

The Rise of Comparative Law: a Challenge for Legal Education in Europe



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The Rise of Comparative Law: a Challenge for Legal Education in Europe

Bénédicte Fauvarque-Cosson

Ladies and Gentlemen,

The 20th century witnessed the rise,¹ the decline, and the renaissance of comparative law. At the beginning of the twenty-first century, the renaissance of comparative law seems to be well on its way. The various factors which had caused its decline, in particular this very positivistic, legicentric and parochial method of law teaching at universities, are now giving way. The development of European private law, on various levels, has injected new energy into legal studies. All this has created a renewed interest in comparative law, not only at universities but also in modern practice: legislators seek inspiration from foreign or international models; judges and arbitrators use comparative law as a device to justify their decision, or – which is even more remarkable – to reach a decision.

Due to the internationalisation and Europeanisation of life and law, legal insularity is no longer possible. In this context, it is no surprise that comparative law is increasingly praised as an effective way to lead out of national isolation. This comes in sharp contrast with the way the discipline was considered, at least in my country, during the whole of the twentieth century: a demanding hobby for the most passionate, a mere means of becoming more knowledgeable, a very academic subject, relegated to the modest status of a collateral discipline, together with the history or sociology of law. The acknowledgment of the new international dimension of comparative law will greatly contribute to changing this state of mind, which, in spite of being in decline, is still predominant, at least in some countries. For indeed, comparative law is nothing more than the application of the comparative method, and there is no reason to restrict the use of this method to national legal systems (leading to “horizontal comparison”). It can perfectly well be used to compare internal rules with international, European or other transnational sources of law (“vertical comparison”), or indeed to compare various supranational rules which apply in the same field of the law.² However, this new international dimension of comparative law has not yet been acknowledged everywhere and comparative law is still too often described as the study of foreign sources of law. If the “internists” were conscious of this major change, they would necessarily admit that they also are “comparatists”. Take the example of sales law: in France, it is governed both by internal rules of the *Code civil*, European rules which have been inserted in the *Code de la consommation* and the Vienna Convention for International Sales.³

The stark contrast between the still rather modest position of comparative law as an academic discipline and the ever-increasing need for comparison, both in theory and practice, may stem from the fact that in many universities “comparative law” takes the form of a course describing the legal systems of the world. Indeed, post World War II, a great deal of academic energy was spent on the theory of legal families. Many scholars attempted to divide the legal world into various “great systems”. In 1964, René David published his book *Les grands systèmes de droit contemporains*. The work was translated into several major

languages and became perhaps the most widely known comparative law book of its time.⁴ In spite of the criticism they have encountered, David's or other classifications have long been used, and still are. It is, however, one thing to present the various traditions of the world, but quite another to elaborate accurate and useful tools for comparison in a world where legal traditions have been profoundly affected by the internationalisation of the law.

In order to bring comparative law to the forefront of the curriculum, comparative law scholarship must be profoundly innovative. There is a real need for new academic tools. Such need is not fulfilled by books on "comparative law" or on "great systems", but by books which deal with a specific subject (contract law, tort law, family law...) in a comparative way. Such books should not give priority to one legal system over the others, but rather be "non-national" in nature.

The *Ius Commune Casebook* series constitutes the first and probably foremost example of the radical change which has occurred. The Casebooks do not merely uncover the law in action. They also show how law could evolve as a consequence of lessons drawn from comparison between national legal systems or as might follow from the interplay between national and supranational law.

This contribution will first describe the rise of comparative law in legal scholarship (1) and then reflect upon the consequences of this rise as regards the comparative law tools which are required for legal education: there lies the real challenge for legal education in Europe (2).

1 The place of comparative law in legal scholarship

From a mere collateral position, comparative law has now acquired a core position.

(a) Comparative law, a collateral position

In order to give an overall picture of the modest status of comparative law as a legal discipline in France and elsewhere (but maybe to a lesser extent, especially in Belgium and the Netherlands), I will refer to the works of Jean Carbonnier.

Jean Carbonnier was one of the greatest private lawyers of the twentieth century, a leading academic, and a great legislator. Yet Carbonnier advocated new non-positivistic approaches. He thus became the father of French legal sociology and in his works he stressed the importance of comparative law.⁵ Carbonnier's scholarship constantly refers to foreign legal systems for he was particularly open-minded and intimately familiar with many foreign languages, cultures, and legal systems. For all these reasons, Jean Carbonnier could appropriately be seen as a great comparatist.⁶ However, in spite of his extensive knowledge of foreign cultures and legal systems, and despite his interest in compari-

son, Carbonnier never tried to place comparative law as a discipline at the forefront of French academia. In his *Introduction au droit*, he classified comparative law as a collateral science, as opposed to the truly legal sciences (*sciences proprement juridiques*). More precisely, Carbonnier considered comparative law (together with legal history) to be a “classical collateral science”, as opposed to the “new collateral sciences” (sociology, ethnology, psychology, linguistics, law and economics). He nonetheless believed that comparative perspectives should be integrated into all legal disciplines, provided that proper comparative methods were used. Indeed, Carbonnier had a clear sense of pluralism in law, reciprocal influences, and the necessity of comparison.⁷

Carbonnier profoundly influenced French scholarship throughout the second half of the 20th century. His views represent the leading doctrine in many areas of the law. This is the reason why his views on comparative law deserve to be revisited.

Carbonnier defined comparative law as “the application of the comparative method to the various systems of law as they exist in our time”.⁸ While he praised comparison as a tool for understanding technical concepts, he expressed some reluctance as to the use of comparative law in the legislative process and was very preoccupied by the fact that important methodological aspects had been disregarded by French scholars.⁹

Although he believed that the primary function of comparative law was to be an instrument for legislative reform, at the same time, he was suspicious and particularly reluctant to adopt foreign institutions that might interfere with, or disrupt, the internal coherence of the French legal system. Carbonnier was concerned about possible “distortions” (*déviances*) which may be caused by the adoption of solutions derived from the study of comparative law, especially since such solutions may sometimes have major effects which cannot be anticipated in an adequate and encompassing manner. In some of his famous articles, he denounced the “myth” of the foreign legislator and criticised the practice that consists in distorting foreign examples in order to make them more persuasive for the French legislator.¹⁰

Carbonnier’s concern was also sociological and cultural. He believed that comparative law could contribute to legal sociology and *vice versa*, but he also observed that recourse to foreign institutions often entailed difficult attempts to transplant foreign laws.

He was also very critical of the phenomenon of internationalisation and Europeanisation of French law. He strongly denounced its impact on French internal law and stigmatised the reception of a *droit cosmopolite*¹¹ which gives rise to a form of *acculturation juridique*.¹² In particular, Carbonnier rejected Edouard Lambert’s idea of using comparative law to identify a common law or *droit commun législatif* capable of filling the lacunae of French internal law.¹³ According to Carbonnier, not only there are no such general common law principles, but comparative law is by no means a transnational legal order.

Carbonnier's criticism prompted by his fear for "distortions" which may be brought about by comparative law appears rather representative of the opinion of many. At least in France, French lawyers did not feel the need to engage in the process of comparison before reforming their laws. This very parochial attitude may well be due to historical factors: the French, which have long exported their legal system, are not accustomed to importing legal ideas from other countries.¹⁴ But there is yet another explanation, linked to the fact that, as aforementioned, comparative law was long viewed as a purely academic discipline, orientated towards knowledge and science, not action. This approach is well reflected by the title of one of the leading work of the famous Italian comparatist, Rodolfo Sacco: *La comparaison juridique au service de la connaissance du droit* – Comparison, in order to know one's own system better... Regarded as purely scientific and never admitted as useful, the discipline was deemed to remain the privilege of a happy few, especially since other comparatists advocated a very demanding and scrupulous method of comparison, and this could well be deterring.¹⁵

There is a sharp contrast between the minor importance of comparison in law and the constant role of comparison in life and in other disciplines. For indeed, according to René Descartes, it is only through comparison that one knows exactly the truth:

*"Dans tout raisonnement ce n'est que par comparaison que nous connaissons exactement la vérité."*¹⁶

As soon as we, as human beings, become aware of the presence of the other, we start comparing (and getting envious...). In the field of human sciences, comparison is so widespread that it bears a specific name: "comparatism".¹⁷

Unfortunately, it took some time to acknowledge that comparison could serve other purposes than purely scientific ones and it hence lasted long before various methods of comparison developed.¹⁸ By the end of the twentieth century, more practical approaches had finally emerged. Some tribute must be paid here to two leading comparative law books. In *Les grands systèmes de droit contemporains*, René David and Camille Jauffret-Spinozi advocated practical applications of comparative law and praised its legislative function.¹⁹ In their world-famous *Introduction to Comparative law*, Konrad Zweigert and Hein Kötz were the first to take the view that "[t]he primary aim of comparative law, as of all sciences, is knowledge" but they then recognise many other functions for comparative law: an aid to the legislator, a tool for construction, a component of the curriculum at universities, a contribution to the systematic unification of the law, the development of a private law common to the whole of Europe...²⁰

It seems to me that comparatists have long been torn between their high scientific aspirations which led them to view comparative law as a pure science, deprived of practical effects, on the one hand, and the realities of everyday life, where there is a constant need for comparison on the other. It took them some time to admit that they did not only have the right, but even the responsibility to

transform comparative law into a useful tool for students, lawyers and legislators. It took some time for comparative law to finally attain a core position.

(b) Comparative law, a core position

Comparative law helps in fighting against both positivism and dogmatism. It demonstrates the relative nature of national systems and contributes to a less formal approach to law. It shows both the possibility and also the limits of convergence among legal systems, especially between the civil and the common law worlds.

The construction of a European private law has boosted comparative law in France and provided it with a new form of legitimacy.²¹ The change was first felt in academic circles, then by judges, and finally among the practising bar.

In academic circles, there is a growing awareness that comparative law has become a basis for law-making at the European level. This is not only true for EC law but also for the elaboration of soft law. The emergence of European private law is being accompanied by the development of European legal scholarship. Even the much criticised “top-down approach”, which consists in drafting rules contributes to the rise of comparative law.²² It opens a new field of comparison between our national legal rules, the new European directives or regulations and soft law products. It gives rise to a growing awareness of the existence of a new European legal culture.²³ More generally speaking, the creation of a common European legal science is indispensable for the future development of the European Union. Indeed, it will enable European private law to develop within an established framework.

Comparatists must understand today’s challenges and come to grips with them. The ongoing unification of European private law has opened new prospects. The discipline has moved from merely foreign laws to transnational sources. Moreover, a major change of direction occurred, moving from a purely scientific conception to a more practical orientation.

Revitalised as it is, comparative law is now facing several new challenges. An international approach to comparative law must be found. At the same time practical applications must be explored. But there is more to it. While Europeanisation and globalisation have increased the interest in comparative law, its methodological foundations have not yet been solidified. In practice, researchers do actually more or less follow their own method, largely based upon their individual background and knowledge. A middle path must be found, for an excessive obsession with methodological questions may lead the internists to reject comparative studies as mere discourses in legal philosophy or, in other words, to fail to recognise it as true legal analysis. The solution may consist in the formulation, by comparatists, especially by those who are in charge of the comparative law courses at their universities, of basic maxims of comparison, similar to the current principles of textual interpretation that can serve as guidelines and help to prevent fundamental errors.

2 The need for new academic tools based on comparison

In many universities, the standing of comparative law is still rather modest. In France, students interested in pursuing comparative studies used to be discouraged from doing so if they wished to become academics. Hopefully, attitudes can evolve. All that is required is patience. During the nineteenth century, French law professors were proud to say that they did not teach French law but the Civil Code. During the twentieth century, they broadened their teaching and taught French law with equal emphasis on statutory rules and case law. Today, even if few French scholars describe themselves as fully-fledged comparatists, they all tend to think and work more and more comparatively.²⁴ While the study of national legislation still remains the core of French legal education, most academics genuinely believe that comparison should be included in their lectures and writings on French law. However, there is rarely enough time and space for this to happen in practice. This is one of the reasons why comparative law should not be “integrated” but maintained a distinct discipline, with more emphasis accorded to it in the curriculum.

Over the last few years, by claiming and accepting its role as a guide of the European legislator, legal scholarship has strengthened its standing, even so in countries where it was traditionally not considered as an authoritative, let alone a binding, source of law. More importantly, it acquired a standing which was no longer merely national but also transnational. However, the role of legal scholarship, strengthened by its new European identity, is not only, nor even principally, to guide the legislator. It is also, first and foremost, to favour a true European teaching of the law and thus to permit the emergence of a true European culture.

It seems to me that there is a sharp discrepancy between the development of an active collective European scholarship and the still very limited use of really European tools in the law faculties. In other words, so far European scholarship has been very much preoccupied and orientated towards legislative action on a European level (a). More efforts should be directed towards the diffusion and use of new teaching instruments specifically dedicated to students and based on a comparative approach (b).

(a) European scholarship: a guide for the European legislator

The most remarkable – and also the most criticised – recent phenomenon in European scholarship is the emergence of a genuine “collective legislative doctrine”,²⁵ produced by trans-border groups which can be nomadic (meeting in constantly changing venues) or sedentary (because of the fixed meeting place) but nonetheless truly European or international. Whilst some of these groups have developed “doctrinal codifications” close to the “Restatements” model, others are attempting, in ways that are undoubtedly closer to the traditional perception of the role of legal academics, to contribute to the elaboration

tion of European private law via the identification of common principles.²⁶ In areas where European law is expanding rapidly (such as private international law), some groups, such as the European Group on Private International Law, have come together in order to give their opinion on Commission projects (green papers, proposals for regulations).²⁷

In the last few years, the publication, by the Commission, of several green papers in various fields has enabled European jurists to influence the European legislator. Legal scholarship, in the widest sense, was invited to comment upon all the ideas expressed in these documents. For example the Green Paper on the Convention on the Law Applicable to Contractual Obligations,²⁸ followed by the publication on 15 December 2005 of the Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I),²⁹ the Green Paper on the Review of the Consumer Acquis, published on 8 February 2007,³⁰ which reveals the determination of the Commission to work towards the harmonisation of the law of contract, this time by reviewing European consumer law, and by drafting a “horizontal” instrument, which would apply across a wide field comprising points of general policy (such as the choice between minimal or total harmonisation), points which are specific to consumer law (like unfair contract terms) and also rules relating to specific consumer contracts (for instance to the contract of sale to consumers). Even though the latter Green Paper does only deal with consumer law, it is clear that the solutions which will be adopted will influence the development of the law of contract in general.³¹

The role played by “European legal scholarship”, acting as a guide for the legislator and more specifically for the European Commission, has increased and become more institutionalised since the Commission gave an official mandate to certain groups, essentially made up of academics, to develop a Common Frame of Reference (CFR) in the area of contract law. In carrying out its mission, European scholarship does not have the pretension of replacing the legislator. At its best, it will act as a guide, sometimes to be followed, sometimes also disregarded. This type of contribution is one of a series of initiatives which aim to contribute to a true common legal culture in Europe.³²

The work in progress shows, that there has been a change in the places where law is produced, and that this change is not merely tolerated but brought about and officialised by the European authorities. Never before the European authorities had encouraged the creation of such vast networks of researchers and experts, with the aim of reinforcing the participative democracy which, for a long time, has been so absent in the development of European Community law (which was criticised as being the work of technocrats). Nevertheless, the process is long, difficult and a source of frustrations and tensions.

A number of criticisms have been voiced. One of them argues that these academic groups have no political legitimacy. However, it must be recalled that these academics merely propose a model, to be submitted to the competent authorities for debate, in accordance with the democratic process. At all times

and in all places, legal scholarship has played an important part in assisting the legislator, whether at the national, European or international level, whether this happened spontaneously or was organised by the legislator itself. Another criticism argues that this “top-down approach” is inappropriate; however, it seems to me that all approaches, be they pragmatic or more conceptual, contribute, in various ways, to the development of a European legal culture.

Yet, it is true that so much of the attention is now being diverted towards the Common Frame of Reference that one tends to forget how multifarious and multifaceted the contribution of European scholarship is. To focus exclusively on the works which involve the elaboration of common texts, drawn up as models for legislators (both European and national) and for contracting parties, would regrettably minimise this contribution. Works which lead to black letter rules only constitute a specific aspect of the contribution of legal scholarship to European contract law. It is the tip of the iceberg. The essential part is elsewhere: it is encompassed in the double mission, intrinsically intertwined with our identity as academics, that is to say, the teaching of law and the dissemination of legal thinking.

It is our role to train European jurists and to build a common legal culture, independently from Community legislative projects. In order to achieve this, legal academics should provide more tools for a truly European teaching of law.

(b) European scholarship as the source of a truly European legal teaching

A number of collective works – groundbreaking at their time of publication – are now regularly republished. In this way “Towards a European Civil Code”, the first edition of which was published in 1994 and the third edition in 2004, brings together 44 contributions by famous academics, almost all of which are Europeans.³³

However, the most striking editorial phenomenon consists in the quasi-systematic publication of the works of all these European academic networks, which have “sprouted like mushrooms”.³⁴

Thus, several works were published by comparatists who take part in the Common Core Project and meet every summer, at the beginning of July, in Italy (in Trento or now in Turin).³⁵ Another example is the “Manifesto for Social Justice in European Contract Law”, published in several journals and in various languages by the Group for Social Justice in European Private Law. The Society of European Contract Law (Secola) also regularly publishes the records of its symposia.³⁶ The works of the Study Group are now published in a series entitled “Principles of European Law”³⁷ and so are the works of the Acquis Group.³⁸ At the beginning of 2008, new works of other groups contributing to the elaboration of the Common Frame of Reference will be published: the group made up of members of the *Association Henri Capitant* and the *Société de législation comparée* will publish three volumes in the collection on European and compara-

tive law of the *Société de législation comparée*. These books present the work of the Group on the three parts of the Common Frame of Reference: terminology, leading principles (*principes directeurs*), revised texts (based upon the Principles of European Contract Law). They will be published in French and English.

The same holds true for journals on “European law” (rather than Community law): they also have “sprouted like mushrooms”: the *Zeitschrift für Europäisches Privatrecht* (ZEuP) saw daylight in 1993, followed by others, by the European Review of Private Law and, in the field of contract law, by the European Review of Contract Law.³⁹ Together with these journals, new informal networks have developed, consisting of comparatists who populate the editorial committees.

The rapid development of European legal thinking led to a radical change: research in the field of law became less national and more European and transnational. It takes place collectively, across national and generational barriers, with teams of young researchers working together with experienced professors. This is one of the greatest challenges of our time, which jurists are now prepared to take up.⁴⁰ That change has already been acknowledged by those academics who are members of various European networks. However, they only constitute a minority, which expresses itself most frequently in English or German, and generally originates from Germany, Belgium and Northern Europe.

The strength and durability of this European legal thinking largely depends on the place it will be granted in universities. Surprising as it may seem, legal education may well still be the flaw of the whole process of Europeanisation. In many European countries – particularly in France and in Southern countries – legal education is still very nationalistic.

A purely national teaching of law should be left behind and “the European dimension of education”, referred to in article 149(2) EC, should be developed.⁴¹ In order to achieve this, scholars need to go back to the spirit and method of the *ius commune* – the scholarly law developed in Europe before the national codifications of the previous centuries and without any intervention from a public authority.⁴²

In this respect, the various objectives of the Bologna reforms should be recalled:

- reorganisation of law faculty programmes, with a less national and more European perspective;⁴³
- revision of the teaching methods in order to grant a wider place to less academic approaches, in countries where these had been neglected;
- development of pedagogical instruments which can be used in teaching programs at the master level in the whole of the EU.

The purpose here is not to discuss the opportunity of the Bologna reform, but to put emphasis on the necessity to take real steps to change the academic

programs. However, this can only be done if appropriate pedagogical instruments are published, also in other languages than German or English.

The publication and translation of pedagogical instruments which can be used throughout the EU is crucial to the development of the European dimension of education in legal sciences.^{44 45}

Three varieties of instruments are needed:

1) First of all, we need some books which bring together the main texts on European law as such (directives, regulations, conventions, doctrinal codifications...).⁴⁶ Although these are mere compilations of texts which can be found quite easily, they represent a precious tool and demonstrate the interest of academics for European or international legal sources, including those which are not binding. These could be classified as “primary materials” books.

However, such books are not the most important type of instrument. European teaching should not be based on the study of unstable European texts but ought to concentrate on the comparative study of concepts and of solutions to different questions. This necessitates a change of paradigm: the law which is taught should not necessarily be the law which is applied in national legal systems (*le droit positif*).

2) Secondly, we need textbooks and treatises on each field of the law. The first and most famous is the work of Hein Kötz, published in German in 1996, under the title *Europäisches Vertragsrecht*. It was then translated into English by Tony Weir and published in English in 1997 under the title *European Contract Law*.⁴⁷ The main characteristic of this book is that it places itself beyond and outside the national legal framework and describes a European law which does not exist as an applied law. As noted by Reinhard Zimmermann, this work actually creates “an intellectual frame for the discussion, development and teaching of contract law in Europe”.⁴⁸ It constitutes a “pioneer” work of a new type, for which the way had been prepared by the preceding work of Zweigert and Kötz, which was also first written in German and then translated into English under the title “Introduction to Comparative Law”.

3) Thirdly, we need casebooks or, even better, sourcebooks which gather text, cases and materials. In an ideal academic world, where students are in small classes and participate actively, this is the most important of the three types of pedagogical instruments. The model already exists and has met great success in some universities: it is of course the series of works, entitled *Ius Commune Casebooks for the Common Law of Europe*, which has been published on the initiative of former ECJ Advocate General Walter van Gerven.⁴⁹ These sourcebooks⁵⁰ contain extracts of judgments, legislative texts, and academic writings. They represent a wonderful teaching tool because they enable comparisons between the different systems, the identification of common points as well as of differences, the explanation of these differences, and they make it possible to measure the interaction between the national and supranational systems, they provide the tools to understand and measure what a strong convergence

is taking place. They make use of a “bottom-up approach” rather than of the top-down method used by the other instruments (the difference between the two methods is as follows: the bottom-up instruments use concrete data as their starting point, whilst the other use rules and concepts). They are an indispensable complement to the top-down method which is still predominant in the civil law countries. It is therefore to be hoped that the use of these sourcebooks will rapidly expand.⁵¹ It may even be hoped that, thanks to them, new teaching methods will be used in those universities where the *cours magistraux* are still predominant. For indeed, these books deserve to be used by undergraduates and not only in Masters degrees.

A fourth type of pedagogical instruments could also be developed in the form of specific commentaries on various codifications. Indeed, the unification of law by means of legislation will never be complete or properly understood if it remains in black letter rules. We can already predict that the current European harmonisation initiatives will not resist diverging interpretations by national judges and lawyers. Indeed, the whole process must be underpinned by a truly European way of thinking, materialised in a truly European teaching of the law. In this respect, commentaries based upon detailed analyses of comparative law are needed, all the more so because the texts refer to general concepts, likely to be subject to diverse interpretations by national judges (in this respect, the commentaries which accompany the Principles of European Contract Law and the Unidroit Principles are insufficient). A method of interpretation or hermeneutic rules should also be developed by those academics who engage in this enterprise, compatible with the new spirit of these optional codifications. The exegetical interpretation which was formerly used to interpret national codifications, should give way to other methods, based upon convergence, so as to take into account the fact that the new European law purports to embody the expression of a new common thinking, of a new *ius commune*. Principles of interpretation, which are likely to be adopted and implemented by European and national judges, need to be developed.

European scholarship, far from exhausting its role in the elaboration of common texts, has simply laid the first stones of its true mission: that of becoming the source of a common legal culture. It should from now on channel its efforts towards the development of new pedagogical instruments. These instruments should give students the capability to understand the various legal traditions and grasp the commonalities and differences, to deal with concepts which are not present in their own legal system but are not that different from the ones they know.

Conclusion

There is today a surprising discrepancy between, on the one hand, the rise of comparative law as well as the energy with which academics are striving towards the unification of European private law, and, on the other hand, the limited means allocated, on the national as well as on the European level, to the European education of future jurists. Although we can rejoice in the knowledge that, in Europe, academics have reacquired a significant role in the law-making process, we must remain vigilant. Academics must from now on focus their efforts on the teaching of European law as a real template for the unification of law in Europe. We need to europeanise our legal reasoning and develop new attitudes. This is the *sine qua non* condition for a general law in Europe to exist once more.⁵²

Notes

The hyperlinks mentioned in the notes have also been reproduced on the website of Leuven CCLE in order to allow fast navigation (www.ccle.eu). All URLs have been verified in November 2007.

- ¹ This rise started in 1900 at the *Congrès international de droit comparé*, organised under the auspices of the *Société de législation comparée*. See: Congrès international de droit comparé, *Procès-verbaux des séances et documents* – Vol. I (Paris: LGDJ, 1905) and more in particular: E. Lambert, “General Report”, p. 3 ff.; R. Saleilles, “Rapport sur l’utilité, le but et le programme du Congrès”, p. 9 ff. and of the same author “Conception et objet de la science du droit comparé”, p. 167 ff. The centennial of this Congress was celebrated in Louisiana by the Tulane University School of Law. Commemorating the event, the contributions of scholars from all over the world have been reproduced in a special issue of the School’s law review: “Centennial World Congress on Comparative Law” (2001) 75 *Tulane Law Review*, No. 4, p. 859 ff.
For an historical perspective on the status of comparative law throughout the twentieth century, see: R. Zimmermann, “Comparative Law and the Europeanisation of Private Law” in: M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford: OUP, 2006) p. 539 ff.
- ² M. Reimann, “The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century” (2002) 50 *American Journal of Comparative Law* (AJCL) No. 4, p. 671 ff. and, of the same author, “Comparative law and Private International Law” in: M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford: OUP, 2006) p. 1363 ff., especially at p. 1388 ff. on the emergence and impact of supranational legal orders. See also B. Fauvarque-Cosson, “Le droit comparé: art d’agrément ou entreprise stratégique?” in: *De tous horizons – Mélanges Xavier Blanc-Jouvan* (Paris: Société de législation comparée, 2005) p. 69 ff.
- ³ For instance, all recent contract law books now compare the internal rules with international conventions, European directives or regulations, European case law, and even private codifications such as the Unidroit Principles or the Principles on European Contract Law.
- ⁴ David divided legal systems into five families: Western systems, socialist systems, Islamic law, Hindu law and Chinese law. These categories were based on two main factors: ideology and legal techniques. Subsequently, David slightly modified his categories by first distinguishing three legal families: the Romano-Germanic family, the common law, and the (now-dismantled) socialist family. Next, David identified another group of systems, consisting of Jewish law, Hindu law, the law of the Far East, the African regimes and Malagasy law.
In the latest edition of the influential *Les grands systèmes de droit contemporain* (Paris: Dalloz, 2002), his co-author, Camille Jauffret-Spinozi, distinguishes three legal families: the Romanistic-German family, the common law family and the Russian one (which can no longer be classified as the socialist family). She adds a fourth part entitled “other conceptions of the social order and of the law”, which includes Muslim law, Indian law, Chinese law, Japanese law and African law. For a different perspective, in terms of tradition rather than families, see H.P. Glenn, *Legal traditions of the world* (Oxford: OUP, 2004).
- ⁵ J. Carbonnier, “L’apport du droit comparé à la sociologie juridique” in: *Livre du centenaire de la Société de législation comparée* (Paris: Société de législation comparée, 1969) p. 75 ff.
- ⁶ Nobody in France ever thought of Carbonnier as a “comparatist” but this is not that surprising in view of the modest status of comparative law and comparatists in the twentieth century.
- ⁷ J. Carbonnier, *Droit civil, Introduction* (Paris: Puf, 2002) p. 152 ff., in particular the paragraph entitled “Le droit civil français en face des systèmes juridiques étrangers”, especially no. 85 “on the main legal systems, including canon law”.

- ⁸ J. Carboneer (supra: note 7) p. 26 ff.
- ⁹ E. Picard, "L'état du droit comparé en France en 1999" in: A.H. Angelo, David Annoussamy, John Bell et alii, *L'avenir du droit comparé* (Paris: SLC, 2000) p. 165 ff.; B. Jaluzot, "Méthodologie du droit comparé. Bilan et prospective" (2005) *Revue internationale de droit comparé* (RIDC) p. 29 ff.
- ¹⁰ J. Carboneer, "A beau mentir qui vient de loin" in: J. Carboneer, *Essais sur les lois* (Paris: Répertoire du notariat, Defrénois, 1995) p. 227 ff. ; J. Carboneer, *Sociologie juridique* (Paris: Puf, 1994) 23. ff. For an example of such distortions, see: M. Reimann, "Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?" (2003) 11 AJCL No. 4, p. 751 ff.
- ¹¹ J. Carboneer, *Droit et passion du droit sous la Ve République* (Paris: Flammarion, 2000) p. 37 ff.
- ¹² J. Carboneer (supra: note 7) p. 79 ff.
- ¹³ Idem.
- ¹⁴ More preoccupying (and less overt) is the attitude which consists in blaming comparative law scholars for attempting to weaken and trivialise the French legal tradition by pointing to solutions that are adopted abroad.
- ¹⁵ Pierre Legrand in many of his contributions and in his book entitled *Le droit comparé, Que sais-je* (Paris, Puf, 1999), thus advocates complex cultural and interdisciplinary comparison. However, his approach renders the discipline so complicated that it may well discourage and deter scholars from becoming involved in the first place. This highly exclusive approach to comparative law is in complete opposition to the present needs of society.
- ¹⁶ Descartes, who considered comparison as a fundamental operation, integrated it in its method. See: R. Descartes, *Règles pour la direction de l'esprit, œuvres et lettres* (La Pléiade, 1937) p. 96, see in particular rules XII et XIV.
- ¹⁷ J.-J. Glassner, "v° Comparatisme" in: *Grand Dictionnaire de la philosophie* (dir. M. Blay) (Paris: Larousse, 2003) p. 165.
- ¹⁸ Thus, comparatists use different methods depending on their goals, the subject matter, and the geographical areas under scrutiny. When scholars engage in comparison as a basis for legal unification, they concentrate on countries that share a common heritage. But if they are looking for differences, they may include, or focus on, very different legal systems and their work will soon resemble that of an ethnologist.
- ¹⁹ R. David and C. Jauffret-Spinozi (supra: note 4) p. 8 ff.
- ²⁰ K. Zweigert and H. Kötz (translated by T. Weir), *An Introduction to Comparative Law* (Oxford: Clarendon Press, 3rd edn., 1998) p. 15.
- ²¹ M. Reimann, "The progress and failure of comparative law in the second half of the twentieth century" (supra: note 2) p. 691 ff.
- ²² For a sharp criticism, see: L. Niglia, *The transformation of Contract in Europe* (The Hague: Kluwer Law International, 2002) and, of the same author, "Taking Comparative law seriously. Europe's Private Law and the Poverty of the Orthodoxy" (2006) 54 AJCL No. 2, p. 401 ff.
- ²³ M. Hesselink, *The new European Legal Culture* (Deventer: Kluwer, 2001) p. 58 ff.
- ²⁴ B. Fauvarque-Cosson, "Development of Comparative Law in France" in: M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (supra: note 1) p. 35. ff
- ²⁵ P. Deumier, "La doctrine collective législatrice: une nouvelle source de droit?" (2006) *Revue Trimestrielle de Droit Civil* (RTDCiv) p. 63 ff.
- ²⁶ More info on the Common Core of European Private Law Project is available at: <http://www.jus.unitn.it/dsg/common-core/>.

- ²⁷ The European Group for Private International Law was created in 1991, more info is available at: http://www.gedip-egpil.eu/gedip_groupe.html.
- ²⁸ Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernisation (Rome Convention), COM (2002), 654 final.
- ²⁹ Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I), COM (2005), 650 final.
- ³⁰ See also: Société de législation comparée (ed.), *Livre vert sur la révision de l'acquis communautaire en matière de protection des consommateurs. Réponses françaises* (Vol. 5 in: Collection Droit privé comparé et européen) (Paris: Société de législation comparée, 2007) 212 p. and B. Fauvarque-Cosson, "Quelle protection des consommateurs pour demain? La Commission européenne hésite et consulte" (2007) *Recueil Dalloz*, p. 956 ff.
- ³¹ B. Lurger, "The 'Social' Side of Contract Law and the New Principle of Regard and Fairness" in: A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra, E. du Perron and M. Veldman (eds.), *Towards a European Civil Code* (Nijmegen: Kluwer Law International / Ars Aequi Libri, 3rd fully revised and expanded edn., 2004) at p. 273 and p. 291 ff.
- ³² R. Zimmermann (supra: note 1) p. 539 ff.
- ³³ A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra, E. du Perron and M. Veldman (eds.), *Towards a European Civil Code* (supra: note 31) 866 p.
- ³⁴ R. Zimmermann (supra: note 1) at p. 555 ff.
- ³⁵ Cf. R. Zimmermann and S. Whittaker, *Good Faith in European Contract Law* (Cambridge: CUP, 2000); R. Sefton-Green (ed.), *Mistake, Fraud and Duties to Inform in European Contract Law* (Cambridge: CUP, 2004).
- ³⁶ An overview of the publications of the Society on European Contract Law is available at: <http://www.secola.org/>.
- ³⁷ The *Principles of European Law* are published in co-operation with Bruylant (Belgium), Oxford University Press (United Kingdom) and Staempfli Publishers Ltd. (Switzerland). Three volumes were published in 2006:
- Vol. 1: C. von Bar (ed.), *Benevolent Intervention in Another's Affairs*;
 - Vol. 2: M. Barendrecht, C. Jansen, M. Loos, A. Pina, R. Cascao and S. Van Gulijk (eds.), *Service Contracts*;
 - Vol. 3: M. Hesselink (ed.), *Commercial Agency, Franchise, and Distribution Contracts*.
- See the General Presentation in Volume 2:
- "Like the Commission on European Contract Law's 'Principles of European Contract Law', the results of the research conducted by the Study Group on a European Civil Code seek to advance the process of Europeanisation of private law. Among other topics the series tackles sales and service contracts, distribution contracts and security rights, renting contracts and loan agreements, negotiorum gestio, delicts and unjustified enrichment law, transfer of property, and trust law. The principles furnish each of the national jurisdictions a grid reference.*
- They can be agreed upon by the parties within the framework of the rules of private international law. They may provide a stimulus to both the national and European legislator for moulding private law. Beyond this, they aim to further discussion about the creation of a European Civil Code, or a Common Frame of Reference in the area of patrimonial law, by submitting a concrete model."*
- ³⁸ Research Group on the Existing EC Private Law (Acquis Group) (ed.), *Principles of Existing EC Contract Law (Acquis Principles): Contract I – Pre-contractual Obligations, Conclusion of Contract, Unfair Terms,*

- (Munich: Sellier, 2007); further information on the work of the Acquis Group is available at: <http://www.acquis-group.org/>.
- ³⁹ O. Lando, "The European Principles in an Integrated World" (2005) 1 *European Review of Contract Law* (ERCL) No. 1, p. 3 ff.
- ⁴⁰ R. Zimmermann (supra: note 1) at p. 573 ff.
- ⁴¹ M. Hesselink (supra: note 23) p. 58 ff. See also the European Legal Forum initiative: <http://www.european-legal-forum.com/>.
- ⁴² B. Oppetit, *Droit et modernité* (in: collection Doctrine juridique) (Paris: Puf, 1998) p. 75 ff. ("Retour à un droit commun européen")
- ⁴³ B. Fauvarque-Cosson, "L'enseignement du droit compare" (2002) RIDC, p. 293 ff.
- ⁴⁴ B. Fauvarque-Cosson and S. Patris-Godechot, *Le Code civil face à son destin* (Paris: La documentation française, 2006) at p. 171 ff. See also J. Basedow, who convincingly advocates a true European teaching of contract law, in: Jean-Sylvestre Bergé and Marie-Laure Niboyet (eds.), *La réception du droit communautaire en droit privé des Etats membres* (Bruxelles: Bruylant, 2003) at p. 234 and p. 242 ff.
- ⁴⁵ Recently, in French: T. Kadner Graziano, *Le contrat en droit privé européen, Exercices de comparaison et d'harmonisation* (Basel/Brussels: Helbing & Lichtenhahn/Bruylant, 2006) 413 p.
- ⁴⁶ See for example, O. Radley-Gardner, H. Beale, R. Zimmerman and R. Schulze (eds.), *Fundamental texts on European Private Law* (Oxford: Hart Publishing, 2003) 537 p.
- ⁴⁷ A second volume is on its way. For other examples, see: B. Markesinis, H. Unberath and A. Johnson, *The German Law of Contract. A Comparative treatise* (Oxford/Portland: Hart Publishing, 2nd edn., 2006); S. Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent* (Tübingen: Mohr Siebeck, 2001); S. Whittaker, *Liability for Products: English Law, French Law, and European Harmonisation* (Oxford: Oxford University Press, 2005).
- ⁴⁸ R. Zimmermann (supra: note 1) at p. 550 ff.
- ⁴⁹ More information on the Ius Commune Casebook Project is available at: <http://www.casebooks.eu/>. The following volumes have been published: W. van Gerven, J. Lever and P. Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law* (Oxford: Hart Publishing, 2000) 969 p.; H. Beale, A. Hartkamp, H. Kötz and D. Tallon (eds.), *Cases, Materials and Text on Contract Law* (Oxford: Hart Publishing, 2002) 993 p.; J. Beatson and E. Schrage (eds.), *Cases, Materials and Text on Unjustified Enrichment* (Oxford: Hart Publishing, 2003) 640 p.; D. Schiek, L. Waddington and M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Oxford: Hart Publishing, 2007) 998 p. See also R. Zimmermann (supra: note 1) at p. 548 ff.
- ⁵⁰ W. van Gerven and B. Fauvarque-Cosson, "La convergence des droits en Europe" (2007) *Petites affiches*, No. 79 (Numéro special: "Les 50 ans du Traité de Rome") p. 63.
- ⁵¹ See, already following the same kind of method: R. Goode, H. Kronke, E. McKendrick and J. Wool, *Transnational Commercial Law – Primary Materials* (Oxford: OUP, 2007) 924 p. and *Transnational Commercial Law – Text, Cases and Materials* (Oxford: OUP, 2007) 832 p.
- ⁵² See R. David, "Le droit continental, la Common Law et les perspectives d'un jus commune européen" and R. Sacco, "Droit commun de l'Europe et composantes du droit" both in: M. Cappeletti (ed.), *New perspectives for a common law of Europe/Nouvelles perspectives d'un droit commun de l'Europe* (Boston/Brussels: Sijthoff/Bruylant, 1978); H. Coing, "Europaisierung der Rechtswissenschaft" (1990) *Neue Juristische Wochenschrift* (NJW) p. 937 ff.; G. Van den Bergh, "Ius commune, a History with a Future?" in: B. De Witte and C. Forder (eds.), *The Common Law of Europe and the Future of Legal Education* (Deventer: Kluwer, 1992). For an historical overview, see R. Zimmermann (supra: note 1) at p. 545 ff.

The Leuven Centre for a Common Law of Europe

Mission Statement

Further information on Leuven CCLE is available at:

www.ccle.eu

The objective of the Leuven Centre for a Common Law of Europe (Leuven CCLE) is to focus research efforts of the Faculty of Law of the Katholieke Universiteit Leuven (K.U.Leuven) on legal developments that are common to the whole of Europe. A tradition of more than forty years of research in the field of comparative and European Community law serves as an excellent starting point for the activities of Leuven CCLE.

The area's of interest are: (i) the law of the European Union and developments in European human rights and humanitarian law (ECHR law), (ii) the national legal systems of the European countries in a comparative context and in their interaction with European Union law and (iii) the interplay of European (Union) law with international law.

The Leuven CCLE research method consists in bridging the classical dividing lines between legal disciplines and in engaging in comparative and cross-disciplinary legal research, while at the same time embedding legal scholarship in broader social, economic, cultural and political contexts. Studies will not only focus on private law, but also on public law and areas of the law situated at the boundaries of its classical branches.

The first and foremost goal of Leuven CCLE is to promote fundamental legal research on the interaction between the aforementioned different fields and methods, thereby thoroughly analysing bottom-up as well as top-down movements. This approach is necessary in order to determine to what extent the building bricks of national, European and international law can be used to promote a common legal construction for Europe.

Leuven CCLE approaches the law not as a rule set in stone, but as a living and dynamic process. The core of the process is the interaction between different legal orders in Europe: between Community and national law, between separate national legal systems and between European and international law. As the composite of legal rules grows ever more complex, the question of legitimacy of legal rules is perceived as a major subject of research.

The Leuven CCLE approach to scholarship and research is rooted in the firm conviction, indicated by forty years of comparative analysis, that it will become more and more apparent that legal systems which *prima facie* may look very different are built around common principles that in Europe constitute a *ius commune* or a common law of Europe.

The Ius Commune Research School

Further information on the Ius Commune Research School is available at:

www.iuscommune.eu

The Ius Commune Research School is a cooperation of the Law Faculties of the *Universiteit Maastricht*, the *Katholieke Universiteit Leuven*, the *Universiteit Utrecht* and the *Universiteit van Amsterdam*. The School was established in 1995 and is formally recognised by the Royal Dutch Academy of Sciences since 1998. The School accommodates about 200 (senior) researchers and 150 research fellows (PhD students). Apart from researchers of the four founding Faculties, the School has admitted individual members of the Law Faculties of the *Vrije Universiteit Amsterdam* and the *Université de Liège* among its members. Close affiliations exist with the universities of Edinburgh and Stellenbosch.

The Research School facilitates the individual research of its members and promotes the co-operation among these members. In addition, the School takes care of the programme of studies of the School's research fellows.

The Ius Commune Research School aims at facilitating high-level legal research in the field of international and transnational legal processes. The research within the school is guided three main problem definitions:

- which is the role of law in politics (policy) and legal practice (implementation) of international integration processes and to what extent is international integration dependent upon harmonisation of law (ius commune)?
- which positive and negative effects has international integration on harmonisation of law (ius commune) and the specific character of national legal cultures and legal systems (legal culture)?
- can principles of democracy and the rule of law be used as guiding principles and assessment criteria to evaluate processes of international integration (principles of democracy and rule of law as foundations of a ius commune), both on the domain of public law as well as on the domain of private law (to what extent do fundamental freedoms and constitutional rights also play a role in private law)?

