EDITORIAL

TOWARDS A *IUS COMMUNE 3.0?!*

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> *"In the light of these developments, I submit that a* new ius commune *for Europe is taking shape before our eyes. We see it, but we are not completely aware of it."*
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> T. Koopmans[1]

§1. INTRODUCTION: TOWARDS A *IUS COMMUNE 3.0*?

There are certain periods in a person's life in which one feels the need to contemplate somewhat on life as it has unravelled so far. Caught in such a moment, wandering back to my early days in legal research, I started reminiscing about the old computer programs that were used back then, especially the text-writing programs. In those days, the mid-nineties of the previous century, all legal researchers seemed to use *WordPerfect 5.0* and *5.1*, following up on the older *WordPerfect 4.2* which later became *WordPerfect 6.0*, and so on. Each new version of this program, with the accompanying higher number, promised and delivered a more modern and a better version. Nowadays we see the same, for example, in the market for mobile phones; the iPhone 3 soon became the iPhone 4, then became the iPhone 4G, and has now become the iPhone 5.

Much along the same lines, I would like to propose here that the legal research tradition within Europe that has engaged in the development of a European legal scholarship, a modern *ius commune* – such as the legal researchers who have combined their efforts in the Maastricht based *Ius Commune Research School* – should strive to work on and work towards a '*ius commune 3.0*' as the upgraded, modernized version of the original *ius commune* tradition, which is the historical backbone of the currently

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1 T. Koopmans, 'Towards a new "ius commune"', in B. de Witte and C. Forder (eds.), *The Common Law of Europe and the Future of Legal Education* (Kluwer Law International, The Hague 1992), p. 49.

prevailing '*ius commune 2.0*' that legal researchers within Europe have studied and analysed since approximately the 1990s.

To deliver that message, I would like to start (Section 2) by explaining how the legal research world got from *ius commune 1.0* to *ius commune 2.0*, as I call them. The upgraded '3.0' version will be explained thereafter in Section 3, followed by the reasons for this proposal in Section 4. Of course, there will probably be researchers who feel that this is not at all new to them, as I acknowledge in Section 5. These researchers are probably right, but the new and upgraded '3.0' version should become, in my view, the new standard for *all* of the *ius commune* researchers, and that is something that still needs some work. The modernization I propose should become enshrined in our standard vocabulary and in our way of academic thinking. Naturally, this upgraded vision has several consequences and downsides as well (Sections 6 and 7), but it is still worth the effort, as I claim in Section 8 before I get to my final remarks (Section 9).

§2. FROM 1.0 TO 2.0 (IN ABOUT EIGHT CENTURIES)

'*Ius commune 1.0*', or rather the original *ius commune*, was, as is well known, about the common legal heritage of the European countries, id est, the rediscovery of the former Roman-Canon law across continental Europe, and the reception of those laws by their reintroduction in those countries. Professor Coing has characterized it along these lines:

> [T]his continental ius commune never superseded the local and national customs and statutes. Its authority was only subsidiary. Its rules were followed only where no local of national rules existed. Still, these different local and national rules were interpreted in the light of the Roman-Canon law. A unified legal literature written in Latin existed and was used in all countries on the continent. (…) The ius commune gave to the continental countries a common stock of legal institutions, rules and concepts.[2]

This *ius commune* tradition lasted from the 12th to roughly the 19th century, probably because it embodied the common core of legal principles, and not (only) because it was Roman law. This tradition had a true European character, was flexible and continued to exert influence even after the great codifications were introduced.[3]

The 'new' *ius commune*, or, in my phrasebook: '*ius commune 2.0*', builds on the tradition just described. It has been brought to the academic forefront – for instance within the *Ius Commune Research School* in the Netherlands and Belgium – in the 1990s

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2 See H. Coing, 'European Common Law: Historical Foundations', in M. Cappelletti (ed.), *New Perspectives for a Common Law of Europe* (Springer, Florence 1978), as cited by Koopmans, in B. de Witte and C. Forder (eds.), *The Common Law of Europe and the Future of Legal Education*, p. 43. See also R. Zimmerman, 'Roman Law and the Harmonization of Private Law in Europe', in A.S. Hartkamp et al. (eds.), *Towards a European Civil Code* (4th edition, Ars Aequi Libri, Nijmegen 2011).

3 On these aspects: R. Zimmerman, in A.S. Hartkamp et al. (eds.), *Towards a European Civil Code*.

by legal researchers who were keen on analysing the harmonization and/or unification efforts of the law in the European countries, usually based on comparative research. Much of the research within the *ius commune* tradition thus focuses on the possibility of integration or harmonization of legal rules within cooperation structures like the European Union. The desired result of these efforts could be described as achieving a set of 'shared values and generally recognized legal methods as well as common principles and guiding maxims', to borrow Zimmerman's words.[4]

§3. TOWARDS A *IUS COMMUNE 3.0* (AFTER 20 YEARS)

The message of this contribution is simply this: the researchers within the *ius commune* research tradition cannot and should not stop here. They cannot keep going about their business as they used to over the last two decades. They need to refresh, to reboot and indeed to upgrade themselves in due time; I think the time to do so has come. Thus, the concept of '*ius commune 3.0*' that I would like to introduce here is an *upgrade* of the still rather 'new' but also rather quickly ageing '*ius commune 2.0*' as described earlier.

Of course, such an upgrade would be possible in several distinct ways. But what should be done, in my view, is that the *ius commune* tradition should start working on its multidisciplinary character, on the empirical side or, in other words, its multidimensional angle. Thinking of ways to incorporate the existing empirical insights, and even also to use empirical methods (id est, 'all techniques for systematically gathering, describing and critically analysing data (objective information about the world)')[5] to actually find such extra-legal insights, should be at the centre of attention. Hereafter, I will elaborate somewhat more on the 'why' question that will no doubt be raised in this respect. For now, my proposition is that the search for a truly European *ius commune* is changed as of now, in such a way that the focus will no longer be only on comparative law but also on empirical legal scholarship, or, in other words, on a multidimensional angle on legal scholarship.[6]

§4. DO WE NEED THIS 3.0 APPROACH?

It is my firm belief that incorporating empirical scholarship would be the logical next move to make, but why? Is there actually a need to shift the focus? In my view, there is such a need and that need also shows precisely why a focus on multidimensional scholarship would indeed be the logical next step.

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4 Ibid., p. 51.

5 R.M. Lawless, J.K. Robbennolt and T.S. Ulen, *Empirical Methods in Law* (Aspen, New York 2010), p. 7.

6 For a much more detailed and elaborated plea, see W.H. van Boom, 'Empirisch Privaatrecht', *TvPr* (2013), forthcoming.

I am fully aware, of course, that Professor Smits has recently stated that lawyers should not overestimate the meaning of empirical work for the law. He warns legal scholars in this respect because:

> (…) [T]he relationship between the normative question of what the law ought to be (…) and the empirical question whether something 'works' is not completely clear.[7]

He is, indeed, totally right in insisting that the relationship between law and extra-legal insights is not an easy one. But even if that is the case, one may not close ones eyes to what is currently happening in the legal research world, and that is that multidimensional scholarship is growing fast and becoming more important. We can see that the international discourse as well as the national debates are becoming more and more multidimensional, more empirical in orientation. This is exemplified by the ongoing national debate in the Netherlands on law as a scientific discipline.[8] That debate concentrates on legal methodology, or rather the proclaimed lack thereof. And since empirical scholarship could be helpful in this respect, there seems to be a tendency among legal scholars and (the Deans of) law schools to steer legal scholarship somewhat more towards the '3.0 approach' I have proposed here. And of course, the *ius commune* research tradition cannot afford to lag behind.

On a more down to earth level, any research group can probably use such an upgraded, modernized focus in the standard peer review assessments that are needed every so many years; this will help to safeguard the future of such a research group. In the same vein, one can point to the ever growing need to find external funding for research, and the growing competitiveness in this regard. A new focus, a new '3.0 profile' might make this competition somewhat easier.

Last but not least, if a research group wants to stay attractive for young and bright future scholars it needs to prepare for what is the state of the art in research in the near future. And surely, any ambitious group of researchers would want to stay an interesting partner for these youngsters. Also, any research group should strive, in my view, to deliver newcomers at the research front that are better researchers than the ones that trained them.

§5. NEW WINE IN OLD BARRELS?

I realize that some (legal) researchers will have asked themselves 'Aren't we already "doing" this?'. And indeed, that is true. Many examples of empirical work could be given.[9] But, even if that is the case, two troubling questions arise.

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7 J.M. Smits, *The Mind and Method of the Legal Academic* (Edward Elgar Publishing, Cheltenham 2012), No. 16.

8 Ibid.

9 G. Low, *European Contract Law between the Single Market and the Law Market* (Wolf Legal Publishers, Nijmegen 2011), is a good example, since that book links social science insights specifically to the European unification debate.

First, does the *ius commune* tradition *show* this enough? Perhaps it does not. It is not the essence of its fame that it engages in multidimensional scholarship; *ius commune* orientated researchers are first and foremost known for their comparative research.

The second troubling question is whether the *ius commune* tradition actually already *does enough* at this stage. To be honest, I do not think so; there is not yet enough focus on the multidimensional aspects of *ius commune* research. Let there be no misunderstanding: this is not to cast any blame on any one of the researchers involved; my message is nothing but a stringent warning. The *ius commune* research tradition should be preparing itself to take the plunge into what I would like to call 'the great wide multidimensional research space', in order to prepare for the future.

§6. CONSEQUENCES?

Now, if it would in fact happen as I have suggested, what would be the consequences thereof? Let me sketch three possible consequences.

First and foremost, researchers working within the *ius commune* tradition would have to start doing more multidisciplinary, more empirically orientated work, or at least in their own analyses use more of the insights that have been brought to the fore by such empirical studies. Alternatively, and probably preferably, they could try to work more and more often with people from other social sciences, truly combining legal and social sciences' insights.

How does one go about doing this? It is going to be more difficult, no doubt, to be an achieving researcher. And thus it would be wise, for example for the law school Deans, not to make demands that are too high in this regard on those researchers because this type of research is not immediately suited to every person. But more focus is needed, probably starting with the young researchers that come aboard each year. And of course, those in charge (within law schools and research groups) should be prepared to give room to those that do engage in this type of research, for instance by looking more closely at the demands and ambitions as regards the preferred output in terms of number of publications and sorts of outlets.

Second, the *ius commune* tradition would have to make absolutely sure that it *teaches* what it *preaches*. It would be of the utmost importance to adjust the young researchers' training programmes, at least to some extent, trying to focus more on multidimensional methods and empirical scholarship. This could be accomplished by developing a PhD training course ('Empirical methods in law') within each research group that works within the *ius commune* tradition. Of course, another possibility in this respect could be that those research groups try to work together and bring this empirically orientated training course under a broader, (inter)national umbrella, for instance in a 'Centre for

Methodology and Empirical Legal Studies'.[10] This Centre could then also be used to train the prospective PhD students while they are still students at our universities.

Along with these adjustments in the training programmes, there should of course also be special training sessions, also as a form of permanent education, for those researchers that have not been able to profit from those (new) PhD training courses, because they have already finished their PhD. The need to do so is obvious for those researchers to be able to participate properly.

A third consequence is that the *ius commune* tradition would need to involve more non-lawyers, such as psychologists, economists, sociologists, and so on, in its research staff and research networks. Full membership of the research group in question should be available to these researchers and they should actively be sought after.

§7. ANY DOWNSIDES TO THIS?

Of course, there are some downsides to this new, or rather, adjusted approach, which can and should be mentioned. First, it is important to recognize (again) that an empirical approach will not in and of itself answer all legal questions. In this regard, it is worth noting what Lawless et al. note:

> While it is true that empirical evidence frequently provides us with crucial insights into important public policy issues on which there are deeply opposing views, such issues may ultimately turn on normative issues that cannot be answered by empirical research.[11]

And indeed: empirical insights can supplement or nuance the existing legal modes of thinking, or negate certain presumptions, but they can never (totally) replace the essentially normative[12] legal analysis and public policy choices related to that analysis.[13] Of course, from a lawyer's perspective, this is of course a good thing because it means that lawyers will retain their purpose in society.[14]

Second, the manner of doing research will become more complex under this new approach. As evidence of this, there is an extensive body of literature that deals with all sorts of problems one encounters when engaging in interdisciplinary research.

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10 R.A.J. van Gestel, I. Giesen and W.H. van Boom, 'Een Landelijk Centrum voor Methodologie en Empirische Rechtsbeoefening', *NJB* (2012), p. 2032.

11 R.M. Lawless, J.K. Robbennolt and T.S. Ulen, *Empirical Methods in Law*, p. 21.

12 E.L. Rubin, 'Law and the Methodology of Law', *Wis. L. Rev.* 3 (1997), p. 555.

13 See ibid., p. 556; I. Giesen, *Handle with care – Inaugural Lecture, Utrecht University* (BJu, Den Haag 2005), p. 87; I. Giesen, 'Recht en … Psychologie: over de waarde die psychologische inzichten voor de civilist kunnen hebben', *WPNR* 6912 (2011), p. 1072–1073; J.B.M. Vranken, 'Een nieuw rechtsrealisme in het privaatrecht', *WPNR* 6912 (2011), p. 1121.

14 See also W.H. van Boom, I. Giesen and M. Smit, 'Civilologie en de Vaart der Privaatrechtelijke Volkeren', in W.H. van Boom, I. Giesen and M. Smit, *Civilologie: Opstellen over Empirie en Privaatrecht* (BJu, Den Haag 2012), p. 210.

Interdisciplinary work in the field of law leads to all sorts of perils, or 'traps for the unwary', as Vick calls them,[15] most notably the difficulty of understanding other disciplines and of misinterpreting results from other disciplines.[16] As a solution to this enhanced complexity, more collaboration between lawyers and social scientists is called for.[17]

This problem can thus be tackled by involving social scientists, but even then, another downside will still be that, most probably (at least when looked at superficially and quantitatively), *less* work will be done. The collective output in the number of published articles of any given research group, taken together, will most probably drop dramatically. This of course is caused by the fact that getting a multidimensional article ready will be more burdensome. But it will also be because getting that article published is going to be more difficult if one aims at the international peer reviewed multidisciplinary journals that the 'upgraded' researchers should aim at. But, as stated, in order to tackle that issue the legal academia should adjust the demands imposed on its researchers: one truly multidimensional article in a truly respected peer reviewed journal each year should suffice.

§8. IS IT REALLY WORTH IT?

I venture to state without hesitation that it is well worth pursuing a more empirical form of scholarship because researchers will then be 'maximizing insights and minimizing blind spots'.[18] As Ulen stated, empirical scholarship 'will greatly advance our understanding of law'.[19] Phrased differently: ignoring empirical insights might very well be worse than using them, because we should not close our eyes to reality, to society as it actually functions with the existing legal rules and regulations. It would thus be unwise not to think broadly, no matter how sceptical legal researchers usually are in this regard.[20] One

15 See D.W. Vick, 'Interdisciplinarity and the Discipline of Law', 31 *Journal of Law & Society* 2 (2004), p. 185.

16 D.W. Vick, 31 *Journal of Law & Society* 2 (2004), p. 185. See also R.M. Lawless, J.K. Robbennolt and T.S. Ulen, *Empirical Methods in Law*, p. 20–21; W.H. van Boom, I. Giesen and M. Smit, 'Inleiding', in W.H. van Boom, I. Giesen and M. Smit, *Civilologie: Opstellen over Empirie en Privaatrecht*, p. 1–3, and T. Hartlief, 'De civilist en de civilologie', in W.H. van Boom, I. Giesen and M. Smit, *Civilologie: Opstellen over Empirie en Privaatrecht*, p. 33–52.

17 See for characteristics of empirical research the overview in R.M. Lawless, J.K. Robbennolt and T.S. Ulen, *Empirical Methods in Law*, p. 10–20.

18 D. Manderson and R. Mohr, 'From Oxymoron to Intersection: an Epidemiology of Legal Research', 6 *Law Text Culture* (2002), p. 165.

19 T.S. Ulen, 'The Importance and Promise of Empirical Studies of Law', in P. Nobel and M. Gets (eds.), *New Frontiers of Law and Economic* (Schulthess, Zürich 2006), p. 29. See also J.B.M. Vranken, *WPNR* 6912 (2011), p. 1119 and 1120, and D.W. Vick, 31 *Journal of Law & Society* 2 (2004), p. 181–182 on the advantages of interdisciplinary work.

20 T.S. Ulen, *Empirical Methods in Law*, p. 34. See more elaborately on the benefits of using social science in law: C. Engel, 'The Difficult Reception of Rigorous Descriptive Social Science in the Law', in N.

needs to remember in this respect that law is not just about what is written down in rules as such. Law is first and foremost an instrument to change people's behaviour and to change society.

That being the case, the only way to deal with law properly requires, from those engaged in the business of law, some knowledge and some willingness to think about what real people in real life situations in a modern society are engaged with and run into, and how they function in a certain legal environment, with all of its rules and regulations.

This is all the more true where law, as it is these days, is highly diversified over a plurality of sources in a globalized setting. As Zimmerman noted with regard to the codification efforts of European private law, such efforts will 'have to be preceded, inspired and substantiated by a European scholarship'.[21] I strongly believe that in our day and age this European scholarship can only be accomplished if legal scholars do not only engage in extensive comparative research but also focus on empirical insights.

Next, it is also worth going down this path because it is interesting and intellectually stimulating to step outside one's own sphere. And it is also worth the effort because doing so will most probably increase the value of our output, since this output will be based on more and broader data. That output will combine legal, normative insights and arguments with facts and figures to support or contradict those legal arguments, which will make a better weighing of all the arguments for or against certain solutions possible and will thus lead to more elaborated results.

A fourth, more practical justification to plea for a shift in focus is that empirical scholarship is already finding its way into our courts. Sociological, psychological and economic studies are being used in our courtrooms, influencing decisions on matters of public policy.[22] This first happened in the United States of America, but the idea is crossing the Atlantic.[23] If a judge is to use such extra-legal studies, he must have some basic knowledge of the other disciplines and know how to cope with them. And since legal scholars should educate these judges, there is another need for legal scientists to re-focus.

Stehr and B. Weiler, *Who Owns Knowledge? Knowledge and the Law* (Transaction Publishers, New Brunswick 2008), p. 200–202. On the justification for using empirical work in law, see also B.G. Garth, 'Observations on an Uncomfortable Relationship: Civil Procedure and Empirical Law', 49 *Ala. L. Rev.* 1 (1997), p. 106–107.

21 R. Zimmerman, in A.S. Hartkamp et al. (eds.), *Towards a European Civil Code*, p. 30.

22 See e.g. E. Mertz, 'Undervaluing Indeterminacy: Translating Social Science into Law', 60 *DePaul L. Rev.* 2 (2011). See also J. Monahan and L. Walker, 'Judicial use of Social Science Research', 15 *Law and Human Behavior* 6 (1991), p. 571–584.

23 All this is not to say, however, that empirical evidence is always used; it is rather quite the contrary, see R. Lempert, 'Empirical Research for Public Policy: With Examples from Family Law', 5 *J. Empirical Legal Studies* 4 (2008), p. 908, at footnote 1.

§9. FINAL OBSERVATIONS

Three final observations round up this contribution. First, I firmly believe that the '*ius commune 3.0*', with its proposed shift in methodological focus, will become the 'even better' version of the current *ius commune* research tradition. Of course, (almost) *all* researchers will need to get on board in some way or another in order to achieve that goal; hence the idea to provide for permanent education in 'empirical scholarship'.

Secondly, and by all means, the *ius commune* tradition will have to re-focus, but it has to do so without losing track of the background of its researchers, who have been trained as lawyers, because that is what most of us are and will remain. In this respect, one can find comfort in the fact that this is widely acknowledged, also by proponents of interdisciplinary research.[24]

And so, thirdly, as for my answer to the question posed in the title of this contribution, I would say: Let's take a big plunge into the great unknown. Let's take the first steps together towards a society driven, empirically orientated *ius commune* research tradition, functioning in a new, modern and globalized, 21.0 version, of our legal world. Towards a *Ius Commune 3.0*!

24 See D.W. Vick, 31 *Journal of Law & Society* (2004), p. 190.