticism* (1987), p.39 (emphasis original). See also Ronald Dworkin, *Law’s Empire* (1986), p.14.

130. E. Lermnier, *Philosophie du droit* (2nd edn, 1835), p.290 (“Le caractère de chaque peuple ne saurait être familier qu’à un indigène”).

131. Pierre Legendre, *Jour du pouvoir: Traité de la bureaucratie patriote* (1976), p.58 (“un Américain, même très savant, ne saurait entrer dans le discours des institutions en usage sur le continent européen sans courir le risque de tous les experts; ce discours lui demeure aussi fermé que pouvait l’être, aux oreilles coloniales, le discours nègre”).

132. Paul Feyerabend, *Farewell to Reason* (1987), pp.104–105.

133. Edward W. Said, *Culture and Imperialism* (1993), p.261.

134. *Idem.*, p.32.

then praises women who, by virtue of their contrasting sexuality, are other-oriented, empathetic and multi-imaginative. Rather than questioning the terms of an argument which presents woman as man's opposite, femininity maintains them. Although it reverses the values assigned to each side of the polarity, it still leaves man as the determining referent. In other words, rather than departing from the opposition male/female, femininity participates in it. Rather than focus on who women are and how they have come to be who they are, femininity remains trapped in a male-centred logic.¹³⁵ I am not in search of uniquely original essences, either to restore them or to set them in a place of unimpeachable honour. What I do think is that there is what Edward Said calls "an irreducible subjective core" to the English legal experience.¹³⁶ It is not that a civilian lawyer cannot understand the English legal experience (or that a man cannot understand womanhood). Rather, the point is that a civilian can never understand the English legal experience *like an English lawyer*. Understanding there can be, but a *different* understanding it will *have* to be. I am arguing that scholarship about law should so acknowledge through an apt comparative sensibility. Indeed, the comparatist finds himself in the position of being able to bring to bear an understanding on the legal culture under scrutiny that is original and that may even prove particularly insightful. This, for example, was Arendt's conviction: "In matters of theory and understanding, it is not uncommon for outsiders and spectators to gain a sharper and deeper insight into the actual meaning of what happens to go on before or around them than would be possible for the actual actors or participants, entirely absorbed as they must be in the events."¹³⁷ I am not truly concerned whether the insight is sharper or not. I am prepared to assume that, sometimes, it can be. But my point is that no matter how acute the insight he brings to bear on Italian law, the English lawyer will necessarily think differently from the Italian-lawyer-understanding-Italian-law, that he will of necessity *not* think as an Italian lawyer. The English lawyer will, therefore, never understand Italian law *on its own terms*, that is, in the way Italians do given the way it appears to them;¹³⁸ he will never transcend his acculturation.

135. This passage is a long—and close—paraphrase of Ann Rosalind Jones, "Writing the Body: Toward an Understanding of *l'écriture féminine*" (1981) 7 *Feminist Studies* 247, 255–256. Said refers to a similar argument by the writer, Wole Soyinka, as regards the concept of "négritude" in the context of the European–African opposition: *idem*, p.229.

136. Said, *idem*, p.31.

137. Hannah Arendt, unpublished address, 1975, cited in Elisabeth Young-Bruehl, *Hannah Arendt: For Love of the World* (1982), p.xi.

138. Italian law is itself but a representation concocted by Italian lawyers. See Pierre Legrand (1994) *Camb.L.J.* 607 (bk. rev. of Atias, *op. cit. supra* n.29).

VI. WHAT GLOBALISATION?

THE growth of a transnational organisation such as the European Community has provoked a regulated encounter between the common law and civil law traditions and made the boundaries between these legal traditions more porous. The pre-eminent question, however, is whether this phenomenon has also had a concomitant impact at the epistemological level. My argument is that it has not. The actualities of European Community law have not in any way changed the fact that "a lawyer brought up within a system of judge-made law has a legal outlook utterly different from one who has grown up within a codified system".¹³⁹ Common law lawyers and civilians continue to take a different view of what it is to have knowledge of the law, of what counts as legal knowledge. The positivities in terms of which the real is known, the images of the real that are formed have not coalesced: there continue to exist two fundamentally discrete understandings and representations of truth. In other words, there is to be found, in each of the two legal traditions represented within the European Community, an irreducible element of autochtony constraining the epistemological receptivity to globalisation.

Legal integration at the level of posited law does not help to dispel the lack of appreciation by common law lawyers of the notions of "system", "rule", or "right" as understood by civilians, nor does it serve to efface the lack of understanding by civilians of the importance of facts or the significance of the past at common law. Indeed, the epistemological chasm is irreducible. A common law lawyer, trained in England, in the context of a particular cognitive approach to systems, rules, facts, rights and the presence of the past, will simply never be able to appreciate a system, a rule, a fact, a right or the past as her Continental counterpart understands them. The reason is that "behind the characteristic doctrines and ideas and technique of the common-law lawyer there is a significant frame of mind".¹⁴⁰ The same, of course, could be said of the civil law world. I find it helpful to conceive of common law and civil law knowledge as constituting two discrepant (and entrenched) paradigmatic unities. The notion of "paradigm", though polysemic (even, as has been demonstrated,¹⁴¹ when used

139. Roderick Munday, "The Common Lawyer's Philosophy of Legislation" (1983) 14 *Rechtstheorie* 191.

140. Roscoe Pound, "What is the Common Law?", in *The Future of the Common Law* (1937), p.18.

141. Margaret Masterman, "The Nature of a Paradigm", in Imre Lakatos and Alan Musgrave (Eds), *Criticism and the Growth of Knowledge* (1970), p.59. Masterman claims that in Thomas S. Kuhn, *The Structure of Scientific Revolutions* (2nd edn, 1970) the author ascribed 21 different meanings to the word. In his reply to critics, Kuhn acknowledges the ambiguity of his usage: "Reflections on my Critics", in Lakatos and Musgrave, *idem*, pp.271-272.

by its progenitor), captures, *inter many alias*, the idea of a *Weltanschauung* in the sense of a body of beliefs, values, assumptions, practices and techniques largely common to the members of a given community. The point is not, of course, to argue that every individual from, say, the common law world operates within precisely the same cognitive framework. Yet it appears undeniable that, despite some flexibility, there exists “a system of cultural principles, a method of organizing and attributing meanings, a practice of cognitive mapping that is held, with little variability, by large numbers of people” within a specific legal tradition.¹⁴² This is why the civil law and common law worlds are not any closer than they have been since English law was last French. If anything, by linking the two legal worlds, the European Community has dramatised their cognitive disconnections and has made possible a new awareness of difference (or “otherness”).¹⁴³ Nor is the situation likely to change, as Coke discerned long ago: “For bringing of the common laws into a better method, I doubt much of the fruit of that labour.”¹⁴⁴

My argument should invite a reconsideration of the *grande idée* of a European legal unity enforced in the name of humanist rationality and grounded in the premise that legal homogeneity is the optimal basis for the European Community to prosper and that the two legal traditions prevailing in (Western) Europe are too intermingled, their histories too interdependent, for organisation into opposite entities. Articulate propositions in favour of a return to a so-called *jus commune* fail to address “the difficulties involved in achieving mutual understanding between [different groups of lawyers], given that each one views the others within the meanings constructed in its own language”.¹⁴⁵ They seem unaware that the problematisation of the comparative enterprise must imply a deep awareness of the epistemological framework and the broader cultural patterns within which legal systems operate. Pringsheim, in a well-known paper published in the *Cambridge Law Journal* in 1935, writing about English law, referred to “a taste for the particular, for the characteristic, for reality and reasonableness apart from all abstract

142. Jorge Ardití, “Geertz, Kuhn and the Idea of a Cultural Paradigm” (1994) 45 *Brit.J. Sociology* 597, 614.

143. Arguably, this situation offers an instance of a wider cultural phenomenon. The intensity of contact between cultural groups often has the paradoxical consequence that it stimulates cultural diversity by confirming group members in their own identity. See Geert Hofstede, *Cultures and Organizations* (1991), p.238; Michel de Certeau, *La culture au pluriel* (1974), pp.127–128.

144. Edward Coke, “To the Reader”, 4 *Co.Rep.* II at x (being the preface to the fourth of a collection of reports published between 1600 and 1616).

145. Bernard S. Jackson, “‘Legal Visions of the New Europe’: *Ius Gentium, Ius Commune, European Law*”, in Jackson and D. McGoldrick (Eds), *Legal Visions of the New Europe* (1993), p.34.

ideas”;¹⁴⁶ he stated that these features were accountable by “the fundamental character of a nation”, a question of “spirit”, “which will always remain a secret”.¹⁴⁷ Clearly, Pringsheim had been inspired by the German historical school and the Hegelian concept of the *Volksgeist*. Such views have the important merit of moving the debate away from rules and concepts, beyond posited law and of bringing together law, society and culture.¹⁴⁸ Indeed, Montesquieu had already formulated the defining mission of the comparatist: “it is not the body of the laws that I am looking for, but their soul”.¹⁴⁹ If, acting as “the connoisseu[r] of diversity” he must be and eschewing any role as “the guardia[n] of universality”,¹⁵⁰ the comparatist similarly focuses on the “soul” of the laws, as I have tried to do, he must be led to the conclusion that there exist in Europe irreducibly distinctive modes of legal perception and thinking, that the ambition of a European *concordantia* is (and must be) a chimera, that European legal systems are not converging.

146. Fritz Pringsheim, “The Inner Relationship Between English and Roman Law” (1935) *Camb.L.J.* 347, 348.

147. *Idem*, p.365.

148. See H. F. Jolowicz, *Lectures on Jurisprudence* (J. A. Jolowicz (Ed.) 1963), pp.127–129.

149. Montesquieu, *op. cit. supra* n.101 (*sub* “Dossier de l’Esprit des Lois”), at p.1025 (“ce n’est point le corps des lois que je cherche, mais leur âme”). These words are taken from a folder which Montesquieu had entitled “Choses qui n’ont pu entrer dans la *Composition des Lois*” (“Materials that could not fit into the writing of *The Spirit of Laws*”).

150. Richard Rorty, *Objectivity, Relativism, and Truth* (1991), p.206.