The Concept of Legal Convergence

Antonios E. Platsas

The concept of convergence of legal systems stands for a leading idea in the modern discipline of law. Whereas one could neo-romantically still perceive law as a *Landesjurisprudenz*, a sort of provincial and domestic study, it would be fair to maintain that, after the end of the Second World War, the concept of legal convergence of systems has become of paramount importance in the national, the regional and the international sphere. The discipline of law has, thus, effectively departed from its narrower and more nation-oriented roots post the 1648 Westphalian paradigm, albeit not always and not necessarily.

Concurrently, the phenomenon of convergence of legal systems has had wide-ranging implications in political, legal and economic life of the world's modern republics. Even systems which would resist convergence projects initially, would eventually subscribe to such projects (contagion theory of legal systems). The magnificence of such a leading idea as the concept of legal convergence arises from no other reason than the fact that convergence is a multifaceted, multimodal and flexible phenomenon. Convergence of legal systems can, therefore, occur either through centralised or decentralised modes (top-down and bottom-up legal convergence).

Close to this, one would be reminded that a thing is beautiful in that it partakes in beauty itself. And a system tends to benefit from a convergence circle in that convergence is something that tends to come with benefits for systems that partake in such a circle. Indeed, in its ideal form, the concept of legal convergence can be either an organic self-perfecting, self-evolving reality or a constantly updated centrally designed project. The Platonic ideal of the one effectively amounts to nothing else but a yearning for simplicity, as Merryman put it, our world frequently presenting us with a rather chaotic, disorderly and perplexing state of affairs in so many aspects of human existence. Law, traditionally, despite its formalist and modernist credentials, has added to this rather chaotic world with its nationalist and inward-looking deviations. Almost any of Kafka's works would readily point to this direction. The chapter recognises that there were times when law would be a synonym to the nation (and vice versa); yet, the new world legal and economic architecture that arose out of the ashes of a bloodstained and torn humanity more than seventy years ago was actually engineered on the premises of international legal and political cooperation.

Finally, against the background of the economic and financial crisis, that is with us for more than a decade now, this contribution explores the essence of the idea of legal convergence by recognising amongst other things the relation of legal convergence to economic convergence in the industrial world. It further attempts to assess the feasibility of genuine legal convergence projects by referring to leading examples of legal harmonisation in Europe and the world and by exploring the theory of legal

transplants, the theory that acts as the cornerstone of the modern legal convergence thesis. The chapter concludes on the need for the greater democratic legitimacy of convergence projects, especially when it comes to ones that would not be the result of organic decentralised growth but of central design.

Keywords: Platonic doctrine; theory of universals; culturalism; universalism; formal convergence; functional convergence; economic convergence; regulatory competition; political will; European law; international law; democracy; technocracy; legal convergence

1 The Concept of Legal Convergence

Legal convergence is about the coming together of legal systems.[1] Convergence of the kind can be achieved at the regional level and at the world level,[2] whereas one's thesis in the area would also make allowance for the possibility of both top-down and bottom-up approaches.[3] The concept of convergence can also relate to the processes of harmonisation (minimum harmonisation but also maximum harmonisation of legal standards),[4] approximation and uniformisation of legal standards.[5]

Ideally, such a phenomenon, when and where it occurs, has to materialise in a gradual fashion.[6] This is an idea that ought to normally apply in areas of law that are not culturally defined *stricto sensu.* Areas of cultural significance to the legal system, e.g. family law or criminal law, may still be wholly or close-to-wholly regulated by the legal system itself. At other times, culturally neutral areas of law may or may not be the subject matter of convergence. Corporate laws tend to be one's typical example here as an area of law which is rather culturally neutral but still one that would be open to convergence of approaches or harmonisation of solutions. Equally, relatively culturally neutral areas of law would not necessarily be priority areas for convergence as would be the areas of trade standards, technological standards and other economic law standards. One could, of course, argue that technological standards are still culturally neutral standards in themselves. However, even if this is the case, one notes here the fact that the practical benefit of harmonisation of technological standards through legal means by far exceeds their rather neutral essence in legal cultural terms, in which case convergence of such standards tends to be close-to-essential. So too, the legal harmonisation of such standards ought not to act as a hindrance of future technological advancements to the benefit of humanity. In any case, one notes that the concept of legal convergence would be mainly concerned with such areas as trade, technology, human rights and, to a certain extent, social rights.

Furthermore, the modern legal convergence thesis ought to carefully tread between the ideal of legal assimilation of systems and flexibility. Thus, the convergence thesis tends to be a rather multifaceted, multimodal and flexible thesis; and flexible it must be for a universe

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[1] Markesinis (2000); van Hoecke (2000), p. 9.
[2] Platsas (2017), p. 245.
[3] Ibid.
[4] Weatherill (2020), p. 266.
[5] Platsas (2017), p. 7.
[6] Markesinis (1994).

of demoi is contemplated in such a thesis. Legal systems ought to strive to come together but not always and not necessarily. Indeed, even where the convergence exercise is necessary, a certain space for organic growth of national law, around previously agreed standards, could be afforded to the legal systems participating in a circle of convergence.

Moreover, the convergence thesis makes additional allowance for accepting uniform statutory standards, especially where these would be essential for the expediency of trade in the face of a globalised world. The same could be said in relation to the creation of human rights norms but, when it comes to human rights application, one would speak here of more of an *approximation* of human rights standards in practical terms, especially considering that a certain minimum margin of appreciation could be afforded to national legal systems and authorities.

As an epistemic concept, the concept of legal convergence finds itself at the concurrence of humanism, cosmopolitanism, ecumenism, economic utility, efficiency, effectiveness, practicality, technological cooperation and political integration. There lies the leading character of the concept of legal convergence; in the fact that it aims to regulate, or even deregulate, a number of aspects of human activity to the benefit of countries, systems, citizens and corporate actors. A final point is that the vigour of the modern legal convergence thesis lies also in the fact that this is a largely technocratic exercise that would have to be democratically legitimised by the participants in a given legal convergence circle.

2 The Leading Character of the Convergence Thesis in the Discipline of Law

The legal convergence thesis is the leading thesis in the modern discipline of law. Methodologically, it is regulated by such disciplines as law, philosophy, political science and economics. Substantially, there does not seem to be any other theoretical concept or idea currently that has so many and wide-ranging connotations for so many different areas in so many legal systems. Indeed, the concept of legal convergence has significant connotations not just on the legal substance and procedure of systems but also on more subtle aspects of legal life, e.g. law's educational models around the world.

Law as a *techne* and as an *episteme* is otherwise in the process of re-aligning itself to the epistemic singularity of other disciplines, such singularity characterising the overwhelming majority of disciplines nowadays.[7] Law, traditionally a subject for the nation in the era of modernity, has certainly matured to the point that legal harmonisation projects are nowadays part and parcel of major global developments. The world, of course, does not necessarily need more law; however, the world needs more harmonised laws.

Beyond this, convergence can take the form of co-evolution of national and supranational legal solutions, reflexive efforts of harmonisation and it can also be the result of regulatory competition and dissemination of the more effective and/or efficient legal standards. The legal convergence thesis is a thesis that makes sense for countries, economies, lawyers and individuals. A yearning for simplicity is what effectively forms the practical rationale of the convergence thesis,[8] our world's architecture of international cooperation being rather complex and opaque,[9] even if the phenomenon of globalisation promotes more unified and interconnected legal and economics patterns.

[7] Zweigert and Kötz (1998), p. 15.
[8] Merryman (1981), pp. 364-365.
[9] See de Witte (2014), p. 464.

3 Formal Convergence vs Functional Convergence

Prior to fully engaging with the precise epistemic co-ordinates of the concept of legal convergence, it would be important to discuss and assess a rather significant distinction in the modern convergence thesis, the one that provides for formal and functional modes of convergence. A formal mode of legal convergence is effectively one that presupposes structured efforts of legal co-ordination amongst different legal systems, normally under established patterns of international law, regional law and so on. A functional mode of legal convergence, on the other hand, is a pattern of convergence that can come about without the interference of such structured efforts whatsoever. Furthermore, a formal mode of legal convergence may fundamentally be a mode of convergence that enables convergence of form(s), structures, overall characteristics and the related in the area of legal normative matter. The functional mode of legal convergence, on the other hand, relates to the legal convergence of substantives beyond form; it is about whether or not legal institutions, legal norms, operations and frameworks of different legal systems effectively converge in their substantives, even though, as stated, there may not be any interference or input from formal convergence patterns. Either way, it should be noted here that convergence is about whether the very legal mentalities[10] of different legal systems have converged in points or areas of legal substance, procedure and practice. Convergence then is not just about epistemological substrata but about epistemological substrata and actual perceptions of such.[11] In effect, the confluence of epistemological substrata and the same or similar perceptions thereof, amongst recipient systems of convergent law, lead to genuine legal convergence. It is then and only then that convergence is practically achieved. Moreover, it has also been argued that formal convergence equates doctrinal convergence[12] but this approach would clearly be open to academic debate.

The author posits that, whilst formal convergence *may* relate to convergence of legal doctrine, the two should not be taken to be synonyms to one another. Legal doctrine is one thing. Legal form that may or may not pinpoint at doctrine is quite another. Also, ideally, one could expect that legal convergence is reached both at a formal and at a functional level (hybrid legal convergence thesis). In this respect, one is reminded here that, by reason of the fact that harmonised instruments of law, 'like transplants, tend to focus principally on the "formal" institutions of the law',[13] it would be quite important that both the forces of written/formal elements and unwritten/informal elements in convergent legal systems are combined.[14] In any case, occasionally, a formal/doctrinal model of legal convergence under classic international law will be necessitated. At other times, however, one ought to allow market and/or social forces, or, indeed, any other legitimate forces within legal systems e.g. political forces, to enable legal convergence at a functional level. For instance, in the area of corporate governance one could have, as one already has, functional convergence of approaches without the interference of national legislators.[15] This, then would, in principle, be a voluntary legal exercise.[16] Of course, law is still a predominantly doctrinal and a rather formal subject in so many of its theoretical and practical manifestations. As such, whereas

[10] Legrand (1996), p. 60.
[11] Cf. Legrand (1996), p. 60.
[12] Micheler (2009), p. i.
[13] Arvind (2010), p. 79.
[14] Arvind (2010), p. 78.
[15] Cf. Coffee (1999), p. 650.
[16] Coffee (1999), p. 650.

one clearly observes the potential benefits of functional convergence, the importance of formal convergence should not be underestimated.

In the area of functional convergence, the classic example in the bibliography is the one that has been advocated by such scholars as Gilson in relation to the functional convergence of the systems of corporate governance in Germany, the United States and Japan.[17] Coffee has also persuasively argued, in a similar vein, a thesis which resembles Gilson's thesis.[18] The thesis would be that, even though the degree of formal convergence between comparable systems could be effectively absent, the degree of functional convergence between such systems may have materialised and could be relatively significant. Kerr's 1960 leading economics thesis, which still stands as the economics engine of the modern legal convergence thesis, as we will be seen further below, has advocated and proved that the industrialisation of a number of countries, falling in the developing and the developed world, effectively led to their convergence of cultures. This being the case, the more formalist legal scholars of us ought to take heed. Indeed, the forces of globalisation and, by extension, the forces of spontaneous and/or functional convergence could certainly outpace the more formal types of legal convergence, especially the ones that materialise on a top-down basis or the ones that require time-consuming political compromises and so on. So too, it may sometimes be more likely for legal convergence to occur through the so-called contagion effect of legal solutions,[19] or, more interestingly, by leaving the markets to have the main role in such an exercise. Markets can be wild and, when wholly left to their own devices, perilous, but markets that lead to functional convergence amongst different systems may actually stand as one of the better examples of markets. As such, the materialisation of legal convergence, based on economic and social forces, can result in more in-depth forms of legal convergence, especially in the approximation of economic and social laws. This latter model stands for a liberal legal functional model, which compares well with the more centralised, largely Westphalian, formal model. Furthermore, such scholars as Legrand would consider that the legal convergence which one observes amongst European Union (EU) legal systems is one which is merely functional and superficial (irreducibility of differences between different legal mentalities thesis),[20] otherwise a rather pessimistic thesis, for if we accepted such a thesis, one would have to take it for granted that legal convergence e.g. in the EU could never and will never occur. Finally, for one's analytical purposes, the convergence theorist ought to remind and be reminded here that three years only from Legrand's sceptical but, otherwise, largely frivolous thesis, 11 European States fully aligned their monetary legal frameworks, thereby creating the single currency, the Euro. On the 1st of January 2023, the Euro reached a membership of 20 European States, the Euro being not only a catalyst to European legal convergence, but also, by far, one of the best illustrations of hybrid (formal and functional) legal convergence examples to date in the world. There are already European legal systems that have adopted the single currency without participating in any formal legal co-ordination efforts to it.

[17] Gilson (2000), p. 11; Gilson (2001), p. 337; Gilson (2010), p. 137.
[18] E.g. Coffee (1999).
[19] The Delaware effect, when it comes to US corporate laws, and the Californian effect, when it comes to US environmental laws, would be the classic examples here, i.e. when it comes to other US States taking legal standards of certain US States in certain areas into account.
[20] Legrand (1996), pp. 62, 63, 64, 74-78, 79, 81.

4 Epistemic Co-Ordinates

4.1 Ideological Co-Ordinates: From Philosophy to Law

The Platonic One forms the ideological core of the concept of legal convergence. The concept of convergence is directly linked to Plato's idea of universals. Elsewhere in the bibliography, such an idea would be cited as the one-over-many principle.[21] Plato always believed in the superior character of the whole over the particular by otherwise recognising the importance of both. So did his best student, Aristotle, even if he would have modified the platonic forms thesis by concluding that things are the result of both forms *and* matter.[22] Aristotle went further than Plato by pinpointing also that such notions as natural law are immutable and have the same validity from nation to nation like fire burning in the same way in Greece and Persia.[23] A rather similar point on the universal character of the law of nature was also made later by Cicero.[24] In any case, the point that Plato made as to the superior character of a singularity over a plurality has been maintained by Aristotle, as the superior character of the whole over the parts has been clearly advocated in the latter's *Metaphysics*.[25] Elsewhere, Aristotle is adamant that theoretical subjects, as in theoretical disciplines, are confined to universals.[26]

This forms a very interesting thesis, in that law, as a largely theoretical discipline, ought to have been following this tendency. However, one notes here that law, conventionally ever since 1648, has been more of a specific domestic-oriented matter than a subject that would seek universals in a similar way the convergence thesis would. As such, relevant legal universals tended to be confined within nations mostly. One law would govern the whole State. The State would thus succumb to one central law which the State's subjects would have to follow. As such, law tended to be rather provincial and centralised. Consequently, law as an *episteme* and as a fact of life tended, in partial disagreement with Platonic-Aristotelian doctrine, to pursue universals but that would be something that would predominantly be the case *within* the nation State at least between 1648 and 1945. Of course, international law pre-existed the two world wars. Nonetheless, regional and world legal convergence were practically very limited, if non-existent.

There is otherwise something unique about the idea of universals that Plato advocated in the first place. He claimed that it is habitual in human nature to actually posit a single form for each plurality of things to which we give the same name.[27] Thus, an oak, a chestnut, a maple, a linden and a pine are all different types of trees participating, however, in the form of 'treeness'. The United States (US) legal system, the United Kingdom (UK) legal system, the Brazilian legal system, the Japanese legal system and the Greek legal system are all different legal systems while participating, however, in the form of legal 'systemness', and so on. Plato put his idea of postulation of universals into action, when he explored what

[21] E.g. González-Varela (2020).
[22] Aristotle, *Metaphysics*, 8.1045a. All references to ancient texts are taken from such texts as these would be found in the Perseus Digital Library of Tufts University, unless otherwise stated.
[23] Aristotle, *Nicomachean Ethics*, 5.7.
[24] Cicero, *De Republica*, 3.22.33.
[25] Aristotle, *Metaphysics*, 1.981.
[26] Devereux (1986), p. 484 citing Aristotle's *Nicomachean Ethics.*
[27] Plato, *Republic*, 596a.

makes something beautiful. For him, a thing is beautiful simply because it participates in the form, the idea, or however one would name such quality as beauty.[28]

One cannot neglect, of course, from their analysis the fact that legal systems come, or tend to come, with a degree of variation, which is the result of cultural influences and predispositions. However, much of this variation is related to ideas that are now on the retreat, e.g. the nation State or centralised and unitary forms of statehood and so on and so forth. For us in law, the Platonic One has wide-ranging implications however. It actually enables us to proceed with the approximation of legal systems, thereby creating social, political, legal and economic conditions for fairer, more cosmopolitan and more unified societies. This process, normally a gradual one,[29] must meet the approval of the citizens who would be the main beneficiaries of convergent legal projects (correspondence to the democratic ideal principle). Thus, the superior character of the modern legal convergence thesis is found in the fact that this is not a merely technocratic exercise, but a technocratic exercise that has to come in agreement with the ideal of democracy.

4.2 Economics Co-Ordinates: From Economics to Law

The modern idea of legal convergence has had a lot to learn from modern economics, the *locus classicus* in the area being *Industrialism and Industrial Man.*[30] In this seminal work, which was published in the early 1960s, the authors compared the labour economics of a multiplicity of countries, concluding that the global convergence of cultures is the outcome of industrialisation processes.

Moreover, one notes here that nowadays legal convergence promotes the convergence of economies (and vice versa). Using the EU as an example, it seems that the degree of economic convergence in Europe, through the enactment of hundreds of harmonising legal instruments over the decades is now greater than that of otherwise unitary federal States such as the United States (US). Of course, for the EU to reach such a level of economic convergence, it had to create the right legal frameworks in the first place. For instance, Article 114 TFEU is in itself a powerful provision that creates a whole legal framework for the stronger approximation of laws as between the EU's Member States and their legal centre, the EU itself as an organisation. In any case, so wide-ranging has been economic convergence in Europe, through the implementation of liberal economics regulations ever since the 1950s and the 1960s to date (i.e. in the area of freedom of capital, persons, services and goods), that the degree of economic approximation in the EU Member States seems to be greater now than in the US, otherwise a unitary federal nation for more than 240 years.[31]

However, unlike the US, the citizens of the EU do not, as of yet, practically use the freedom of movement of persons for the purposes of settling in another EU Member State as much as the Americans would, when it comes to them settling in another US state. At this point, it should also be remembered that the first President of the European Central Bank (ECB), Wim Duisenberg, has referred to the Euro, Europe's single currency, as a catalyst for legal convergence in Europe.[32] Europe, of course, has no President (as in a single political figure), no central government, no parliament that would enjoy legislative initiative the way

[28] Plato, *Phaedo*, 100c–d.
[29] Markesinis (1994).
[30] Kerr, Dunlop, Harbison, Myers (1960).
[31] Head and Mayer (2021), pp. 44-45.
[32] Duisenberg (2000).

a parliament of a sovereign EU Member State would enjoy; it has a little approved, impersonal, remote and largely broken technocratic bureaucracy that the people of Europe do not necessarily always support, understand, respect or trust. Duisenberg was right though: convergence is about such tangible things as the Euro that result in further legal convergence (not about abstract matter that would relate to persons or officials). The Euro, the single currency, is, therefore, a key driving engine of future legal initiatives in Europe.

One could additionally argue here that if one takes away the Four Freedoms from EU law, there would not be much left in EU law. These freedoms, together with the Euro, form much of the core of European legal convergence initiatives and policies. These Four Freedoms; the single currency; indeed, the European Convention on Human Rights (ECHR) effectively act as the six legal convergence engines of modern Europe.

Moreover, from the economics point of view, a convergence circle could also be the result of regulatory competition.[33] However, the convergence theorist notes here the greater space for regulatory competition as between the United States themselves than between the EU's Member States.[34] In all probability, this seems to be a historical-legal reaction of the Europeans to the traditional legal divergence and competition between European States with the advent of the Westphalian paradigm.

4.3 Political Co-Ordinates: Political Will, Peace and Co-Operation

Whereas economic prosperity and respect for the (economic or otherwise) well-being of the citizen are the two main goals of most convergent legal projects, it is politics that practically sets the precise agenda with regard to ongoing and future harmonising legal projects. The political vision was always there though. In this respect, it should be remembered that one of France's greatest writers, Victor Hugo, already spoke, in the mid-nineteenth century, of '[a] day [that] will come when the only fields of battle will be markets opening up to trade and minds opening up to ideas.'[35] Despite two world wars that have actually started in Europe, Hugo's call is still most relevant to the Europeans and the rest of the citizens of the world.

What was missing, however, was the political will one would readily observe in Europe after the end of the Second World War. Additionally, the convergence of legal systems ought to eventually ensure the convergence of political and economic systems. Of course, the convergence of economic systems and political systems may precede the convergence of legal systems but, in the long run, all these three elements (legal, political and economic) are communicating vessels. It is therefore of significance that political, economic and legal systems dance on the same tune or, at least, a similar tune of expectations.

For all intents and purposes, the magnificence of the legal convergence thesis lies in the creation of common rules, which eventually create the guarantees for long lasting peace and prosperity. Europe, the historical mother of world wars, stands as the leading example in this respect ever since the 1950s. Since then, the Europeans have made the commencement of another world war in Europe not just unthinkable but also virtually impossible by initially imposing stringent legal measures on themselves for limiting the production of coal and

[33] See e.g. Deakin (2006), pp. 71–95.
[34] Cf. Armour (2005).
[35] As cited in Head and Mayer (2021), p. 23.

steel.[36] So too, without a doubt, it is Europe as a legal space that stands at the forefront of the modern convergence thesis. Here is why: the majority of European States comply with three mechanisms of legal convergence: international law, EU law and ECHR law.[37] Such a phenomenon is now also somewhat emulated in the Americas and Africa.[38] However, the depth, the extent and the array of convergent instruments and mechanisms that simultaneously operate in Europe clearly places the particular continent in a unique position. Of course, 'Europe means different things to different people, [something] which suggest[s] that it has different overlapping territorial, political, cultural, and ideological connotations'.[39] Nonetheless, the point remains: Europe, despite institutional failures, democratic deficits, cultural differences and legal delays in its convergence agenda and its political integration, is still the continent that sets the world standards in the area.

Equally, the failures of Europe's functionaries in the political integration and legal convergence of things ought to be a call for reform; not a call for the rise of political and legal nationalisms or a call for the retreat of the legal convergence thesis. This being the case, the question in Europe is not whether there should be convergence of the legal systems which this continent comprises. The question is whether and how more and deeper legal convergence between European legal systems should occur in the future.

A final point, in the area of the political coordinates of the convergence thesis, that would have to be made here, would be in relation to the emulation of solutions from other political systems. Of course, one does not speak here of blindly transplanted solutions from elsewhere in a neo-colonialist fashion. Rather, one speaks of conscious political choices made by certain countries that wish to follow the standards (political, legal and otherwise) of other countries. This can occur in a co-ordinated fashion from a given political centre – the narratives of EU integration would be the classic example here – or in a more spontaneous fashion and on a more piecemeal basis. In law, the latter approach has been called 'legal contagion'[40] effectively. Thus, on the basis that political will exists, it is possible for one legal system to borrow solutions from another legal system without the interference of a supranational or intergovernmental organisation.

5 The Legacy and the Anathema of the Westphalian Paradigm

As mentioned earlier, the legal convergence thesis runs counter the Westphalian paradigm. Traditionally, such a paradigm would, of course, have defined the totality of the world's modern legal systems, at least up until the end of the Second World War. Law was and, to a large extent, still is, in many parts of the world, the toy of the nation State. Law's magnificence otherwise lies in the fact that it mechanises political will. Nevertheless, such a will would normally emanate, at least in the case of democratic States, from the demos. However, one would also certainly be able to argue that this would be about a rather introvert and narrow perception of democracy.

Democracy, in its ideal perception, is not a provincial system of governance, even though it can be. Democracy, in its ideal perception, is about a cosmopolitan image of the world. It is about responsible, enlightened, pro-active citizens. It is about political

[36] Head and Mayer (2021), p. 23.
[37] E.g. see generally de Witte (2014), pp. 445-464 and in particular pp. 445-446.
[38] See e.g. Hirsch (2021), pp. 1-27 for the recent proposals in Africa when it comes to the free movement of African people in the African continent.
[39] Lähdesmäki, Mäkinen, Čeginskas and Kaasik-Krogerus (2021), p. 183.
[40] E.g. Farran (2020), p. 31.

extroversion and economic openness. Without a doubt, however, the rise and rise of nationalisms all over the world has been fuelled by the Westphalian paradigm, which has used law as its enforcing arm. Law has, thus, largely surrendered and succumbed in the past to the Sirens of nationalism that haunted most of the nation States since 1648. The absurdity of divergence of laws, or to use German terminology, the reduction of the subject of law into a provincial discipline, a *Landesjurisprudenz*, has prevailed. Indeed, the Westphalian paradigm came with one of the greatest epistemic paradoxes in the theoretical disciplines; national lawyers would strive to bring uniformity within their own systems but would neglect to perceive their discipline as a largely unified discipline due to a rather distorted perception of the nation or due to a loosely defined type of domestic legal culturalism.

If the creation of modern States teaches us one thing, it is the fact that nations are largely artificial entities. Perhaps a common language, perhaps the same religion for many within a State, perhaps certain shared customs are what make a 'nation' but this is where the nation ends. All else revolves around the ecumene. Accordingly, one cannot simply put all of one's epistemic legal hopes on the nation. So too, even the staunchest of nationalists cannot just escape the fact that in the world of globalisation, the majority of legal systems seem to strive for similar standards unless, of course, a legal system can attest to the fact that its legal standards are clearly advantageous, as in the case of the Delaware effect and the California effect in the US in the areas of corporate and environmental regulation respectively.

The Westphalian paradigm unfortunately persists. The more-than-apparent lack of co-ordination of the world's legal systems and governments in the pandemic, ever since the beginning of 2020, has been yet another clear-cut example of the fact that national legal systems and governments cannot, on their own, deal with world problems. Local problems are best dealt at the local level. Regional problems are best dealt at the regional level. World problems are best dealt at the world level.

If logic teaches us one thing, it is that the deployment of the right resources must occur at the right time, in the right fashion and at the right place. For instance, in Europe, almost every single national government has been coming up with its own approach as to the dealing of pandemic; at a point, vaccination nationalism prevailed and, of course, what looks like the developed world secluded Africa and certain parts of Asia from precious vaccinations, which the scientific community otherwise managed to create at neck breaking speed. In the case of the handling of the pandemic around the world, it would seem that both science and the convergence thesis have been somewhat betrayed by little political corner shops called nation States.

6 Flexibility at the Heart of the Modern Legal Convergence Thesis

A superior thesis is a thesis that makes space for certain flexibility. Of course, not all theses are capable of such a degree of flexibility, yet it would seem that the legal convergence thesis is. Flexibility is about sovereign States having the final say as to whether or not they would participate in legal convergence circles. Flexibility is about such States being able to enter, remain or leave a legal convergence circle, this being a matter for their demos to decide. Flexibility is also about opt-ins and opt-outs. Yet it can also be about national sovereignty being partially limited, because a sovereign country could decide to do so for its own benefit and the benefit of a legal union or alliance, or even for a common goal. Flexibility could also

be about subsidiarity, a principle that has had to grow and mature in the modern EU.[41] It would also be about proportionality in the actions of supranational and intergovernmental organisations.[42] Finally, it would be about the democratic legitimisation of such a thesis altogether, the world's cosmopolitan demoi being the ultimate arbiters of whether they would wish to proceed further, deeper and for longer within a given legal convergence circle.

There is nothing inherently wrong with the idea that like-minded nations and, by extension, like-minded legal systems can proceed together by creating their own limited circles of legal convergence. They could certainly do so beyond the bureaucracies of intergovernmental and supranational institutions, especially if this would accelerate the process of legal convergence.[43] For those who would observe such an idea with scepticism, one would be reminded of the fact that much of international law is to this day about the self-determination and the sovereignty of States. As such, the convergence theorist would not object to the power of sovereign and independent States to proceed in accordance with the legitimate wishes of their electorates, when it comes to legal convergence projects, even if this would be about limited circles of legal convergence initially. Thereafter, after a legal convergence circle would have been formed, others could still join such a circle and so on.[44] It should also be possible to depart from such a legal convergence circle based on the will of the people and so on.

On the other hand, the idea of regional convergence is not always one that comes with ideal results. However, such a type of convergence would still be a first step in the area, since regional convergence could make away with national legal variation and unnecessary legal divergences within the same region. Furthermore, global models of legal convergence might be readily defeated out of regional models of legal convergence. However, taking the global trade system as our example here, we ought to note that, in the absence of global legal approaches in such a system, 'international rulemaking will become fragmented amid a mix of bilateral and regional trade agreements, WTO plurilaterals, unilateral actions, and non-market measures.'[45] As such, regional systems of legal convergence may be the way forward on many occasions, but, equally, global legal convergence should be actively pursued in areas of global importance such as world trade rules and the international architecture of markets.

7 Legal Convergence as Organic Growth

Ideally, a circle of legal convergence should make allowance for further future integration of political matters and harmonisation of legal solutions. The idea of convergence and all that it comes with can most certainly flourish as an organic reality in the world's legal systems. One contemplates here the creation of positivist convergent legal standards, such standards allowing further convergence in an evolving fashion. In an exercise of legal convergence, legal transplants can be allowed to domestically mature further.[46]

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[41] The leading provision of EU law on subsidiarity would be Article 5(3) TEU. See also the TFEU Protocol No2 on the Application of the Principles of Subsidiarity and Proportionality.
[42] The leading provision of EU law on proportionality would be Article 5(4) TEU. See also the TFEU Protocol No2 on the Application of the Principles of Subsidiarity and Proportionality.
[43] Reinsch and Caporal (2021), p. 13.
[44] Ibid., p. 14.
[45] Ibid., p. 13.
[46] On the two main schools of legal transplants, see Foster (2002), pp. 58-60.

First, one should, of course, identify and create relevant legal patterns, templates or blueprints; second, one should allow convergent law to flourish further in an organic fashion within legal systems, especially after the point of legal convergence would have been reached. Devereux, referring to the Eleatic Stranger, has been quite illuminating on this; thus,

> Laws are by their very nature defective in that there is a discrepancy between their simplicity and fixity and the complexity and variability in that to which they apply. The Stranger goes on to argue that the wise ruler should be free to change laws in response to changing conditions, and should be allowed to tailor his judgments to particular situations even if this goes against the precise formulation of the law.[47]

Here one would be reminded that the modern legal convergence thesis presupposes a plurality of demoi. It is demos, in its widest perception, that ought to be the maker of legal convergence projects. Thus, one's approach here ought to be quite expansive. A modern demos is not merely made out of people or citizens. It is made out of the aforementioned and all the economic actors that such a demos comes with in practical terms. This is a demos that embraces citizens, corporations and all other actors that would nowadays constitute such. Beyond this, one's perception of legal convergence ought to be one that comes in agreement with the democratic ideal. Thus, legal harmonisation projects ought to be democratically legitimised at relatively frequent points of time. The greater the penetration of convergent projects into the demos' legal system, the greater the degree of democratic legitimisation one would expect for such projects and vice versa. Legitimisation here could occur directly or indirectly and one ought to readily admit that the modern demos ought to include corporate actors too, as voices that represent the markets, countries and citizens. Quintessentially, however, the democratic legitimisation should first and foremost be decided by the citizens and so on.

It is in European human rights law that one observes one of the better examples of organic growth in existing circles of legal convergence. For instance, the European human rights judges have declared some time ago in *Tyrer v United Kingdom*[48] that the ECHR has to be seen as a living organism; one that would have to be interpreted in the light of present-day conditions and circumstances. The approach established by the European judges in the late 1970s has had wide-ranging implications in the expansion of the scope of the Convention. Accordingly, such an approach would clearly make allowance for the organic growth of the ECHR itself within Europe's domestic legal systems, which have otherwise ratified the letter of the Convention. Thus, the ECHR is, in Darwinian terms, an evolving convergent legal creature. Perhaps one could observe its living legal instrument doctrine as a counterweight to the otherwise powerful doctrine of margin of appreciation it also comes with, the latter being a doctrine which allows certain leeway to European legal systems in the application of certain of the ECHR provisions. Crucially, however, the interaction of these two mechanisms (living instrument doctrine and margin of appreciation doctrine) effectively amounts to a state of affairs that promotes the continuous (re)calibration of the scope of the Convention by the European Court of Human Rights (ECtHR), even if there would be no 'one size fits all' approach.[49]

To conclude, convergent instruments such as the Convention allow for a certain organic growth of the convergent jurisprudence they come with, even though this would

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[47] Devereux (1986), p. 501 citing Plato, *Statesman*, 294a-c, 294d-295b, 295c-e, 296d-297b.
[48] App no 5856/72 (ECtHR, 25 April 1978), Series A, No 26 (1979–80) 2 EHRR 1.
[49] Ita and Hicks (2021), p. 74.

ultimately be down to the ECtHR judges to adjust. In any case, the Convention's expansion to the sphere of civil *and* social rights[50] allows us to consider it as a particularly interesting instrument which promotes organic legal growth of its convergent remit over time.

8 Technocratic For the People: A Technocratic Exercise Subject to the Democratic Ideal

Furthermore, one must be reminiscent of the point that the demos in the developed world is nowadays powerful. It is the driving engine of modern society. It defines the law. It creates the law through representatives. It regulates the whole being of the State, for the State is ultimately the conception and the design of the demos. So too, the picture of the world that each State represents is to a considerable extent the perception of its demos. A multiplicity of demoi is contemplated in our thesis.

In such a universe, technocratic exercises on the idea of convergence are filtered through the demos, for the demos is the body that legitimises such an exercise. This is a legal universe of enlightened demoi, whose citizens perceive themselves, are and act as responsible world citizens. These are citizens respectful of both locality and globality. They form cosmopolitan republics that are the soul and the driving engine of world legal, social and economic standards. Equally, the organic growth of the law is something one can contemplate, especially when the convergence exercise is not about uniformity but about increased legal similarity (i.e. approximation). A little bit like the organic growth of flora around human-made, posited axes, the legal convergence ideal can create centralised legal axes upon and around which domestic solutions can organically grow and flourish, especially where such variation would not actually defeat the purpose of legal convergence. The legal core would thus remain the same but slightly different solutions could grow around harmonised legal standards. At other times, of course, identical legal solutions would have to be the case. International law is abundant with such uniform examples, as is EU law.

One should be absolutely clear also about the fact that, after a certain point, i.e. after the exercise of legal convergence would have been legitimised by way of democratic will, the exercise would have to be a rather technocratic one in itself. Here one notes not only the complexities of creating convergent/harmonised law[51] but also the fact that the implementation of the convergent norm must be one that will be catered for by experts. For instance, one would have to mention in this respect the fact that legal harmonisation without harmonised implementation of convergent law cannot occur and that implementation and transposition matters would have to be carefully considered. Thus, one ought to distinguish between formal and substantive implementation matters in the sphere of convergence, in addition to identifying between externalities-to-the-legal-system and internalities-to-the-legal-system which could and, where possible, should be taken into account in the same matters.[52]

[50] E.g. Leijten (2017).
[51] Markesinis (2004), p. xi.
[52] Platsas (2017).

9 Conclusion

Our world's cosmopolitan republics must continue to further the cause of the legal convergence thesis because the promotion of such a thesis comes with considerable practical utility. Consequently, such a drive towards an ever more convergent world in legal terms is not about an abstract academic exercise. It is about practical benefit from the legal, political and economic point of view. The legal Academy should also promote this thesis to an even greater extent for the bettering not just of the discipline of law but also, most importantly, for the bettering of the lives of billions of people around the world. Economically closer, we can achieve more. Legally united, we will succeed. Politically divided, we shall fall. Of course, a sovereign national legal system would, by definition, be free to proceed on its own, under the free-rider principle.

Nonetheless, such an exercise should not be reduced to a sort of blind and drunken type of freedom, a distorted perception of freedom for the sake of divergence, resembling a nationalist legal chimera that cannot simply be accepted in the face of an ever more globalised and interconnected world. In fact, such an approach would not be about the pursuit of genuine political freedom. It would be about negation. Legal systems that proceed unilaterally in the world of globalisation are effectively in danger of becoming marginalised.

Let us also be absolutely clear about this: even if international organisations and their bureaucrats may have failed the idea of legal convergence in the past,[53] one must ensure that the idea of harmonisation of legal systems is salvaged. Consequently, one could reform the institutions that claim that convergence is at the centre of their operations; not the idea itself. The concept of legal convergence does not stand for some sort of a broken theory in the minds of those who live apart from the citizen, when it is actually the citizen that effectively benefits the most from such a noble cosmopolitan idea. The convergence thesis is a concrete thesis, which allows for flexibility and certain organic legal growth based on the democratic ideal.

Reverting to the point of the failures of bureaucracies, the occasional failures and the democratic deficits within European institutions, for instance, should not halt the idea of legal convergence in Europe. The failures of bureaucrats, in a largely democratic Europe and in an increasingly democratic world, ought not to be used against the idea of legal convergence. Of course, the convergence thesis can become even clearer and more concrete in the future.[54] However, the point to be reiterated here is that it is not the idea that is problematic; it is those who do not properly implement the idea that seem to be the main cause of concern. Reform would be key then.

Finally, the autopoietic essence of the convergence thesis leading to organic legal growth must not be overlooked and should be further strengthened in the future. In any case, one ought to remain faithful to what seems to be for many decades now the leading idea in the discipline of law: the convergence thesis.

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[54] E.g. for a recent discussion on certain terminological aspects of the legal harmonisation concept in the context of EU law and cross-border insolvency law, see Ghio (2020), p. 578.

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