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**Convergence, Divergence,
and the Middle Way in Unifying
or Harmonising Private Law**

LUKE NOTTAGE

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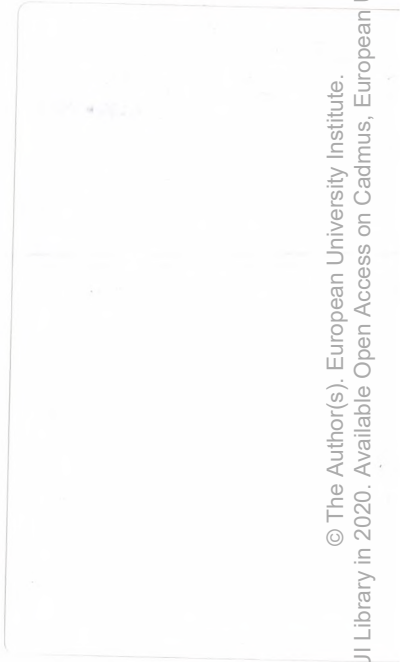
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LUKE NOTTAGE

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“Convergence, Divergence, and the Middle Way in Unifying or Harmonising Private Law”[#]

Luke Nottage[^]

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“*Medio Tutissimus Ibis*”^{**}

I. The Renewed European Civil Code Debate

Enactment of a European Civil Code, long the province primarily of academic musings, has gained in potential practical significance recently. Both the Commission of the European Union (EU) and the European Parliament have called for reports. A “Study Group on a European Civil Code” was formed in early 1998, starting a year later to develop proposals for codifying private law for EU Member States. A Steering Committee was made up of prominent academics including Guido Alpa, Christian von Bar, Ulrich Drobnig, Roy Goode, Arthur Hartkamp, and Ole Lando. The EU’s Council of Ministers subsequently expressed interest in this codification initiative, at meetings of Heads of Government in Cologne in early 1999, and of Justice Ministers in Tampere in autumn 1999. The Parliament has renewed discussions on this topic. A Working Paper by a group led by von Bar was published in November 1999, covering mainly the needs and options for unification of general contract law, service contracts, insurance contracts, non-contractual obligations, consumer credit, and civil procedure. The Parliament is also consulting others, including European University Institute (EUI) Fellow Christoph Schmid on 21 November 2000. In parallel, the Commission has been charged with preparing a report on the issues involved, by the end of 2001, involving five of its Directorates. Writing in February 2000, von Bar has boldly predicted that a European Civil Code could become a reality within ten years.¹ Meanwhile, a private project led by

[#] This paper grew out of a Comment on an article entitled “Civil Law and Common Law: Two Different Paths Leading to the Same Goal” by Caslav Pejović, my former colleague at Kyushu University. Both are forthcoming in (2001) *Revue juridique polynésienne*. For helpful information or comments on this paper, thanks are due to Jacques Ziller and participants in his Research Seminar on Comparative Law at the European University Institute (EUI) Law Department, on 19 January 2001; Rick Bigwood, David Campbell, Bruno de Witte, Oliver Gerstenberg, Christian Joerges, Karl-Heinz Ladeur, Koichi Morikawa, David Nelken, Rostam Neuwirth, Kimmo Nuotio, Christoph Schmid, Hiroo Sono, Neil Walker, and Peer Zumbansen.

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^{*} “You will go most safely by the middle way”: Ovid (43BC - AD17) *Metamorphoses* Book 3, l.466, translated in A Partington (ed) *Oxford Dictionary of Quotations* (4th new ed. 1992).

¹ C von Bar “The Study Group on a European Civil Code” [4/2000] *Tidskrift utgiven av Juridiska Föreningen i Finland (JFT)* 323, 337 (“Five years of preparatory work and another five years of discussions within the profession and the political world should be a realistic scenario”). But see the views expressed recently by a German lawyer and member of the European Parliament: J Wuermeling “Europäisches Privatrecht: Wider den Oktroi der Uniformität” [2001/3] *Europarecht* (forthcoming). For details on these recent developments

Guiseppe Gandolfi has already published the first part of a European Contract Law Code, modelled on the Italian *Codice Civile*.²

Earlier interest expressed by the Parliament in 1989 and 1994 had prompted the elaboration of non-binding Principles of European Contract Law (PECL) by a group of academics led by Lando. While many commentators still argue for such "soft law" harmonisation measures,³ Lando himself believes that the time has come to promote unification through a mandatory Code. Recalling the codification debates in Europe in the 19th century, he now aligns himself with Thibaut, the advocate of codification, rather than Savigny, who favoured a more gradual elaboration of civil law principles largely by scholars.⁴

This paper surveys the writings of these and other main protagonists either of unification through a mandatory regime or harmonisation by a variety of other means, focusing on the explicit or implicit comparative law methodology adopted by these commentators.⁵ It contends that some deeper tensions are revealed in this burgeoning corpus of comparative private law scholarship, fuelled by debates about unifying or harmonising law particularly in Europe (Part II.A), but also world-wide (Part II.B). One characteristic of these studies is the focus primarily on *convergence*: similarities in actual results in particular litigated cases, doctrinal developments, shared legal vocabulary, or the like. Convergence tends to be perceived as occurring in fact, as well as being normatively desirable. The focus is found most strongly among those favouring unification, but also among advocates of a range of harmonisation initiatives. Both groups, moreover, share a second characteristic. They direct overwhelming attention to *legal rules and solutions*, "the law in books" rather than the "law in action", despite some commentators giving lip-service to the latter's importance in comparative research (Part II.C). However, vigorous counter-arguments have been presented which uncover and defend diversity and *divergence* (Part II.D). These often arise regarding the Europeanisation (or otherwise) of private law, but address or implicate issues in comparative law methodology generally. Most adopt an *expansive view of law*, sometimes radically so. These various strands of scholarship should be carefully unpacked to see whether there is scope for finding a "middle way" through this methodological jungle, unveiling new perspectives and implications for the emerging debate on unification and harmonisation of private law (Part III). The views presented aim to help those either embarking on – or deepening – an interest in this area, as well as institutions like the EUI which no doubt will continue to be drawn into this increasingly vigorous discussion.

II. Convergence and Divergence, Rules and Context

and debates], see C Schmid "*Legimitaetsbedingungen eines Europäisches Zivilgesetzbuchs*" (56 *Juristenzeitung*, forthcoming 2001; also in English translation as *Legitimacy Conditions for a European Civil Code*, EUI Working Paper RSC 2001/..., EUI, Florence, 2001) Part I **[to be confirmed]**.

² Académie des Privatistes Européens (ed) *Code Européen des Contrats* (1999).

³ See eg K Riedl "The Work of the Lando-Commission from an Alternative Viewpoint" (2000) 8 *European Rev Private Law* 71; C Schmid "'Bottom-Up' Harmonisation of European Private Law: *Ius Commune* and Restatement" in S Feiden & C Schmid (eds) *Evolutionary Perspectives and Projects on Harmonisation of Private Law in the EU* (EUI Working Paper LAW No 99/7, European University Institute, Florence, 1999) 103 (reprinted in V Heiskanen & K Kulovesi *Function and Future of European Law* (Institute of International Economic Law, Helsinki, 1999) 75).

⁴ O Lando, "Optional or Mandatory Europeanisation of Contract Law" (2000) *European Rev Priv Law* 59.

⁵ Their broader conceptions of European law and integration processes are also touched upon, but linking these to specific legal principles and socio-economic developments at the European level remains an important topic for future research. Thanks are due to Kimmo Nuotio for stressing this important further backdrop to the present analysis, as well as ongoing debate about enacting (or otherwise) a European Civil Code.

The broader issue of convergence versus divergence in Europe has been discussed increasingly since the early 1990s. In 1996, for example, Bruno de Witte exclaimed that "the convergence debate is still on!".⁶ This remains true, in view of further forceful counter-arguments explicit or implicit in some more recent writing, discussed especially in Part II.C below. However, those perceiving and advocating convergence in Europe probably still form the majority, with some major works published in the late 1990s, as shown next.⁷

II.A Convergence in Europe?

Already in 1993, for instance, Basil Markesinis had proclaimed that in Europe there is:⁸

a convergence of solutions in the area of private law as the problems faced by courts and legislators acquire a common and international flavour; there is a convergence in the sources of our law since nowadays case law *de facto* if not *de jure* forms a major source of law in both common and civil law systems; there is a slow convergence in procedural matters as the oral and written types of trials borrow from each other and are slowly moving to occupy a middle position; there may be a greater convergence in drafting techniques than has commonly been appreciated ... there is a growing rapprochement in judicial views.

Nonetheless, he argued in 1997 that the time was not yet ripe for developing a European Civil Code. One reason advanced was that parts of a Code must be well-interconnected, which will demand numerous adjustments to national laws. A more general problem is a perceived "constitutionalisation of private law – informed by a very different ideology than the one that shaped our traditional private law with its Roman origins".⁹ This requires that tort law harmonisation, for instance, proceed in tandem with harmonisation of social security rules and subrogation rights. A third reason offered against codification was that drafting techniques for legislation remain significantly different, despite some convergence. Instead, Markesinis proposes ongoing attempts to develop mutual understanding at various levels, including collaborative projects in comparative law research and initiatives in legal education.

Nonetheless, he has recently edited another collection of works entitled *The Coming Together of the Common Law and the Civil Law*.¹⁰ Underlying this convergence thesis, and proposals to accelerate it through collaborative research and education, is Markesinis' general comparative law methodology. He contends that one should begin by comparing "factually equivalent litigated circumstances", because "the reader then easily grasps a problem which is familiar to him [or her] and notices with interest (and, perhaps, some amazement) that its answer, not infrequently, is analogous if not identical to the one he finds in his own system"; problems of "dealing with concepts which are either untranslatable, or relevant to one system but not another, or simply the products of structural differences or 'oddities' which exist in the 'foreign' law" should only be addressed later "when they can also be better understood ...

⁶ B De Witte "The Convergence Debate" (1996) 3 Maastricht J European & Comp L 105, 106.

⁷ See especially those reviewed in C Schmid "The Emergence of a Transnational Legal Science in Europe" (2000) 19 Oxford J Leg Studies 673 (based on his publications cited above n 3).

⁸ B Markesinis "Learning from Europe and Learning in Europe" in B Markesinis (ed) *The Gradual Convergence: Foreign Ideas, Foreign Influences and European Law on the Eve of the 21st Century* (Clarendon Press, Oxford, 1993) 1, 30.

⁹ B Markesinis "Why a Code is Not the Best Way to Advance the Cause of European Unity" (1997) European Rev Private L 519, 521.

¹⁰ Hart, Oxford, 2000.

combined with comparative legal history".¹¹

One difficulty with this approach is revealed by a collection of essays edited by Markesinis himself, comparing similar factual situations litigated in France, Germany, and England: English tort law reached markedly different conclusions.¹² This inconvenient result is met with the assertion that "under pressure from the Court of Human Rights in Strasbourg, English law might be on the verge of change".¹³ Further, Markesinis admits that the reasoning process or style adopted in the judgments remains different in English law. Yet he suggests that arguments of general public policy (largely based on simple – possibly simplistic – economic analysis) in English courts are considered in Germany, for instance, yet only in preparatory work for the Civil Code and in academic or empirical studies. Markesinis leaves us with the unsatisfactory observation: "Why this is so is not entirely clear and ... awaits an authoritative and empirically justified response".¹⁴

Reinhard Zimmermann also tends to stress and advocate convergence, but more at the level of developing a common "grammar" or legal language, and with greater sensitivity to differences in results.¹⁵ Further, he advocates *beginning* with legal history. He believes that:¹⁶

Our situation in Europe today is similar to that in early 19th century Germany in many respects. For, once again, we are living in a period of transition. Contrary to all other disciplines taught at a modern university, legal science in Europe has, at least for the last hundred years, been predominantly national in substance, outlook, and approach. Since the continental legal systems have been codified, there have been, in principle, as many legal systems as there are national states ... This national isolation of legal science is an anachronistic today as was the particularism of legal sources in early 19th century.

Zimmermann suggests that European law is moving beyond promoting just economic unification, into developing common policies in a broad range of areas, yet it remains highly fragmented. Like Savigny in 19th century Germany, he advocates a rediscovery – led mainly by academics, especially of Roman private law rules and principles – of the foundation of Europe's *ius commune*, allegedly influential also in English common law.

Zimmermann notes the inconvenience of 19th century fragmentation for the "burgeoning commercial community" and that "pressure for legal unification arising, first and foremost, in the trade related fields of law" resulted in significant new legal enactments.¹⁷ Yet he remains curiously silent about possible contemporary economic – let alone socio-political – pressures for further institutionalisation of private law at the European level nowadays.¹⁸

¹¹ B Markesinis, "Judicial Style and Judicial Reasoning in England and Germany" (2000) 59 CLJ 294, 295.

¹² B Markesinis (ed) *Tortious Liability of Statutory Bodies: A Comparative and Economic Analysis of Five Cases* (Hart, Oxford, 1999).

¹³ Above n 11, 294.

¹⁴ *Ibid.*, 304. Cf the ambitious attempt to develop new theories of legal reasoning, after uncovering for instance the different responses under English and French law to loss suffered as a result of a dangerous thing having caused abnormal risks, in G Samuels *The Foundations of Legal Reasoning* (Blackstone et al, London et al, 1994) 76-9.

¹⁵ R Zimmermann "Civil Code and Civil Law: The 'Europeanization' of Private Law within the European Community and the Re-emergence of a European Legal Science" (1994/5) *Columbia J European L* 63, 82 (arguing for a "re-Europeanization" of shared principles obscured by two centuries of legal nationalism), 100 (noting the divergence of German law from its Roman roots).

¹⁶ R Zimmermann "Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science" (1996) 112 *LQR* 576, 580.

¹⁷ *Ibid.*, 578.

¹⁸ See also generally his "Civil Law and Common Law: The 'Europeanisation' of Private Law within the European Community and the Re-Emergence of a European Legal Science" (1994/5) 1 *Columbia J European Law* 63.

Another Roman law theorist, Alan Watson, would go even further in arguing that all significant change is achieved by “legal transplants” – rules taken by jurists from other legal systems¹⁹ – and not by social transformations, so that only the former deserve serious attention.²⁰ Further, while presenting numerous historical examples of legal transplants which took root in a variety of new settings, he seems less committed to developing some transnational “common grammar”, and certainly more sensitive to differences in rules developed in various legal systems.²¹ This combination of an almost exclusive focus on rules, yet sensitivity to differences, suggests that there is no necessary correlation between the former and convergence; but Watson’s position remains unusual among most comparative private law scholars nowadays.

In contrast to Zimmermann, when advocating the transformation of PECL into a binding European Civil Code, Ole Lando concludes by focusing precisely on economic necessity. In thus preferring Thibaut’s solution to the fragmentation of 19th century legal science, Lando asserts baldly that:²²

One must expect that intensive trade will create a need for a greater amount of legal certainty which a Code will provide. World trade has grown very fast, and this has brought the CISG [the UN Sales Convention of 1980] into existence. In the European Union, where trade between the Member States has increased ever since 1958, the more trade and communication continue to grow, the more urgent the unification of the law of contract will become.

Kristina Riedl also stresses the “expansion and internationalisation of trade” in bringing about a “paradigm shift ... an irreversible global development” in contemporary contract law, undermining national frameworks. She links this to a parallel increase in European regulatory processes, at least in Europe, creating “a colourful pervading collection of disintegrative processes”. Riedl concludes that a mandatory Code goes against this tide, and therefore urges Lando and his colleagues to instead keep elaborating PECL and other “soft law” initiatives.²³

Christoph Schmid develops more concrete proposals in this direction. He argues that enactment of a European Civil Code encounters problems of competence under European law, and risks not being accepted by citizens and jurists in Europe due to “enduring social, political and cultural differences between the Member States and consequent problems for a central ‘concretisation capacity’ of European courts”. This is fuelled by greater familiarity with national private law – European economic law is “not rooted in the collective consciousness to a similar degree”.²⁴ Instead, Schmid advocates establishing a “European Law Institute”(ELI) inspired by the American Law Institute (ALI), preferably supported by the EU Commission and/or European Parliament and bringing together various groups of academics and practitioners.

¹⁹ On Watson’s narrow focus on rules, see P Legrand “The Impossibility of Legal Transplants” (1997) 4 Maastricht J European & Comp L 111, 112-3.

²⁰ Arguably, Watson has put this argument in both “strong” and “weak” versions, with only the former implying that the broader social context deserves no attention: see W Ewald “Comparative Jurisprudence (II): The Logic of Legal Transplants” (1995) 43 AJCL 489. However, Watson’s subsequent writings (eg *The Evolution of Western Private Law* (John Hopkins UP, 2000) indicate that he himself holds to the “strong” view. For a very recent illustration of a form of “transplant” scholarship, albeit one seemingly oblivious to broader issues in comparative law methodology, see A Vaquer “Importing Foreign Doctrines: Yet Another Approach to the Unification of European Private Law? Incorporation of the *Verwirkung* Doctrine into Spanish Law” [2000-2] ZEuP 301.

²¹ See eg his emphasis on historical contingency and chance in processes of legal transplants, and pervasive misunderstandings, in A Watson “Aspects of Reception of Law” (1996) 44 AJCL 335.

²² Lando, above n 4, 69.

²³ Riedl, above n 3, 77-8.

²⁴ Schmid, above n 2, Parts I and III.2 respectively.

He envisages this new institution drawing not only on comparisons of private law in various Member States (the focus of Lando and his colleagues when elaborating PECL), but also the various EU initiatives in the private law arena. The ELI would develop an "integrative Restatement-Code", a set of norms which individual Member States would be free – not required – to adopt, with extensive commentary on the particular provisions.²⁵

Schmid suggests that the ELI could draw on the Study Group established in 1998, the *Académie des Privatistes Européens*, the *Union des Avocats Européens* and/or the *Conseil des Barreaux de l'Union Européen*. He appears to see this broader based organisation as able to meet a problem perceived with the activities of the academic groups so far, namely their potentially limited capacity to "defend the quality and coherence [of their proposed normative structures] in law-making processes, against political interventions of national and political institutions".²⁶ In fact, the ALI has become the subject of intense debate in the United States in recent years.²⁷ Generally, the legitimacy of the Institute and its Restatements of case law have been called into question partly as a result of growing scepticism about judge-made law-making in the United States, since the 1970s.²⁸ In addition, those writing in the "law and economics" tradition have argued that the setup of "private legislatures" like the ALI and some transnational bodies leads to (i) many rules vesting broad discretion to judges; (ii) any precise rules largely reflecting interest group preferences; and (iii) rules overall not constituting a definite departure from the status quo because of interest groups.²⁹ These problems may be the price to pay for promoting "deliberative democracy" in the legal arena, as advocated by some theorists described below (Part II.D), and thus do not necessarily undermine Schmid's advocacy of an ELI modelled on the ALI. But the debate regarding the latter, and now transnational norm-setting bodies, needs further attention before attempting to "transplant" or "remodel" it for Europe.

Other initiatives have also been proposed to advance the cause of harmonisation of European law in a "softer" fashion. One is the attempt to uncover a "common core" to major areas of European contract law, initiated in 1993 at the University of Trento in northern Italy. This drew on a manifesto signed in 1987 by eight Italian comparative lawyers, *il circolo di Trento*, which proclaimed as a first thesis:³⁰

Comparative law, understood as a science, necessarily aims at the better understanding of legal data. Ulterior tasks such as the development of law or interpretation are worthy of the greatest consideration but are necessarily only secondary ends of comparative law.

²⁵ Ibid, Parts IV.2(b) and (c).

²⁶ Ibid, Part III.4. Cf generally his "Bottom-Up" Harmonisation of European Private Law: *Ius Commune* and Restatement" (above n 3); and "The Emergence of a Transnational Legal Science in Europe", above n 7, 687-8.

²⁷ See eg "From the Trenches and The Towers" (1998) 23/3 L & Soc Inq 621-78, and (1998) 26/3 Hofstra L Rev 567-834.

²⁸ R Hyland "Perspectives on Private Law Codification in America in the 21st Century" (Paper presented at the Civil Code Centennial Conference, "Legislation in the 21st Century and Private Law", Tokyo 12 November 1998).

²⁹ See A Schwartz & R Scott "The Political Economy of Private Legislatures" (1994) 143 U Pa L Rev 595; discussed in P Stephan "The Futility of Unification and Harmonization in International Commercial Law" (1999) 39 Va J Int'l L 743, especially 756-61; and applied therein (and in his "Accountability and International Lawmaking: Rules, Rents and Legitimacy" (1996) 17 Nw J Int'l L & Bus 681) precisely to transnational norm-setting organisations.

³⁰ R Sacco "Legal Formants: A Dynamic Approach to Comparative Law (I)" (1991) AJCL 1, 4 (n 6).

Another thesis was:³¹

Comparison turns its attention to various phenomena of legal life operating in the past or the present, considers legal propositions as historical facts including those formulated by legislators, judges and scholars, and so verifies what genuinely occurred. In this sense, comparison is an historical science.

One of the eight signatories of this manifesto, Rodolfo Sacco, calls such historical facts "legal formants" and suggests that they may divide further into general propositions or rules and particular reasons for them. He argues that disharmony among all of these aspects in each legal world must be analysed to further the aim of scientific or academic study, comparing similarity and differences among legal systems. While recognising that statements made in a legal system which constitute its legal formants "may not be strictly legal ...[t]hey may be propositions about philosophy, politics, ideology or religion", Sacco appears particularly impressed by the greater focus on case law allowed by comparative law, and the "factual approach" developed by Rudolf Schlesinger at Cornell University in the 1960s to exhaustively compare contract formation rules.³² Schlesinger's group asked academics familiar with different legal systems to explain what results would be reached in practice, not what one legal dogma might state, in particular cases taken from Anglo-American or German judgments.

Mauro Bussani, professor at the University of Trento, suggests that this approach invites broad consideration of all factors which might impact on a legal problem.³³ His former colleague there, Ugo Mattei, is known for attempts to compare legal systems under criteria of economic efficiency.³⁴ So far, however, his suggestion that the transaction costs and savings should be weighed in deciding if and how to enact a European Civil Code have not been developed sufficiently. Mattei makes the unsubstantiated and implausible assertion that "the best transaction-cost reducing codification is the one that is able to verbalise and codify what there is already in common in the law of as many of the Member States as possible".³⁵ Yet in some earlier work, he appeared more realistic about how rules which seem inefficient, and therefore presumably raise transaction costs, may remain in place in many jurisdictions.³⁶

Mattei's present assertion assumes instead that a Member State's national law, say of contract, has evolved as a set of efficient norms. That would run counter to some empirical research suggesting that firms in England, at least, "opt out" of its more rigid normative framework for resolution of contractual disputes, by selecting arbitral processes allowing a more contextualised approach.³⁷ In addition, Mattei's assumption is implausible in

³¹ Ibid, 26 (n 29).

³² Ibid, 26-30, 32.

³³ M Bussani "'Integrative' Comparative Law Enterprises and the Inner Stratification of Legal Systems" (2000) 8 *European Rev Private Law* 85. He remarks that his approach differs from Sacco's, but it is hard to see where, and both appear firmly within the tradition established by the 1987 manifesto.

³⁴ See especially U Mattei *Comparative Law and Economics* (U Michigan Press, Ann Arbor, 1997).

³⁵ U Mattei "A Transactions Cost Approach to the European Civil Code" (1997) 5 *European Rev Private Law* 537, 539.

³⁶ "Efficiency in Legal Transplants: An Essay in Comparative Law and Economics" (1994) 14 *Int'l Rev L & Econ* 3. Arguably inefficient rules were noted in France and the US regarding one property rule, as opposed to more obviously efficient England, Germany and Italy. Mattei suggested that enduring inefficiencies were due to irrational "ideology" (ibid, 10-16). However, his own example suggests how precarious the emergence of a clearly "efficient" rule is. More specifically, it reveals the possibility that the majority of European legal systems may have developed sets of inefficient rule for (perhaps different) "ideological" reasons.

³⁷ H Collins "Formalism and Efficiency: Designing European Commercial Contract Law" (2000) 8 *European Rev Private Law* 211. To be sure, one difficulty with Collins' review of

view of the extensive literature on the "path dependent" evolution of norms and institutions. At its broadest, path dependence refers to "historical sequences in which contingent events set into motion institutional patterns or event chains that have deterministic properties".³⁸ Economic historians, and now some working in the "law and economics" tradition, have developed a utilitarian variant to explain self-reinforcing processes in which "actors rationally choose to reproduce institutions – including perhaps sub-optimal institutions – because any potential benefits of transformations are outweighed by the costs".³⁹ Mattei and his former colleague, Fabrizio Cafaggi, do state that their version of:⁴⁰

Comparative law and economics contends that history and path-dependency are crucial to identify causes and modes of legal change and it is neither committed to a conscious, planned evolution of the law, nor to an invisible hand phenomenon.

Yet they go on immediately to assert that greater scope for judges to draw on foreign solutions creates a context in which "it is hard to find a different legitimisation other than (contextualised) economic efficiency"; and that due to more possibilities for other legal actors to choose foreign law to govern their dealings, "it is difficult to resist the hypothesis that the selection process is governed by some efficiency concerns".⁴¹ Thus, the invisible hand reappears.

A similar tension emerges in Mattei's more recent ruminations on codifications and alternatives in and for Europe. He concedes that assessing economic incentives involved in setting legal norms, although "a very difficult economic measurement to carry out and a very difficult choice", might derive from "the legal system's fundamental understanding of how much of private law is mandatory and how much is default [rules], an understanding that might itself be determined more by tradition and path-dependence than by conscious policy".⁴² But Mattei then implies that doctrines of general contract law developed in European civil codes have evolved which nonetheless achieve or reflect an economic calculus, specifically regarding whether to impose mandatory as opposed to default rules. This assertion is made to bolster the

the empirical studies supporting its view is the formalisation observed since the 1980s in arbitral processes, and arguably some substantive norms applied, at least in transnational settings. See L Nottage "The Vicissitudes of Transnational Commercial Arbitration and the *Lex mercatoria*: A View from the Periphery" (2000) 16 *Arb Int'l* 53; A Chamberedon "The Quality of Europeanised Private Law - Form v Substance?" (2000) 8 *European Rev Private Law* 237. Another is that he refers to an study published by Laura Nader regarding dispute resolution in the US garment industry, whereas extensive recent research into a variety of trade arbitration systems in that country suggests that they adopt a very formal approach to dispute resolution: see eg L Bernstein "Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms" (1996) 144 *U Pa L Rev* 1765; L Bernstein "The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study" (1999) 66 *U Chicago L Rev* 710. Indeed, this has led to a questioning of the tendency, apparent at least since the days of Karl Llewellyn, to systematically revise American commercial law in light of business practices and expectations: D Charry "The New Formalism in Contract" (1999) 66 *U Chicago L Rev* 842. Of course, because US law adopts more substantive reasoning than English law (below n 59, 60), such formal tendencies may still create an amalgam of normative standards even for a given business community that favours the more contextualised approach that Collins believes English firms prefer. However, the processes leading to formalisation identified in particular by Bernstein's research deserve investigation also in England. So too, in other European jurisdictions, if we are to really apply a new sensitivity to economics and other social sciences in comparative private law studies.

³⁸ J Mahoney "Path Dependence in Historical Sociology" (2000) 29/4 *Theory & Society* 507, 507.

³⁹ *Ibid.*, 517.

⁴⁰ U Mattei & F Cafaggi "Comparative Law and Economics" in P Newman (ed) *The New Palgrave: A Dictionary of Economics and Law* (MacMillan, London, 1998) 346.

⁴¹ *Ibid.*, 350.

⁴² U Mattei, "Efficiency and Equal Protection in the New European Contract Law: Mandatory, Default and Enforcement Rules" (1999) *Virginia J Int'l L* 537, 544.

argument that a uniform but minimalist set of contract law rules should be developed, drawing on such accumulated wisdom.⁴³

The underlying problem appears to be that Mattei sees path dependence as relevant much more to economic as opposed to legal institutions. He and Cafaggi argue that:⁴⁴

economic institutions can differ greatly according to the historical path along which they have developed and the social context, whereas legal phenomena may have a transnational homogenous dimension.

This distinction is certainly not obvious, nor is it followed by other theorists who stress the importance of path dependence for the evolution of both legal rules and economic institutions which may remain inefficient.⁴⁵ Indeed, retaining distinctions between legal and economic evolution seems more consistent with functionalist, power-based, or legitimisation variants of contemporary path dependence theory.⁴⁶

More interesting is Mattei's view recently that initiatives like the UNIDROIT Principles and PECL "hide under the technocratic ideal a market ideology aiming to keep contract law 'that really matters' in the hands of leading law firms and of their corporate clients".⁴⁷ Yet, despite cynicism about such initiatives, in favouring instead a minimalist European Code, he seems remarkably optimistic in asserting that "civil law codes have been intellectual products almost entirely immune from interest group capture".⁴⁸ There may well be significant differences between codifiers and private lawmaking by experts, in the balance between technical expertise versus political accountability, and corresponding structures or processes for deliberation in contemporary settings. But there is now a rich literature in political economy precisely on such issues, which is not pursued.⁴⁹

This unfulfilled promise of an expansive inquiry when undertaking comparative private law studies, perhaps unable to shake off a strong tradition of formalism in Italian law,⁵⁰ is also apparent in more recent research emanating

⁴³ Ibid, 548, 552-3. It would replace separate consumer law regimes dominated by mandatory rules (developed especially through EU Directives), as opposed to the "new commercial law" dominated by default rules (being developed by private initiatives like the UNIDROIT Principles and PECL).

⁴⁴ Above n 40, 348. When questioned about this and earlier quoted passages, Fabrizio Cafaggi explained that this goes back to their view that efficiency is a less determinative criterion in legal settings in the first place, compared to economic institutions. Further, path dependency in recent economic theory also draws on the same type cost-benefit assessments that underpin determinations of efficiency, so path dependency might be less for legal phenomena. Accepting this view, however, implies surely that efficiency is unlikely to have much explanatory or normative appeal in judge-made law or even the legal norms selected by contracting parties, as they go on to imply. It would also undercut Mattei's views that national contract laws have tended to succeed in an economic calculus of central issues such as whether to make rules mandatory or not, and that a common core of contract rules in Europe is likely to economise on transaction costs.

⁴⁵ See eg L Bebchuck & M Roe "A Theory of Path Dependence in Corporate Ownership and Governance" (1999) 52 Stan L Rev 127. Such theories also militate against the view that competition among legal regimes should be the main regime for convergence in Europe. See eg J Smits "A European Private Law as a Mixed Legal System: Towards a *Ius Commune* through the Free Movement of Legal Rules" (1998) 5 Maastricht J European & Comp L 328, 336-9.

⁴⁶ Mahoney, above n 38.

⁴⁷ Above n 41, 553 (citing his "The Issue of Private Law Codification and Legal Scholarship" (1998) *Hastings Int'l & Comp L Rev* 883). However, PECL appears less driven by "market ideology" (cf Hyland, below n 97).

⁴⁸ Ibid, 570. Compare the involvement of interests favouring an emergent bourgeoisie in the enactment of the *Code Civil*: P A Fenet (ed) *Naissance du Code Civil: La Raison du Législateur* (Flammarion, 1998). Thanks to Jacques Ziller for bringing this work to my attention.

⁴⁹ See Schwartz & Scott, Stephan (above n 29).

⁵⁰ See generally G Calabresi "Two Functions of Formalism" (2000) 67 U Chicago L Rev

from Trento. Bussani and Mattei were responsible for convening a meeting in Trento in 1994 which resulted in a comparative study of "good faith" being embarked upon, one of three pilot studies for elaborating a project to uncover a "Common Core of European Private Law".⁵¹ Schlesinger remains the "late honorary editor" and Sacco the "honorary editor" in this ambitious project, which involves around one hundred academics from fifteen EU Member States as well as Israel, South Africa and Switzerland. Along with a book edited by Bussani and Mattei on *Making European Law: Essays on the 'Common Core' Project*, and one forthcoming from Cambridge University Press on *Enforceability of Promises in European Contract Law* edited by the American legal historian James Gordley, a variety of topics (ranging from contract to tortious liability and property law) are now being researched.⁵²

The coordinators selected for the recently published study on good faith, Zimmermann and Simon Whittaker, remain remarkably faithful to the methodology originating from Cornell, supported by *il circolo di Trento* and applied in this project. They selected simple factual situations derived primarily from German judgments, and invited national reports asking:⁵³

(i) for a purely legal, or doctrinal, analysis, indicating the practical result (including remedies) and the way in which it is reached, ... some indication as to significant differences of opinion which might exist within the respective legal system, and a discussion of underlying policy concerns. But [they] also asked (ii) that this analysis be placed in its legal context so the country reporters should explain why one legal analysis was adopted rather than another; and (iii) that account be taken of any institutional, procedural or even cultural features that might be pertinent to a proper understanding of the approach involved.

Unfortunately, scant attention appears to have been paid to (iii) by the national reporters, none known for their expertise in procedural law — let alone legal sociology. A rare instance cited of "contractual practice" in England in providing clauses to cover economic contingencies, for example, turns out to be drawn from a contributor to a major commentary on English law for practitioners, unlikely to have involved systematic empirical research into the issue.⁵⁴ Careful comparative studies into other contractual settings have suggested very different patterns.⁵⁵

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⁵¹ S Whittaker & R Zimmermann "Good Faith in European Contract Law: Surveying the Legal Landscape" in R Zimmermann & S Whittaker *Good Faith in European Contract Law* (Cambridge UP, Cambridge, 2000) 7, 58.

⁵² The latter reportedly will result in further edited volumes:

- Eva-Maria Kieninger, *Security on Movables*
- Mauro Bussani and Vernon V. Palmer, *Pure Economic Loss*
- Barbara Pozzo, *Property on Environment*
- Ruth Sefton-Green and Jacques Ghestin, *Mistake and Misrepresentation*
- Michele Graziadei and Lionel Smith, *Trusts*
- Franz Werro and Vernon V Palmer, *Strict Liability*
- Pier Giuseppe Monateri, *Complex Liability*
- John Cartwright and Martijn Hesselink, *Pre-contractual Liability*

See <http://www.jus.univr.it/dsg/common-core/books_list.htm>; and E Hondius "The Common Core of European Private Law, Trento, 15-17 July 1999" [2000] *European Rev Private Law* 249.

⁵³ *Ibid.*, 60.

⁵⁴ S Whittaker & R Zimmermann, "Coming to Terms with Good Faith" in R Zimmermann & S Whittaker *Good Faith in European Contract Law* (Cambridge UP, Cambridge, 2000) 653, 685. The latter refers to the text at page 568, which cites Colyer in *Halsbury* (para 261) as proclaiming "the almost invariable practice to stipulate that the service charge [by the tenant for services provided by a landlord] is to be paid by reference to a formula".

⁵⁵ Firms dealing in kitchen furniture and mining machinery in Britain and Italy, but not in Germany, *never* reported including a "hardship" clause providing for adjustment of

Further, Whittaker and Zimmermann conclude from their review of reports on all thirty "cases" that English law, in particular, does *not* develop a different *conception* of contract. But they do so by bracketing the "question at large including ... the truly binding nature of contract as against Holmes' view of the common law position".⁵⁶ Yet one central meaning of good faith in other systems adopting that general principle is that people ought to keep their word, while Whittaker and Zimmermann note that deliberate breach of contract is treated more seriously for example in French and Spanish law based on good faith principles.⁵⁷ As Richard Hyland pointed out years ago, such a moralistic upholding of consent presents a sharp contrast to the risk allocation approach to Anglo-American contract law, supported by views such as those of Justice Holmes in the United States.⁵⁸

Even within "Anglo-American law", moreover, different conceptions of contract law are apparent. American law, which does recognise a general duty of good faith, is more open to substantive reasoning whereas English law prefers more formal reasoning. The latter focuses on the parties' agreement or promises as the source of binding force, and eschews overt recognition of broad standards.⁵⁹ Patrick Atiyah and Robert Summers argue convincingly that these differences in patterns of legal reasoning are related to systemic differences in legal institutions, such as the greater role for – and expectations regarding – statute law.⁶⁰ This broader context, which can contribute to different "visions" of law, seems crucial to compare jurisdictions other than England and the United States as well.⁶¹ Yet it emerges only fleetingly from the national reports reviewed by Whittaker and Zimmermann in their study of good faith. For instance, they agree that the general view in England seems to be that the law should be developed by Parliament, not the courts, but do not elaborate this point.⁶² They also dismiss the suggestion that "English law takes as its starting point a commercial model of contract, whereas 'civil law systems' think more in terms of private transactions more generally", on the grounds that differentiated results

contractual obligations in the event of changed circumstances: S Deakin, C Lane and F Wilkinson "Contract Law, Trust Relations, and Incentives for Co-Operation: A Comparative Study" in S Deakin and J Michie (eds) *Contracts, Cooperation and Competition* (Oxford UP, Oxford, 1997) 105, 124. This practice seems consistent with the surveyed firms in Britain reporting on average the highest degree of "flexibility outside contract" (including "being ready to help in an emergency" and "give and take") in "trust" relations, perceived as crucial to business relationships: cf B Burchell & F Wilkinson "Trust, Business Relationships and the Contractual Environment" (1997) 21 *Cambridge J Econ* 217, 226-232.

⁵⁶ Whittaker & Zimmermann, above n 54, 698. They add the questionable remark that "Holmes' work concerned the *common law*; clearly, the [position that a party should be free to break a contract and pay damages] must be read subject to the impact in the modern law of the equitable remedies of specific performance and injunction" (idem, n 162, original emphasis). In fact, immediately before stating this position, Holmes had observed that "a court of equity is not in the habit of interfering until the time has gone by, so that the promise cannot be performed as made". Justice Gummow cites case law to the contrary in Australia and England, but only since the 1950s: W M C Gummow *Change and Continuity: Statute, Equity, and Federalism* (Oxford UP, Oxford, 1999) 49-51.

⁵⁷ Ibid, 693.

⁵⁸ R Hyland "On Setting Forth the Law of Contract" (1992) 40 *AJCL* 542. See also R Hyland, "Pacta Sunt Servanda" (1994) *Virginia J Int'l L* 405, 406 and 428-30.

⁵⁹ L Nottage "Form and Substance in US, English, New Zealand and Japanese Law: A Framework for Better Comparisons of Developments in the Law of Unfair Contracts" (1996) 26 *VUWLR* 247.

⁶⁰ P S Atiyah and R S Summers *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press, Oxford, 1987).

⁶¹ Developing their view, John Bell similarly advocates comparing "law as tradition", which "is a process in which actors are engaged, sets the context for decision-making, and is a group of people engaged in the activity of the tradition and shaping it". See "Comparative Law and Legal Theory" in W Krawietz (ed) *Prescriptive Formality and Normative Rationality in Modern Legal Systems* (Duncker & Humblot, Berlin, 1994) 19, 24.

⁶² Zimmermann & Whittaker, above n 54, 687, 689-90.

are reached in the thirty cases, and that even commercial transactions are subjected to standards of "reasonableness".⁶³ This ignores a point well taken by Hein Kötz, namely that the most litigated cases before the House of Lords arose from charter parties, carriage of goods contracts and insurance contracts, especially marine insurance; and the influential Commercial Court deals with many cases involving international parties. Such cases were very rare in Germany's highest court in civil matters; its appellate courts seem to deal with proportionately more contracts for the sale of land or used cars, involving personal non-commercial relationships, or between professionals and non consumers. He concludes that there may be:⁶⁴

more than a grain of truth in the observation that 'the English law of contract was designed for a nation of shopkeepers' while 'the French system was made for a race of peasants' ... [in which case] it should come as no surprise that the English rules on disclosure and indeed on good faith duties in the negotiation, performance and execution of contracts may differ in form and *perhaps also* in substance from those on the Continent.

Finally, even ignoring such possible divergences at the level of general principle and institutional frameworks, Zimmermann and Whittaker concede some significant disharmony in results reported for the thirty hypothetical cases:

Eleven led to the same result in all the legal systems considered; nine led to the same result in the majority of legal systems but not in one or two ('cases of general but imperfect harmony'); and ten led to a considerable variety of result among the legal systems.

Whittaker and Zimmermann are struck by the degree of convergence, but one must wonder why. If on quantitative grounds, then this seems an arbitrary or unhelpful conclusion. Since incorporating English law into the newly discovered or fabricated European *ius commune* is the main challenge, moreover, it is surely more important that some of the "cases of general but imperfect harmony" involve English law taking a starkly different attitude.⁶⁵ The same is true in some cases admitted to involve significant disharmony, including "case 11 ... in some ways pivotal", in which English law generally allows a party subjected to a fraudulent misrepresentation can rescind the contract even for reasons unrelated to the misrepresentation.⁶⁶ A judgement of overall divergence or convergence surely must be driven by the primary aims of the exercise, and inevitably involve some qualitative aspects. If so, the assessment seems more likely to prove accurate if all possible explanatory factors are incorporated in the analysis, rather than focusing overwhelmingly on rules and specific results.

A broader approach also would appear more consistent with the methodology originally propounded by *il circolo di Trento* and the Cornell group. However, whereas as the Cornell studies resulted in an overwhelming focus on black letter law,⁶⁷ the current project on "The Common Core of European Private

⁶³ Ibid, 698.

⁶⁴ "Towards a European Civil Code: The Duty of Good Faith" in P Cane & J Stapleton (eds) *The Law of Obligations* (Oxford UP, Oxford, 1998) 243, 257 (emphasis added). Koetz repeats this point and the conclusion – indeed, without the words emphasised – in his "The Common Core of European Private Law: Third General Meeting, Trento, 17-19 July 1997" (1997) 5 *European Rev Private Law* 549, 552.

⁶⁵ As in "Case 2" involving a painting sold at extraordinary under-value, even where the buyer knew that it was by a famous artist: Whittaker & Zimmermann above n 54, 656. This discrepancy is also highlighted by M van Rossum "The Duty of Disclosure: Tendencies in French Law, Dutch Law and English Law; Criteria, Differences and Similarities Between the Legal Systems" (2000) 7 *Maastricht J European & Comp L* 300; and Koetz (above n 64).

⁶⁶ Whittaker & Zimmermann above n 54, 661-2.

⁶⁷ See R Schesinger (ed) *Formation of Contracts: A Study of the Common Core of Legal*

Law” appears to begin with this orientation. An overview of the project offered by Bussani and Mattei refers only to examining rules in statutes, case law and academic writing, not the possibility of exploring more broadly the law in action, and remarks for instance that:⁶⁸

The Common Core Project seeks to investigate in depth more specific areas of the law, especially *technical problems*. The development of a common work methodology is in itself an educational enterprise to those who are participating in it. Hence, it may facilitate *sophisticated technical communication among professional lawyers* already formed in their own legal tradition rather than having as a target the creation of prospective common European lawyers.

The latter objective is passed over to another project involving publication of textbooks useful for law students throughout Europe, which is seen as a complementary initiative in building a common culture. On the one hand, this additional mechanism for “soft law” harmonisation in Europe already has led to several weighty tomes, mostly published first in German and translated into English, containing detailed comparisons of contract and tort law doctrine.⁶⁹ Closer to the Trento approach, on the other hand, is the publication of casebooks bringing together “cases and other materials with accompanying notes, introductory comments and comparative overviews each of the main areas of law”, in a project initiated in 1994 by Walter van Gerven and Adriana Alvarez:⁷⁰

The Project takes a functional approach to comparative law whereby the emphasis is put not so much on the differences between the various legal ‘families’ or ‘cultures’, but rather on how the various legal systems cope with certain factual situations which are bound to happen in every legal system. Beyond exploring the actual outcomes reached by each system and the applicable ‘rules’, the casebooks also show the policy considerations which come into play. Indeed, law cannot be studied in a vacuum. While ‘legal cultures’ may present certain differences, which come to bear in the mode of reasoning, the style, etc, it is the experience of the authors that policy considerations are shared to a greater extent than one suspects, and not necessarily along the traditional ‘fault lines’ of ‘legal cultures’.

Systems (Oceana, Dobbs Ferry/London, 1968). An interesting exception is the exploration of more fundamental underlying principles by a youthful Ian Macneil: “Time of Acceptance: Too Many Problems for a Single Rule” (1964) 112 U Penn L Rev 947 (also in section B-9 of the above volume). Those principles remained one part, but an increasingly minor one, in his elaboration of “relational contract law” theory. More formative of the sociological approach underpinning that theory, however, may have been his experiences in living and teaching law in Tanzania over 1965-7. Cf generally D Campbell “Ian Macneil and the Relational Theory of Contract” in I Macneil *The Relational Theory of Contract: Selected Papers of Ian Macneil* (Sweet & Maxwell, London, 2001).

⁶⁸ M Bussani & U Mattei “The Common Core Approach to European Private Law” (1997/8) 3 Columbia J European Law 339, 343 (largely reproduced, without attribution, at <<http://www.jus.unitn.it/dsg/common-core/approach.html>> Part I(b)).

⁶⁹ See H Koetz & A Flessner *European Contract Law, Vol 1: Formation, Validity, and the Content of Contracts, Contract and Third Parties* (T Weir trans, Clarendon, Oxford, 1997); C von Bar *The Common European Law of Torts, Vol 1: The Core Areas of Tort Law, its Approximation in Europe, and its Accommodation in the Legal System* (Clarendon, Oxford, 1998). The latter, however, already anticipated contributing towards enactment of a European Civil Code (see also von Bar, above n ...), whereas Koetz remains more ambivalent (see eg above n 64). So does Markesinis, who has also published massive works, focused more narrowly on comparing English and German tort law, and insisting much more on case law analysis (above n 2). Much slimmer volumes containing brief “national reports” on aspects of tort law doctrine also have appeared regularly from the “European Group on Tort Law (the Tilburg Group”): see eg J Spier *Unification of Tort Law: Causation* (Kluwer, The Hague et al, 2000).

⁷⁰ P Larouche “Ius Commune Casebooks for the Common Law of Europe: Presentation, Progress, Rationale” (2000) 8 European Rev Private Law 101, 107.

Thus, some mention is made of comparing law in context, but this context is viewed only in terms of earlier “grand theories” of legal families, which on examination prove – not surprisingly – to add little to the picture. Further, as in the study published by Whittaker and Zimmermann, the first full casebook published following this methodology focuses on black letter law – rules, concepts, and “policy considerations” only as revealed in case law or doctrinal writing.⁷¹ A rich literature on “tort law in action”, at least in the United Kingdom, appears to have totally ignored.⁷² If indeed the European Casebook project is inspired by the contribution of casebooks towards promoting a common core of legal knowledge throughout the various United States of America,⁷³ it overlooks the fact many contemporary casebooks in that country include extensive “materials” — not limited to the black letter law.⁷⁴ The approach and fruits of this project in Europe also run contrary to the emphasis in the United States on analysing case law to gain profound and critical appreciations of the disunity as well as the coherence of the law, and insights into how the law interacts with its social context.⁷⁵ A collection edited by Volkmar Gessner and others on *European Legal Cultures*, a “book about law” rather than a “lawbook”, remains a notable exception amidst the literature in Europe being developed mainly for law students.⁷⁶

II.B Convergence World-Wide?

Many commentators similarly tend to stress convergence in private law worldwide, allegedly in the shadow of globalisation of economic relations; but without studying such broader phenomena empirically or in the context of contemporary debates in legal and social theory.⁷⁷ This tendency is apparent among those involved in elaborating mandatory regimes for international transactions, as well as those advocating only (or further) “softer” initiatives.

On the one hand, Gerold Hermann and others at the UN Commission for International Trade Law (UNCITRAL), responsible now CISG as well as several instruments affecting international commercial arbitration, often justify these unification efforts by highlighting the expansion of trans-border trade and investment. This is especially so when addressing broader audiences.⁷⁸ When writing for or speaking to lawyers, however, that factor tends to be overwhelmed or displaced entirely. Rather, arguments focus on the more technical advantages of various legal solutions devised by UNCITRAL and their widespread acceptance

⁷¹ W van Gerven et al (eds), *Cases, Materials and Text on National, Supranational and International Tort Law* (Hart, Oxford, 2000). One of the largest chapters in this casebook was published separately in 1998: W van Gerven et al *Tort Law: The Scope of Protection* (Hart, Oxford).

⁷² See eg H Genn *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Clarendon, Oxford, 1987). For a broader survey of the empirical and theoretical research into the impact of tort law rules, see also D Dewees et al *Exploring the Domain of Accident Law: Taking the Facts Seriously* (Oxford UP, Oxford, 1996), reviewed by S Deakin “The Evolution of Tort” (1999) 19 *Oxford J Leg Studies* 536.

⁷³ Cf W Van Gerven “Casebooks for the Common Law of Europe: Presentation of the Project” (1996) 4 *European Rev Private Law* 67, 68. This appears to labour under a serious misconception

⁷⁴ The most impressive is S Macaulay, J Kidwell, W Whitford and M Galanter *Contracts: Law in Action 2 Vols* (The Michie Company, Charlottesville, 1995).

⁷⁵ See generally M Reisman “American Private Law and European Legal Unification: Can the United States be a Model?” 3 *Maastricht J European & Comp L* 217, 223, 229-30.

⁷⁶ Dartmouth, Aldershot, 1996. See the fine review essay of this and two other textbooks, more “lawbooks”, by P Zumbansen, “The Semantics of European Law” (1999) 5 *ELJ* 114, 118.

⁷⁷ Cf the rich analysis in W Twining, *Globalisation and Legal Theory* (Butterworths, London et al, 2000).

⁷⁸ These events are frequent, even in the South Pacific: see eg L Nottage “Trade Law Harmonisation in the Asia-Pacific Region: A Realist’s View from New Zealand - and a Way Forward?” (1995) *NZLJ* 295.

– providing a sort of “global best practice” for legal communities world-wide.⁷⁹

The same invocation of the exigencies of international commerce, while focusing in practice almost exclusively on legal doctrine and developments in case law or arbitral awards, is apparent from the activities and publications of Michael Bonell. As one of the main architects of the non-binding UNIDROIT Principles of International Commercial Contracts, he works equally assiduously around the world to promote instead this “soft law” harmonisation initiative.⁸⁰ His focus on rules, and convergence, is apparent for instance in his writing emphasising the compatibility or common core of the UNIDROIT Principles and both PECL and CISG.⁸¹

Klaus Peter Berger goes further in arguing for a “change of paradigm in international commercial law, a marked shift away from formal rulemaking by international formulating agencies to private codification efforts”. He calls this a “creeping codification of transnational law”, but one driven by a more diffuse “new *lex mercatoria* ... created by the parties to international commercial transactions and their arbitral tribunals”.⁸² Berger alludes to “social control” of transnational contracts, for instance through principles of good faith and fair dealing contained in the UNIDROIT Principles and underpinning “the search for commercial fairness ... reflected *inter alia* in the developing theory on the renegotiation and restructuring of long-term ‘relational’ contractual relationships”. But he correctly points out that, in practice, international arbitrators (at least nowadays) are very reluctant to allow claims for exemption or adjustment of transnational contracts if the parties have not made some contractual provision for unexpected impediments: “sanctity of contract prevails over any attempts to use the new flexibility of transnational contract law as a disguised means of rewriting the contract”.⁸³

Berger’s greater attention to the activities and actual expectations of the parties to international trade transactions, rather than just the courts or even the arbitrators, explains his recent attempt to link this wave of refinement of soft law rules and principles to a range of “economic and geo-political factors”, such as the end of the cold war, European integration, mega-mergers creating truly transnational corporations, developments in global capital flows and markets, and revolutions in communications and information technology.⁸⁴ Further, Berger is aware that these tendencies “towards the evolution of a global civil society” leave for instance “the question whether there are separate sets of transnational commercial law for specialised areas of international business”, and has recently led a significant empirical study into contemporary usage and attitudes regarding the *lex mercatoria*.⁸⁵

II.C Convergence in Comparative Law Methodology

⁷⁹ See eg G Hermann “The UNCITRAL Arbitration Law: A Good Model of a Model Law” [1998-3] Uniform L Rev 483.

⁸⁰ See eg M Bonell “The Need and Possibilities of a Codified European Contract Law” (1997) 5 European Rev Private Law 505, 507; M Bonell “The UNIDROIT Principles and Transnational Law” [2000-1] Uniform L Rev 199.

⁸¹ See, respectively, M Bonell “The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?” [1996-2] Uniform L Rev 229; and M Bonell “The UNIDROIT Principles of International Commercial Contracts and the Vienna Sales Convention (CISG): Alternatives or Complementary Instruments?” [1996-1] Uniform L Rev 26.

⁸² K P Berger “The New Law Merchant and the Global Market Place: A 21st Century View of Transnational Commercial Law” [2000] Int Arb LR 91, 97.

⁸³ K P Berger “The Relationship Between the UNIDROIT Principles of International Commercial Contracts and the New *Lex Mercatoria*” [2000-1] Uniform L Rev 153, 159-60, 163. See also Nottage, above n 37, 61.

⁸⁴ Above n 82, 98.

⁸⁵ *Ibid*, 101. See L Nottage “Practical and Theoretical Implications of the *Lex Mercatoria* for Japan and the Asia-Pacific Region: CENTRAL’s Empirical Study on the Use of Transnational Law”, (forthcoming, 2001) *Revue Juridique Polynésienne*.

Except recently for Berger, therefore, all these proponents of convergent transnational or European private law regimes remain largely focused on the need for – and possibility of – the harmonisation of *rules* through the analysis of black letter law. They ignore possible tensions at the level of fundamental *principle* among even new normative frameworks devised precisely to promote harmonisation, such as PECL and the UNCITRAL Principles.⁸⁶ This lacuna can only become increasingly problematic as more and more normative frameworks emerge, even at the level of treaties dealing with aspects of substantive law.⁸⁷

Further, unless indirectly in discussing commercial arbitration – at least partly rooted in contract anyway – issues of civil procedure get little attention compared to substantive law topics.⁸⁸ This is despite the entanglement of procedural and substantive law issues in much civil dispute resolution. One contemporary example is the difficulty experienced by US courts in determining the relationship between the “parol evidence rule” and the ability to prove a contract by any means under CISG art 11(2).⁸⁹ Another is the first judgment of the European Court of Justice (ECJ) on the Unfair Terms Directive of 1994, rendered on 27 June 2000.⁹⁰ Only belatedly has a major project got underway, at UNIDROIT but in collaboration with the ALL, to prepare Principles and Rules of Transnational Civil Procedure.⁹¹ Perhaps the neglect of procedural law by

⁸⁶ Hyland (above n 58, 548) suggests that PECL reflects a more moralistic condemnation of breach of contract, for instance, by art 1.110(2) putting the risk of loss of default notice on the breaching party. He argues that putting the risk on the injured party (who can more readily take precautions in sending a notice) is consistent with the more objective “risk allocation” approach to contract law in the tradition of Oliver Wendell Holmes in the United States, apparent also in German law, and possible under the UNCITRAL Principles.

⁸⁷ Cf generally F Franco “The Relationship Between International Uniform Contract Law Conventions” [2000-1] *Uniform L Rev* 69.

⁸⁸ A rare exception, albeit one advocating a rather unambitious “proceduralist unification which is derivative, international and partial”, is K Kerameus “Procedural Implications of Civil Law Unification” in A Hartkamp et al *Towards a European Civil Code* (Kluwer, The Hague, 2nd ed 1998) 121, 123. Other, fragmented studies include eg the national reports on “Enforcement of Judgments” edited by Wendy Kennett in (1997) 2 *European Rev Private Law* 321-428; and, focused on a UNIDROIT Convention, is K Boele-Woekli “The Limitation of Rights and Actions in the International Sale of Goods” [1999-3] *Uniform L Rev* 621.

⁸⁹ See eg H Flechtner “The U.N. Sales Convention (CISG) and MCC-Marble Ceramic Center, Inc v Ceramica Nuova D’Agostino, SpA” (1999) 18 *J Law and Commerce* 259 (<<http://www.cisg.law.pace.edu/cisg/biblio/flechtner1.html>>)

⁹⁰ OJ L 95/1999, 23. See Joined Cases C-240/98 to C-244/98, *Oceano Grupo Editorial SA v Rocio Murciano Quintero* etc, 27 June 2000. Plaintiff firms sold encyclopedias to consumers, including a contract clause giving exclusive jurisdiction to the courts in Barcelona, the plaintiffs’ main place of business. They brought suit there for non-payment, but the consumers did not appear. The Supreme Court in Spain had held such jurisdiction clauses to be unfair, but the first-instance Court in Barcelona was unsure whether domestic law allowed it to determine unfairness on its own motion. It referred to the ECJ the question of whether the Directive implies that courts should be able to make determinations of unfairness on its own motion. Although the Directive had not yet been incorporated into Spanish law, the ECJ followed its case law to argue that the aim of such Directives should be followed “as far as possible” (presumably, not where this would contradict clear domestic rules). It decided that the Directive did imply that a court should be able to rule on unfairness on its own motion. Presumably, the Spanish Court will now strike down the jurisdiction clause, and domestic private law may adapt more generally to this European law principle. Nevertheless, this ECJ ruling challenges a fundamental principle of Anglo-American civil procedure: the adversary principle.

⁹¹ Although the first meeting was held only in May 2000 (<<http://www.unidroit.org/english/procedure/main.htm>>), the idea has been developed – and criticised – for several years. See eg G Hazard & M Taruffo “Transnational Rules of Civil Procedure: Rules and Commentary” (1997) 30 *Cornell Int’l LJ* 493; cf R Weintraub “Critique of the Hazard-Taruffo Transnational Rules of Civil Procedure” (1998) 33 *Texas Int’l LJ* 413. Unfortunately, these developments are not mentioned in a recent proposal to develop “European Principles of Civil Procedure”: A Schwartze “Enforcement of Private Law: The

those now working towards a European Civil Code, in particular, stems from the failure of the Working Group formed in 1987 mainly by law professors, led by Marcel Storme, to fulfil their grand ambition of enacting a "European Judicial Code".⁹²

Finally, these "convergence theorists" simply assert, or accept all too readily, that harmonisation of rules follows and is justified by some ill-defined Europeanisation or globalisation of economic relations, values, or the like. By contrast, for instance, careful comparative empirical research coordinated through Cambridge University in the mid-1990s uncovered significant differences in inter-firm contracting behaviour, expectations, and legal institutions in England, Germany, and Italy.⁹³ Likewise, against Storme's recent flat assertion that the varied civil procedure regimes in the EU "creates a high degree of legal uncertainty", and that he has "always maintained as an incontrovertible fact that the diversity of procedural law is a major obstacle to the proper functioning of the common market,"⁹⁴ Johanna Niemi-Kiesiläinen responds compellingly:⁹⁵

the crucial question is whether the market unification approach is appropriate as a starting point for a discussion of procedural reform. The efficiency issues are important, but ... in the best European tradition, the capacity of the judicial system to produce just and fair outcomes is the paramount issue. Besides material justice, defined as the capacity of the judiciary to produce decisions that are just and correct in the light of the applicable law and the facts of the case, it should also be required that the proceedings themselves are just and experienced as fair by the parties.

An important implication is that:⁹⁶

Besides descriptive and dogmatic research, socio-legal research of the procedure is needed. The procedure in action often is different from the procedure in books, and information of both is needed. In addition, if we take the quest for justice and fairness seriously, we need research on people's experiences as the subjects of procedure.

Likewise, common values are often asserted without enough elaboration. Guido Alpo, for instance, asserts that:⁹⁷

common legal values have consolidated in Western Europe. This is true without considering the Roman Law tradition or the Mediaeval Law (so called *ius*

Missing Link in the Process of European Harmonisation" (2000) 8 European Rev Private Law 135.

⁹² This was watered down to a decidedly limited restatement, in a report published as M Storme et al *Rapprochement du Droit Judiciaire de l'Union Européen / Approximation of Judiciary Law in the European Union* (Kluwer, Dordrecht et al, 1994). One problem appears to have been that "the domestic procedures applied within the EU have a higher number of divergencies than similarities", despite "a slow rapprochement from all directions": P H Lindblom "Harmony of the Legal Spheres" (1997) 1 European Rev Private Law 11, 43. Recently, however, Marcel Storme appears to be attempting to revive the idea: M Storme "Towards A Common European Procedural Law" in V Heiskanen & K Kulovesi *Function and Future of European Law* (Institute of International Economic Law, Helsinki, 1999) 233. The topic was also discussed again briefly by Kerameus in the study led by von Bar for the European Parliament (above n 2).

⁹³ See eg Deakin et al, and Burchell et al (above n 55).

⁹⁴ Storme, above n 92, 238 (citing "also" a "Tokyo Marine and Fire Insurance [Company] report on civil procedures in EC countries (London 1991)").

⁹⁵ "International Cooperation and Approximation of Laws in the Field of Civil Procedure" in V Heiskanen & K Kulovesi *Function and Future of European Law* (Institute of International Economic Law, Helsinki, 1999) 249, 251.

⁹⁶ *Ibid*, 255.

⁹⁷ See also G Alpo "European Community Resolutions and the Codification of 'Private Law'" (2000) 8 European Rev Private Law 321, 328).

commune, common law) which are quite different from the 'European ius Commune' of today. In all countries of the European Union there exist fundamental rights of an identical nature. In fact, the constitutional law of the European Union has materialised from the principles accepted in the written and unwritten constitutions of the Member States. Moreover, the European Convention of Human Rights has further been ratified by all Member States, and a draft of a European Charter of Human Rights is already made.

By contrast, the lack of institutional support and other inadequacies regarding such a Charter have been highlighted by Joe Weiler.⁹⁸ In the United Kingdom — always a hard case for convergence theorists — the Human Rights Act 1998 finally embeds the Convention more firmly in domestic law; but it does so belatedly and in ambiguous ways, which are only now being unravelled.⁹⁹ Even those public lawyers sympathetic to the potential for transformations of constitutional values and principles in the United Kingdom stress the complex and multi-layered process involved.¹⁰⁰ Perhaps such views reflect a renewed awareness of diversity not only within the United Kingdom, especially regarding Scotland, but also in the European Union more generally. Jan Smits, surrounded by the cultural and legal pluralism characteristic of the Netherlands, also sees things very differently from Alpa in Italy.¹⁰¹

Today's Europe is immensely diverse. The legal systems of the fifteen Member States often greatly differ as to what is regarded as 'fair' and even as to what is regarded as the proper function of law ... also within the Member States, the concepts of fairness and law often differ. I only need to mention that as a result of immigration of large groups of foreigners over the last decades, there are now within the European Union many different ethno-cultural groups with their own views of what is fair.

In any event, the links between constitutional values and private governance, whether in the form of a European Civil Code or otherwise, need much closer examination. One approach involves rethinking the boundaries drawn between private and public law more generally.¹⁰² Yet that issue has also been overlooked in almost all the literature produced by convergence theorists recently.¹⁰³

⁹⁸ "Does The European Union Need a Charter of Rights?" (2000) 6 European LJ 95.

⁹⁹ See generally P Craig "Constitutionalism, Regulation and Review" in R Hazell (ed) *Constitutional Futures: A History of the Next Ten Years* (Oxford UP, Oxford, 1999) 67. Ambivalence or misunderstandings in regard to European law have long characterised both the legislature (see eg D Nicol "The Legal Constitution: United Kingdom Parliament and European Court of Justice" 5/1 (1999) J Legis Studies 135) and the judiciary (N Walker "Setting English Judges to Rights" (1999) 19 Oxford J Leg Studies 133; cf also the challenges raised now by C McCrudden "A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights" (2000) 20 Oxford J Leg Studies 499, 504-5).

¹⁰⁰ See eg N Walker "Beyond the Unitary Conception of the United Kingdom Constitution?" [2000] Public Law 384, 399-404.

¹⁰¹ "A Principled Approach to European Contact Law?" (2000) 7 Maastricht J European & Comp L 221, 222. See also his *The Good Samaritan in European Private Law: On the Perils of Principles without a Programme and a Programme for the Future* (Kluwer, The Hague, 2000). I thank Jacques Ziller for highlighting this pluralism in the Netherlands, albeit as a possible explanation for the affirmation of diversity by Pierre Legrand in his work since the early 1990s (below n ...)

¹⁰² Cf eg Zumbansen, above n 76, 119, 124; O Gerstenberg, "Private Ordering, Public Intervention and Social Pluralism" in C Joerges & O Gerstenberg (eds) *Private Governance, Democratic Constitutionalism and Supranationalism*, European Commission, Brussels, 1998: EUR 18340 EN, 205; P Vincent-Jones "Contractual Governance: Institutional and Organizational Analysis" (2000) 20 Oxford J Leg Studies 317; H Collins *Regulating Contracts* (Oxford UP, Oxford, 1999), reviewed by D Campbell "Reflexivity and Welfarism in the Modern Law of Contract" (2000) 20 Oxford J Leg Studies 477. More generally, see also D Oliver *Common Values and the Public-Private Divide* (Butterworths, London 1999). Thanks to Jacques Ziller for highlighting in various ways the complexity of this issue.

¹⁰³ But see now S Whittaker "Unfair Contract Terms, Public Services and the

In ignoring or glossing over such issues, they follow the mainstream tradition of comparative law scholarship for most of the 20th century. One major approach in the writing within this tradition, mainly in textbooks and articles, is described by Gunther Frankenberg as “Juxtaposition-plus”:¹⁰⁴

the juxtaposition [being] excerpts from cases, statutes, and doctrinal treatises, and the ‘pluses’ [being] a variety of interpretive and explanatory additions ranging from brief introductory remarks via descriptive sketches of historical backgrounds or systemic contexts to a more detailed analysis of similarities and contrasts.

The most common variant, he argued, was “the casuistic approach with a ‘factual focus of presentation’”, singling out court cases to illustrate how conflicts are legally resolved, such as that propounded by Schlesinger.¹⁰⁵ Markesinis’ textbooks on comparative tort law and even some of his edited works clearly follow this methods. Juxtaposing court judgments and doctrinal writing is only rarely supplemented by broader analyses of judicial style, let alone the full institutional background to claiming for civil wrongs.¹⁰⁶ Zimmermann focuses more on legal history, thus tending towards the historical school in comparative law which sought “to find out how, over time, the natural or universal history of law has evolved”; but his involvement in the Trento community draws him into the casuistic juxtaposition-plus approach.¹⁰⁷ These scholars share with Lando, Bonell and Hermann a commitment to “the general principles and precepts, common cores or the constants of law” with the aim of unifying or harmonising the law, involving what Frankenberg earlier criticised as:¹⁰⁸

The constant reaffirmation of a central notion of law in the avowed attempt to

Construction of a European Conception of Contract” (2000) 116 LQR 252.

¹⁰⁴ G Frankenberg “Critical Comparisons” (1985) Harv Int’l LJ 411, 430.

¹⁰⁵ Ibid, 431. Less common was a systematic approach examining differences and – more often – similarities in legal systems, having set out “general characteristics and abstract concepts or with the institutional infra-structure of a ‘real’ or ideal type legal system”, such as the “legal families” identified in the first part of the well-known textbook by Konrad Zweigert & Hein Koetz (see now: (T Weir trans) *Introduction to Comparative Law* (3 ed, Clarendon Press, Oxford, 1998)). A third, related to the casuistic method, was “the topical approach which focuses on cross-culturally selected social-legal problems and claims to grasp the ‘law in action’”, such as found in J Barton et al *The Law in Radically Different Cultures* (West, St Paul, 1983) see also P Legrand “John Henry Merryman and Comparative Law: A Dialogue” (1999) 47 AJCL 3, 26-9).

¹⁰⁶ Compare eg his *A Comparative Introduction to the Law of Torts* (3rd ed, Clarendon, Oxford, 1994) with Markesinis, above n 11, and B Markesinis “Litigation Mania in England, Germany, and the United States: Are We So Very Different?” (1990) CLJ 233. See also his two collections of essays: *Foreign Law and Comparative Methodology: A Subject and a Thesis* (Hart, Oxford 1997), and *Always On the Same Path* (Hart, Oxford, forthcoming). In the introductory chapter with the same title as the former book, Markesinis professes “the need to look at law in a broader context”, and his “interest in empirical data ... picked up during ... years in the United States and, especially, from the work of John Fleming”, and concern about “studying the law in action” (ibid, 1, 10-11). But only one of the many chapters really attempts to deal with empirical data, being a reprint of the CLJ article just cited, with its subtitle asking rhetorically “are we really so different?”. Cf eg Genn, or Dewees et al, above n 72. Overall, Markesinis’ outlook on law is nicely captured by the second paragraph in his introductory chapter, describing his view of art:

“that some themes have held a constant fascination for artists; that most things that had to be said had, in some form or another, already been expressed by someone; and that often the only way one could stamp one’s individuality on a subject or a theme was through the way one chose to express it, the basic idea being already common property”.

For a very different view of creativity in art, paralleled by a tension between creating and sometimes transcending new markets, see L Nottage “*Ho to Bijutsu* [Law and Art]” (2000) 1666 Toki no Horei 2.

¹⁰⁷ Frankenberg, above n 104, 428; cf Zimmermann & Whittaker, above n 51.

¹⁰⁸ Frankenberg, above n 104, 433.

re-evaluate and re-imagine it. There is little outside the law a jurist has to think about when solving one of these problems.

However, the Trento project in particular claims that it adopts a "functional approach", viewed by Frankenberg as another but distinct mainstream school in comparative law.¹⁰⁹ The reason he distinguishes the two is that by focusing on what social purposes might be served by rules in different legal systems, functionalism in theory should be oriented as much to the law in action as to the law in books. Hein Kötz, one of the main contemporary theorists responsible for reviving Ernst Rabel's advocacy of this approach in the 1920s, has certainly claimed that:¹¹⁰

The comparatist must treat as a source of law whatever moulds or affects the living law in his chosen system, whatever the lawyers there would treat as a source of law, and he must accord those sources the same relative weight and value as they do. He must attend, just as they do, to statutory and customary law, to case-law and legal writing, to standard-form contracts and general conditions of business, to trade usage and custom. It is also increasingly recognised today that the comparatist must be an observer of social reality and that comparative law has much to gain from an interdisciplinary approach.

Unfortunately, Kötz has never adequately met this challenge, as is apparent from the various editions of his well-known textbook co-authored with Konrad Zweigert. In its third edition, for instance, they insist on excluding Japanese law from their comparative analysis of specific private law rules. It is lumped together with the law of the People's Republic of China in a "Far Eastern Legal Family", both supposedly distinguished by a "Confucian" tradition of social ordering beyond the rule of law.¹¹¹ Zweigert and Kötz ignore or downplay extensive social-legal studies suggesting instead how Japanese law is used by citizens in economically rational ways, managed by social elites, or engaged sometimes very effectively to advance political causes.¹¹² Such views should suggest not only that "law matters" in Japan, but also *how* and *why* it matters. In turn, this opens up an examination of whether, and in what ways, those functions may be important in "Western" legal systems.

This challenge is avoided by exoticising and marginalising certain legal systems.¹¹³ In addition, Zweigert and Kötz have reduced the compass of their

¹⁰⁹ Ibid, 434-40. See also A Peters & H Schwenke "Comparative Law Beyond Post-Modernism"(2000) 49 ICLQ 800, 808-10 (mentioning Schlesinger's common core theory in a discussion of functionalism, but only as universalist regarding his descriptions of various legal systems).

¹¹⁰ H Koetz "Comparative Law in Germany Today" [1999-4] RIDC 753, 755.

¹¹¹ Zweigert & Koetz, above n 105, 295-302. Equally disturbingly, U Mattei asserts that both are distinguished by "the rule of traditional law", rather than "the rule of professional law" characteristic of English, German or US law: see his "Three Patterns of Law: Taxonomy and Change in the World's Legal Systems" (1997) 45 AJCL 5, 28, 36-40 (although conceding that Japan may tend a little towards "the rule of professional law", whereas China tends towards "the rule of political law").

¹¹² See eg, respectively, J Ramseyer "Reluctant Litigant Revisited: Rationality and Disputes in Japan" (1988) 14 *Journal of Japanese Studies* 111, M Nakazoto & J Ramseyer 'The Rational Litigant: Settlement Amounts and Verdict Rates in Japan' (1989) 18 *Journal of Legal Studies* 262, J Ramseyer and M Nakazoto *Japanese Law: An Economic Approach* (U Chicago Press, Chicago, 1998); F Upham *Law and Social Change in Post-War Japan* (Harvard UP, Cambridge, Mass, 1987), F Upham "Weak Legal Consciousness as Invented Tradition" in S Vlastos (ed) *Mirror of Modernity: Invented Traditions of Modern Japan* (U California Press, Berkeley, 1998) 48; E Feldman *The Rituals of Rights in Japan: Law, Society and Health Policy* (Cambridge UP, Cambridge, 2000), L Nottage "The Still-birth and Re-birth of Product Liability in Japan" in J Feest and D Nelken (eds) *Adapting Legal Cultures* (Hart, Oxford, forthcoming 2001).

¹¹³ See also N Berman "Aftershocks: Exoticization, Normalization, and the Hermeneutic

potentially very broad comparative inquiry primarily by asserting a presumption that practical results are similar: "the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results".¹¹⁴ To be sure, when writing in his own name – and indeed in suggesting that the good faith principle (or lack of it) is related to whether more problems involving complex commercial contracts come before courts (as in England) – Kötz has warned that such a "presumption of similarity":¹¹⁵

is a rebuttable presumption, and rebutted it must be when there is evidence for doing so. I would therefore urge the members of the [Trento] Common Core Project to bring out the similarities, but not to belittle the differences between the laws of the European countries, and, where such differences exist, to speculate on their reasons.

Unfortunately, speculation is no substitute for detailed inquiry, including venturing into the murky realms of underlying legal or constitutional principle, and decades of empirical studies into "dispute resolution pyramids" and contracting practices.¹¹⁶ The bias towards similarity is revealed by Kötz's own "black letter" account of *European Contract Law*, and reinforced by stressing the presumption, not its rebuttal, in successive editions of his influential textbook co-authored with Zweigert.¹¹⁷

Already in 1979, Christopher Hill had criticised their formulation because it is "far from clear that there is general agreement as to what constitutes a problem", and also that "there are at the very least differences in detail in their resolution".¹¹⁸ He argued that Zweigert and Kötz's emphasis on similarity was related to political factors, especially the urge to unify law after the First and Second World Wars – what Eoersi has called an "ideology of convergence" in Europe. Hill noted that even the first edition of their textbook already anticipated the possibility of enacting a European Civil Code.¹¹⁹ More broadly, Anne Peters and Heiner Schwenke also point out that: "On the [functionalist] premise that legal rules primarily react to social needs, they must naturally converge as well".¹²⁰

Thus, the thesis of convergence emerging *in practice* from functionalist approaches is exaggerated by downplaying the analysis of social needs and the possible myriad functions of law in contemporary societies. It is saved or supported by a focus instead on legal rules, albeit including now doctrinal writing and court judgments as well as statutes, which in turn implies a positivistic theory of law.¹²¹

Compulsion" (1997) Utah L Rev 281; V Taylor "Beyond Legal Orientalism" in V Taylor (ed) *Asian Laws Through Australian Eyes* (Law Book Company, Sydney, 1997) 47.

¹¹⁴ Zweigert & Koetz, above n 105, 34.

¹¹⁵ Above n 105.

¹¹⁶ Cf generally W Felstiner et al "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming"(1980-1) 14 L & Socy Rev 631, and that special issue; Genn, above n 72; Macaulay et al, above n 74.

¹¹⁷ Koetz & Flessner, above n 69; Zweigert & Koetz, above n 105

¹¹⁸ J Hill "Comparative Law, Law Reform and Legal Theory" (1989) 9 Oxford J Leg Studies 101, 110. See also Peters & Schwenke, above n 109, 809-10, 828-9. They also criticise the narrowness involved in reducing the "functionalist" inquiry to comparing legal systems in terms of the potential of their rules to promote economic efficiency, as attempted by Mattei (above n 34).

¹¹⁹ Hill, above n 118, 110.

¹²⁰ Above n 109, 810.

¹²¹ Frankenberg, above n 104, 428, 430 ("juxtaposition plus" scholars "assume that legal cultures are objects whose reality can be grasped texts and excerpts [and] ... that law is coherent body of precepts with clear internal structures"). 438 (noting of comparative functionalism: "What started out as a fascinating hypothetical experiment has turned into a rather dry affirmation of legal formalism").

II.D Divergence in Comparative Private Law

At the other extreme, those adopting expansive theories of law tend to stress divergence and irreducible differences. This is not a logical or necessary corollary. Lawrence Friedman, for instance, has long advocated comparing “legal cultures” by social scientists, defined however along multiple dimensions which arguably implicate an *expansive* theory of law.¹²² Yet he emphasises powerful forces for *convergence*, even – or especially – when seen globally.¹²³ Nonetheless, this combination remains rare among legal theorists.

Instead, for instance, Vivian Grosswald Curran conflates law with culture, and then insists that comparativists must primarily be attentive to *difference*.¹²⁴ Pierre Legrand too, notorious for his vigorous and lyrical protests that “European legal systems are not converging”, argues first that rules are part of a broader “legal culture”; and secondly that analysing the “legal” presupposes and requires analysing the “social”, because law is no more than a social system.¹²⁵ He argues therefore that comparativists must unravel:¹²⁶

the cognitive structure that characterises that culture. The aim must be to try to define the frame of perception and understanding of a legal community so as to explicate how a community thinks about the law and why it thinks about the law in the way it does.

Legrand characterises the epistemological foundations of such a structure as a legal *mentalité* or collective mental programme, and argues that civil law as opposed to (English) common law represent two “epistemological trajectories” with “irreducible differences”.¹²⁷ In this sense, he sees Europe as diverse and “plurijural”, and sets himself resolutely against enactment of a European Civil Code.¹²⁸ Legrand sees this notion as driven by the civil lawyer’s fear of the common law world, and EU bureaucrats uprooted from their national cultures who are driven to instrumentalise legal cultures and render them subservient to the “the governing ethos of capital and technology which itself thrives on abstract generality”.¹²⁹ The attack on plurijuralism is driven by the arrogance of

¹²² See generally the restatement in L M Friedman “The Concept of Legal Culture: A Reply” in D Nelken (ed) *Comparing Legal Cultures*, (Dartmouth, Aldershot et al, 1997) 33; and L M Friedman “On the Emerging Sociology of Transnational Law” (1996) 32 *Stan J Int’l L* 65, 66, 70-74.

¹²³ *Ibid.*, 72-4; and generally L M Friedman *The Horizontal Society* (Yale UP, New Haven (Conn), 1999).

¹²⁴ V Curran “Cultural Immersion, Difference and Categories in US Comparative Law” (1998) 46 *AJCL* 43, 57 (“law does not have a life of its own”). She also suggests that the stress on similarities and convergence in 20th century comparative law scholarship in the United States, at least, derives from émigré scholars from Europe who were conscious of how fascist ideology and practices had exploited differences (*ibid.*, 53, 66-78). Peters and Schwenke (above n 109, 827) find this “not unconvincing”. Another possibility, however, is that the stress on similarity correlates with a narrow focus on comparing legal rules.

¹²⁵ P Legrand “European Legal Systems Are Not Converging” (1996) 45 *ICLQ* 52, 57-8. See also his essays and book reviews collected in: *Fragments on Law and Culture* (Willink, Deventer, 1999).

¹²⁶ *Ibid.*, 60.

¹²⁷ *Ibid.*, 64-74 (common law remains inductive, unsystematic, focused on regularities rather than rules and on facts, starts by looking for existence of a wrong rather than a right, and uses the timelessness of the common law in elevating the judge as “rememberer” of a shared tradition and to nurture a static approach to legal development). See also M Vranken *Fundamentals of European Civil Law* (Blackstone, London, 1997) 215 (arguing that civil law as “learned law”, compared to common law as oriented towards resolving problems of social order, remains a “fundamental difference” despite various instances of convergence between the two systems).

¹²⁸ P Legrand “Against a European Civil Code” (1997) 60 *MLR* 44.

¹²⁹ *Ibid.*, 52. The latter tendency suggests parallels to two longstanding, yet arguably contradictory approaches in Germany to European unification and its legal order, namely “ordo-liberalism” (constitutionalism of private ordering) and “administrative functionalism”

civil lawyers, threatening to truncate the current picture of private law in Europe "which is more comprehensive and, therefore, more insightful in terms of understanding reality", for instance by revealing two differing conceptions of contract.¹³⁰ Legrand argues that rediscovering the *ius commune* in England is simply fallacious; and that anyway a new common text of reference would be internalised differently by common as opposed to civil law systems: "unity can only arise from a commonality of experience, which assumes a commonality of meaning, which presupposes in turn a symbolic community".¹³¹ Rephrasing the jurisprudential view mentioned above, he also sees a Code as a backward step, running strongly "against the more progressive view that law simply cannot be captured by a set of rules".¹³² More recently, developing his arguments also against alleged "convergence fundamentalism" in comparisons of public law in Europe, Legrand has spoken of the "legitimate desire to overcome barriers of communication across legal traditions".¹³³ But this idea has not been developed, probably because its epistemological and normative implications run contrary to his general theory.

Legrand follows closely the "post-modern turn" in comparative law methodology. Two telling general criticisms of post-modernism presented recently by Peters and Schwenke, which go against the cultural relativism implicit in his approach, are that:¹³⁴

Asserting that two persons from two cultures can never have commensurable theories and trying to convince a person from another culture of the truth of cultural relativism at the same time is self-contradictory. Another simple argument against cultural relativism is that cultures are not hermetic, closed, immutable entities.

The latter point, by bringing in empirical observation, can be linked to their criticism also of "cultural framework-relativism". They follow Karl Popper's definition of framework-relativism as "the doctrine that truth is relative to our intellectual background", and agree that this reveals "occidental dogmatic fundamentalism, the old axiomatic-deductive mode of reasoning, in which principles or axioms cannot be questioned" in the light of new experience.¹³⁵

(technocracy): see C Joerges, "Conceptualising Public Governance for a European Grossraum" (paper presented at the workshop on "Perceptions of Europe and Perspectives on a European Order in Legal Scholarship During the Era of Fascism and National Socialism", EUI Law Department, Florence, 29-30 September 2000, freely available at <http://www.iue.it/LAW/staff/joerges/joerges_paper.pdf>) Part III. See also his *The Science of Private Law and the Nation State* (EUI Working Paper LAW No 98/4, EUI, Florence, 1998). However, Joerges (below n 156 et seq) has suggested that EU institutions, especially in interactions with national courts, have transcended such origins in developing traits of supranational deliberative democracy.

¹³⁰ Legrand, above n 128, 57.

¹³¹ Ibid, 60. Against the literature cited by Legrand as indicating that that English law developed independently of law in continental Europe, see now B Markesinis "Homage an das deutsche Recht" (1999) 4 *European Rev Private Law* 429. An intermediate position is adopted by Xavier Lewis, "A Common Law Fortress Under Attack: Is English Law Becoming Europeanized?" (1995/6) 2 *Columbia J European L* 1, 24:

"Seen in the cold light of the history of the past thousand years, what is occurring is probably not fundamentally new. There have been transplants from the continent before. New branches of law have been created before. Certainly, there is now the creation of common legal rules in certain areas throughout the European Community. Legal rules on their own do not make a legal system. To conclude on that basis that the common law is being 'europeanized' is probably as rash as to imagine that it was ever isolated in the first place."

¹³² Legrand, above n 128, 58; cf above n 125.

¹³³ N Walker "Culture, Democracy and the Convergence of Public Law: Some Scepticisms about Scepticism" in P Beaumont, C Lyons & N Walker (eds) *Convergence and Divergence in European Public Law* (Hart, Oxford, forthcoming 2001).

¹³⁴ Above n 109, 814.

¹³⁵ Ibid, 815.

Peters and Schwenke urge us to go "beyond post-modernism" through a dedicated interdisciplinarity and intercultural hermeneutics, attentive to "the moral and political, eventually technically dysfunctional, underpinning of rules in a historical, sociological and cultural perspective".¹³⁶

The tension here parallels Gunther Teubner's general criticism of philosophical deconstruction of paradoxes and contradictions within legal thinking. While admiring such attempts for their unorthodoxy and ability to spark the imagination, he argues that they should prompt social scientists and jurists then to think through implications with a view to understanding contemporary law and society.¹³⁷ One recent application is his analysis of the emergence, and possible transformations, in the new *lex mercatoria*.¹³⁸

Teubner has also attempted "a more sociologically informed formulation of Legrand's culturalism [, attempting] to grasp what happened to the social ties of law in the great historical transformation from embeddedness to autonomy – law's 'binding arrangements'".¹³⁹ In complex contemporary societies, he argues, the legal system develops autonomy and operational closure. But it remains cognitively open, interpreting perturbations from its environment with its own autonomous logic, such as the economic sub-system. This implies that transferring a legal rule or institution, such as a principle of good faith in contract law (through the EC Unfair Terms Directive, or – one might add – a European Civil Code), "irritates a co-evolutionary process of separate trajectories".¹⁴⁰ Specifically, Teubner draws on empirical studies showing that the production or economic regime in England is typical of relatively unregulated Liberal Market Economies, compared to that in Germany, a typical Coordinated Market Economy.¹⁴¹ He argues that a good faith principle will not make sense to such a regime in England if presented as a "facilitative" bundle of duties requiring trust and cooperation; but only if the principle outlaws "certain excesses of economic action". This implies firstly that:¹⁴²

The good faith principle would have to develop into judicial constraints on arbitrary decisions of private governments. As opposed to activating the communitarian traditions of 'duties' of trustful cooperation, the judiciary would

¹³⁶ Ibid, 833.

¹³⁷ G Teubner "The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy" (1997) L & Soc Rev 763; G Teubner "Breaking Frames: The Global Interplay of Legal and Social Systems" (1997) 45 AJCL 149.

¹³⁸ G Teubner "Global Bukovina: Legal Pluralism in a World Society" in G Teubner (ed) *Global Law Without A State* (Dartmouth, Aldershot, 1997) 3.

¹³⁹ G Teubner "Legal Irritants: Good Faith in British Law and How Unifying Law Ends Up in New Divergences" (1998) 61 MLR 11, 17.

¹⁴⁰ Ibid, 29. He continues:

"On the legal side of the binding institution, the rule will be recontextualised in the new network of legal distinctions and it may still be recognisable as the original legal rule even if its legal interpretation changes. But on the social side, something very different will take place. The legal impulse, if it is recognised at all, will create perturbations in the other social system and trigger there some changes governed by the internal logics of this world of meaning. It will be reconstructed in the different language of the social system involved, reformulated in its codes and programmes, which in turn leads to a new series of events. This social change will in turn work back as an irritation to the legal side of the institution, thus creating a circular co-evolutionary dynamic that comes to a preliminary equilibrium only once the legal and the social discourse will have evolved relatively stable eigenvalues in their respective sphere."

¹⁴¹ Ibid, 24-27. See also Peter Hall & David Soskice "Introduction to Varieties of Capitalism" (paper presented at the Seminar on "Economy as Polity: European Theoretical and Historical Perspectives", EUI Robert Schumann Centre, 26 October 2000; forthcoming in Hall & Soskice (eds) *Varieties of Capitalism: Institutional Foundations of Comparative Advantage*, Cambridge UP, Cambridge).

¹⁴² Ibid, 28. Cf another attempt to rethink discretion in English public law in social scientific terms with a view to broader application, albeit adopting a social constructivist approach, see N Lacey "The Jurisprudence of Discretion: Escaping the Legal Paradigm" in K Hawkins (ed) *The Use of Discretion* (Clarendon, Oxford, 1992) 361, 373-6.

have to activate the tradition of constitutional 'rights' which have historically been invoked against governmental authority, and reinforce them in the private law context.

No further details are provided, but this tantalising insight could be developed in light of developments in legal theory and case law discussions of the good faith principle in the United States, another typical Liberal Market Economy. As the Uniform Commercial Code with its express duty of good faith was being introduced throughout the States in the 1960s, Robert Summers first proposed the notion that the duty could only be defined negatively, namely by seeing what conduct is excluded as "bad faith". In 1980, Steven Burton proposed a more positive formulation, namely that good faith performance involves exercising discretion only for purposes reasonably expected when the contract was formed, and not to recapture opportunities forgone when entering into the contract. In the 1990s, Alan Farnsworth suggested that the good faith principle may involve broader positive duties of cooperation, while Summers himself recently indicates this possibility.¹⁴³ That is also the direction suggested by relational contract theory following Ian Macneil.¹⁴⁴ Yet only Summer's initial "excluder" analysis, and possibly Burton's discretion analysis, seem likely to find much resonance with the constitutional principles in the English law tradition which Teubner predicts will become important for evolving a meaningful principle of good faith in England. In contrast to the burgeoning case law interpreting the good faith principle in US contract law, however, only one major judgment from an English court interpreting "good faith" under the Directive makes it difficult to determine yet whether those or similar views are finding favour in England.¹⁴⁵

Teubner also suggests a second implication of his analysis. In the absence of a regime as in Germany in which business and other associations

¹⁴³ R Summers "The Conceptualisation of Good Faith in American Contract Law: A General Account" in R Zimmermann & S Whittaker *Good Faith in European Contract Law* (Cambridge UP, Cambridge, 2000) 118, 125-34, 136. For further background on this ongoing debate in US contract law theory, see also R Barnett, "The Richness of Contract Theory" (1999) 97 Michigan L Rev 1413.

¹⁴⁴ See eg I Macneil "Relational Contract: What We Do and Do Not Know" [1985] Wisc L Rev 483,522; and generally Campbell, above n 68; Vincent-Jones, above n 112. The contours of the evolving broader positive formulation of good faith may be disputed, involving also those proposing a new liberal view of contract (cf eg R Bigwood "Conscience and the Liberal Conception of Contract: Observing Basic Distinctions" (2000) 16 J Contract Law 1 (Part 1) and 191 (Part 2)) as opposed to relational contract theorists following Ian Macneil. But if there is such a movement, this suggests that the basic dichotomy suggested here by Teubner may be overstated. His autopoietic theory may still be applicable, but the co-evolutionary impulses and trajectories would need to be re-thought.

¹⁴⁵ "In all the years before 1980 [after the *Restatement (2nd) of Contract* was decided on, extending a good faith duty to all contractual relationships], there were perhaps 350 reported cases interpreting the obligation to perform a contract in good faith. In the dozen years following 1980, there were another 600 or more." S Burton and E Anderson *Contractual Good Faith: Formation, Performance, Breach, Enforcement* (Little Brown, Boston, 1995) 20, cited in Summers, above n 143, 120. The first reported appellate court judgment interpreting the good faith incorporated into English law from the Unfair Terms Directive is *Director General of Fair Trading v First National Bank PLC* [2000] 1 All ER 371, noted by N Beresford "Improving the Law on Unfairness" [2000] CLJ 242. In addition, however, the Office of Fair Trading (OFT) has investigated thousands of cases of suspected unfair terms, most of which have been voluntarily changed. See generally G Howells "Good Faith in Consumer Contracting" in R Brownsword et al (eds) *Good Faith in Contract: Concept and Contract* (Dartmouth, Aldershot et al, 1999) 105-110. While deserving of closer analysis, these activities seems likely to generate less articulation of underlying reasoning, and thus prove less helpful in assessing Teubner's suggestion. A similar problem arises in the summaries of cases in "CLAB", although it too provides a rich source for determining how the Directive is having effects beyond the courtrooms all over Europe: see C Monda "Monitoring the Enforcement of the Unfair Contract Terms Directive: The European Commission Database on Case Law about Unfair Contractual Terms (CLAB)" in S Feiden & K Riedl *Towards a Europeanised Judiciary? Practitioners' Experiences of National Judges with the Europeanisation of Private Law* (EUI Working Paper LAW No 2000/3, EUI, Florence, 2000) 56, 58-9.



cooperate to produce uniform standard contracts, English courts are expected to continue to intervene more directly when such contracts are impugned by consumers as contrary to good faith. Teubner acknowledges that the courts may rely on "a division of labour with regulatory agencies, particularly the Office of Fair Trading [OFT] and the Trading Standards Departments of local government agencies", but argues that these procedures have "serious defects".¹⁴⁶ More recent studies show instead that the OFT has had a very significant impact in resolving disputes and having contract terms altered by businesses, and occasionally by business associations.¹⁴⁷ In itself, and perhaps especially if the courts begin to take that development into account in their decision-making, this may indicate the emergence of a "neo-proceduralist" element in a legal system otherwise still remarkably wedded to "formal" legal reasoning and corresponding legal institutions.¹⁴⁸ Another difficulty lies in Teubner's premise that English courts will readily follow the Directive's Preamble, seemingly providing that standardised contracts must reflect the consumer interest.¹⁴⁹ Instead, they may be influenced by the more demanding "consumer model" which has prevailed generally in the United Kingdom compared to some other European countries.¹⁵⁰ Alternatively, they may prefer the more demanding model found in the jurisprudence of the European Court of Justice, albeit in other areas of European law.¹⁵¹ Or English courts – and, more likely, lawyers – may remain oblivious or insensitive in relation to such debates.¹⁵²

Again, it is too early to tell in the English context. Nonetheless, Teubner's preliminary suggestions and these further possible elaborations show how autopoietic theory can take Legrand's point that law is a subsystem of society, and accept a view of law as much more than rules; but draw on empirical observations, contrary to framework-relativism, to understand and

¹⁴⁶ Teubner, above n 139, 30-1, citing H Beale "Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts" in J Beatson & D Friedman (eds) *Good Faith and Fault in Contract Law* (Clarendon, Oxford, 1995).

¹⁴⁷ Howells, above n 145.

¹⁴⁸ See eg Nottage, above n 59; "The Centennial of Japan's Civil Code and the Future of New Zealand Contract Law", paper presented at the Australasian Law Teachers Association conference, Victoria University of Wellington, 4-7 July 1999; "Proceduralisation of Japanese Law in Comparative Perspective: Product Liability and Contract", paper presented at the annual meeting of the Law & Society Association, Chicago, 27-30 May 1999. Cf generally G Teubner "Substantive and Reflexive Elements in Modern Law" (1983) 17 *L & Soc Rev* 240; K-H Ladeur *Proceduralization and Its Use in Post-Modern Legal Theory* (EUI Working Paper LAW No 96/5, EUI, Florence, 1996); and J Black "Proceduralizing Regulation: Part I" (2000) *Oxford J Leg Studies* 598.

¹⁴⁹ Teubner, above n 139, 30. On difficulties in interpreting the preamble, cf eg W van Gerven "ECJ Case-Law as a Means of Unification of Private Law?" [1998] *European Rev Private Law* 293, 306-7.

¹⁵⁰ See eg G Trumbull *Contested Ideas of the Consumer: National Strategies of Product Market Regulation in France and Germany* (EUI Working Paper RSC 2000/1, EUI, Florence, 2000).

¹⁵¹ I Klauer "General Clauses in European Private Law and 'Stricter' National Standards: The Unfair Terms Directive" (2000) 8 *European Rev Private Law* 187.

¹⁵² In the first reported English case interpreting the Unfair Terms Directive to end up on appeal (above n 145), the judge at first instance seems to have tried to "reinvent the wheel". Evans-Lombe J asked whether the "acceleration" clause proposed by the financier was "inherently", "procedurally" or "substantively" unfair, and decided that it was not. The Court of Appeal criticised the use of the first-mentioned concept, insisting that the unfairness be judged solely in terms of the Regulations incorporating the Directive. It then interpreted "good faith" to require unusual clauses to be clearly brought to the consumer's attention, unlike the case at hand. As Beresford points out (above n 145, 244), this is a rather narrow approach consistent with earlier English "ticket cases"; the Court gave little attention to the broader standard of "significant imbalance", and even less to the concept of "detriment to the consumer". He thinks the latter tendency is a "minor gripe". The better view is that this case illustrates not only how English courts may simply ignore the Directive, but also how they are likely to narrowly interpret it in accordance with enduring traits of formal reasoning as opposed to more substantive reasoning (Nottage, above n 59).

predict developments in both law and society.¹⁵³ Further, at least so far in some influential works on contracting, Teubner's expansive view of law correlates with a tendency to focus on differences and hence divergence, rather than convergence, in Europe and globally.¹⁵⁴

Christian Joerges also adopts an expansive view, but with a richer normative foundation, one which has led him take more seriously the specifics of judicial reasoning and processes. He too shows sensitivity towards disunity within the European legal order, while criticising Legrand's post-modernist view as unfalsifiable, yet contrary to observed tendencies for meaningful interpretations to emerge in EU institutions, and to the broader infusion of foreign influences within national *mentalités*.¹⁵⁵ Compared to Teubner, moreover, Joerges perceives and advocates more potential for normative discourse engaging national and European institutions. Specifically, he has developed the notion of "deliberative supranationalism" from theories of "deliberative democracy" such as those set out by Jürgen Habermas, "legal theories which ground the law's validity upon the institutions of the traditional constitutional state and the disciplining of internal political controversies through them".¹⁵⁶ Although Habermas writes primarily on the role of courts in promoting deliberation or reasoned elaboration of normative propositions in a legal context, those processes arguably can be activated in other contexts in which law is directly or indirectly implicated.¹⁵⁷ Further, drawing on political

¹⁵³ Teubner's original formulations nonetheless require considerable elaboration (as this paper shows) to generate a satisfying explanatory theory, and the normative implications of his work remain even more elusive. See David Nelken "Beyond the Metaphor of Legal Transplants? Consequences of Autopoietic Theory for the Study of Cross-Cultural Legal Adaptation" in J Priban & D Nelken (eds) *The New Boundaries of Law: The Debate over Legal Autopoiesis* (Ashgate, Aldershot, forthcoming 2001). In other writing, including a recent work on contract law, Teubner writes even more abstractly: G Teubner "Contracting Worlds: The Many Autonomies of Private Law" (2000) 9 *Legal Studies* 399. Not surprisingly, this irritates some commentators: D Campbell "Limits of Concept Formation in Legal Science" (2000) 9 *Legal Studies* 439.

¹⁵⁴ Teubner sees law as emerging from conflicts being defined as divergent expectations calling for a decision which are resolved by using a distinction between legal and illegal. He links this to discussions of legal pluralism, noting already that this basic definition provides "insight into present-day forms of partially autonomous law - for example, international law, the *lex mercatoria*, or the internal laws of international organisations": G Teubner *Law as an Autopoietic System* (Blackwell, Oxford, 1993) 38. However, he argues that fully autopoietic law emerges only when various components of legal discourse, especially legal norms (eg statutory rules) and legal acts (eg judicial decisions), are linked together in a "hypercycle" (ibid 37-42). In his later work on the *lex mercatoria* (above n 138), Teubner sees an equivalent evolution in parties' creation by contract of both substantive norms and dispute resolution by arbitration. Cf B Tamahana "A Non-Essentialist Version of Legal Pluralism" (2000) 27 *J L & Soc'y* 296, 306-11. He approves of autopoietic theory's ability to encompass legal pluralism, but argues that the distinction between illegal and legal is inadequate to differentiate law in specific transactional contexts. Even if true in some cases, this point overlooks the ability of Teubner's theory to generate insights and predictions at a more abstract, inter-systemic level.

¹⁵⁵ C Joerges "The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective" (1997) 3 *European LJ* 378,386. See also T Koopmans "Towards a European Civil Code?" (1997) 5 *European Rev Private Law* 541, 544 (noting the working arrangements regularly reached by common and civil law countries in various transnational legal arenas, and suggesting reasons for why distinctions between the two are now seen as decreasing in importance).

¹⁵⁶ Ibid, 389. See also his "Rationalisation of Law and Bureaucratic Rationality in the US: Legitimacy Problems of European Governance in the Light of Weberian Concepts" (paper presented at the Symposium on "Economy and Society: Max Weber in 2000", University of Wisconsin-Madison, 21-24 September 2000) Part V. For a perceptive introduction to Habermas' work, see Black (above n 148) 608-14. Cf also O Gerstenberg "Law's Polyarchy: A Comment on Cohen and Sabel" in C Joerges & O Gerstenberg (eds) *Private Governance, Democratic Constitutionalism and Supranationalism* (European Commission, Brussels, 1998: EUR 18340 EN) 31, 32, 38, 45.

¹⁵⁷ See eg C Harvey "Governing After the Rights Revolution" (2000) *J L & Soc'* 61. Cf also T Risse "Let's Argue! Communicative Action in World Politics" (2000) 54 *International*

scientists' analyses of Europe as a "multi-level system of governance", Joerges argues that:¹⁵⁸

The Europeanisation of law will have to reckon with asymmetries in different sectors of legal integration and the ever more 'disintegrative' effects of that process. The establishment of common European frameworks for economic and social regulation will proceed; so will the emergence of common minimum standards in consumer protection and of common principles of justice. Non-legislative initiatives will continue to accompany selective legislative and disjointed judicial activities – and no supranational legislator will cure the resulting problems for national systems of private law.

The challenge then becomes to "organise the compatibility of divergent legal orders" rather than "searching for a new unity and ... seeking to preserve an inherited one", codified or collated, and Joerges' recent work has concentrated on the role of courts in this process:

The short-term and long-term effects of European intervention ["legislative acts and, sometimes, the jurisprudence of the ECJ"] are only partly foreseeable and require productive and flexible reactions. This is why the responses to the problems that the Europeanisation process causes will depend on the innovative potential of 'praxis' and the creativity of the judiciary. ... The supremacy that European law and the ECJ can claim is, in principle, selective rather than comprehensive. This is why response to complex issues cannot be expected from rulings originating from 'above', but must emerge from interactive processes within Europe's judiciary.

This thesis is illustrated by the *Dietzinger* case, referred to the ECJ from Germany. In principle, the Court interpreted the right to terminate a "contract"

Organisation 1. These works consider constitutional change and public international law, respectively, but explicitly addressing the interface between law and politics along such lines appears a promising direction for studying private law developments. For example, the marginalisation of attempts to "codify" English law, and similar objections to a European Civil Code predicted by an English writer recently, could be reconceptualised in Habermasian terms as "communicative action" responding to the urge towards narrower "rationalisation" implicit in codification. Cf S Hedley "How Has the Common Law Survived the 20th Century?" (2000) 50 Northern Ireland LQ 283, 297. More generally, Kenneth Avio has recently attempted to develop Habermas' theory by suggesting that participants in a "discourse of implementation" (where problems of scarcity, thus economics, must also be addressed) nonetheless share features of "communicative action", characteristic of discourses of "justification" and "application". Hence, he argues, markets are also "co-original" to both law and democracy, in constitutional states. See K Avio "Scarcity, Discourses of Implementation, and Habermasian Law and Democracy" (2000) 13 Ratio Juris 148. More generally, this means that economics, law and politics cannot be so clearly distinguished as appears in (at least some of) Habermas' formulations, nor can "strategic action" and "communicative action". Perhaps such refinements can save Habermas from sympathetic critiques (eg J Cohen & C Sabel "Directly-Deliberative Polyarchy" in C Joerges & O Gerstenberg (eds) *Private Governance, Democratic Constitutionalism and Supranationalism*, European Commission, Brussels, 1998: EUR 18340 EN, 1, 27-28), and decidedly unsympathetic ones (eg K Ladeur, *Can Habermas' Discursive Ethics Support a Theory of the Constitution?* EUI Working Paper LAW No 99/4, EUI, Florence, 1999). But this is a task for better legal and social theorists than the present author.

¹⁵⁸ C Joerges "Interactive Adjudication in the Europeanisation Process? A Demanding Perspective and a Modest Example" (2000) 8 European Rev Private Law 1, 4. Cf the rather jaundiced view of Mattei (above n 42, 556-565) regarding adjudication involving the ECJ; and proposals by two academics in Switzerland to simplify "from above": R Bieber & C Amarelle "Simplification of European Law" (1998) 5 Columbia J European L 15. A multi-level approach to dealing with the "the present day position of the [German Civil Code] in a 'pluralistic' private law and as particularistic law in the common market of a Europe growing together", including an important role for the judiciary, is presented by R Schulze "A Century of the *Buergerliches Gesetzbuch*: German Legal Uniformity and European Private Law" (1998) 5 Columbia J European L 461, 472-6.

under the Door-step Selling Directive as extending to situations where someone (the son, in this case) provided a guarantee to another (the bank) to secure financial obligations owed by yet another (the father). But it added that the aim of the Directive to protect consumers meant that the right did not arise where "the guarantor has entered into a commitment for a purpose which can be regarded as unconnected with his trade or profession", as well as where the secured debt is contracted by another acting in trade, and in this case the bank's financing was for the father's building firm.¹⁵⁹ Joerges argues that this "yes, but" judgment from the ECJ was made in the context of well-known protections for guarantors in some circumstances offered under the public order proscription in Article 138 of the German Civil Code, and that the ECJ's judgment has prompted the German courts to reassess this protection in the light of evolving European law as well as the normative coherence of German private law.¹⁶⁰ The first case decided by the ECJ on Unfair Terms Directive, on 27 June 2000, may prove to exhibit some parallels to such "interactive adjudication".¹⁶¹

Joerges adds the tantalising remark that his thesis "suggests parallels between the quasi-administrative activities of Committees and the judicial branch".¹⁶² This follows from the expansive view of law explicit or implicit in theories associated with deliberative democracy. Broadening the enquiry in this way, while focusing on interactive reasoning processes, seems likely to reinforce the unlikelihood of any obvious convergence in Europe.

As the scope is broadened, however, it is important that academic

¹⁵⁹ Case 45/96 *Bayerische Hypotheken- und Wechselbank AG v Edgar Dietzinger* [1998] ECR I-1199, I-1222, paras 22 and 23.

¹⁶⁰ Joerges, above n 158, 12-13. See also N Horn (L Nottage trans) "Banks' Duties to Inform and Give Advice under German Law" [December 1998] *European Business Law Review* 367. This approach by the ECJ resembles that of the US Supreme Court in deciding cases quite narrowly, thus promoting democratic deliberation, according to C Sunstein *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard UP, Cambridge (Mass), 1999). The Japanese Supreme Court also has been described as a "yes, but" court, at least on constitutional matters: L Nottage "Top Ten Changes and Continuities in Japanese Law and Society - 1997" (1998) *New Zealand Association for Comparative Law Yearbook* 3: 1997 611.

¹⁶¹ Above n 90. See also some seeds of his more recent formulations in C Joerges "The Europeanisation of Private Law as a Rationalisation Process and as a Contest of Legal Disciplines: An Analysis of the Directive on Unfair Terms in Consumer Contracts" (1995) 3 *European Rev Private Law* 179, 183-4 ("differences among national legal systems in the interpretation of the Directive seem inevitable"), 186 ("legal texts alone can never represent the law", "if private law science is to contribute to the interpretation of European law, it will have to establish a supranational style of discourse tailored to this purpose; if private law scholars wish to defend their own legal tradition, they will have to demonstrate its merits in the light of the interventionist threats of European law"). However, the challenges to "interactive adjudication" remain apparent: see generally S Feiden & K Riedl *Towards a Europeanised Judiciary? Practitioners' Experiences of National Judges with the Europeanisation of Private Law* (EUI Working Paper LAW No 2000/3, European University Institute, Florence, 2000).

¹⁶² Joerges, above n 168, n 14. He cites his earlier work (above n 155) at page 388, but further elaboration is provided notably in Joerges et al *The Law's Problems with the Involvement of Non-Governmental Actors in Europe's Legislative Processes: The Case of Standardisation under the 'New Approach'* (EUI Working Paper LAW No 99/9, European University Institute, Florence, 1999; forthcoming also in J Weiler (ed) *The Europeanisation of Law*, Oxford UP, Oxford, 2001). See also C Joerges with S van den Bogaert "Law, Science and the Management of Risks to Health at National, European and International Level: Stories on Baby Dummies, Mad Cows and Hormones in Beef" (forthcoming, 2001) 7/1 *Columbia J European L*. Cf also O Gerstenberg "Justification (and Justifiability) of Private Law in a Polycontextual World" (2000) 9 *Social and Legal Studies* 419, 426:

"By insisting on constitutional essentials while at the same time grating leeway to experimentation, private law would put [an array of contemporary "private governance regimes"] under pressure to produce their own case law - a law which combines reflexivity with regard to the interests (and the identity) of a society as a whole - with diversity, open-endedness and respect for the highly differentiated functional code of a particular [private governance regime]."

lawyers unchain themselves from their keyboards and venture beyond the seminar rooms to engage in empirical research. Hugh Collins has made some encouraging forays in this direction in recent years. Initially, he had limited himself to some general comments on the nature of law, especially private law. Collins stressed its symbolic value in endorsing sets of moral standards, and its links to markets in consolidating – and eventually appropriating – accepted transactional practices. He also argued that harmonisation of private law in Europe might have been more feasible in the 19th century, when states largely shared a commitment to the abstract values of bourgeois liberalism, but:¹⁶³

If ... private law has returned to a closer connection to cultural practices, then unless those cultural practices share common elements across Europe, the obstacles to uniform laws will have increased. The standard of good faith, for instance, now incorporated into the Directive on Unfair Contract Terms, obtains its meaning from both legal traditions [reflecting moral values] and market practices, *which differ between states*, thus creating an obstacle to practical uniformity of private law.

Collins pointed out that possibly shared substantive goals (eg consumer protection) can involve varying interpretations, such as enhancing market competitiveness or protecting the needy, and that these vary among states. The former interpretation may find more ready favour, but “communitarian impulses” also become implicated in the “project of a uniform European private law ... linked to a broader project to establish a European cultural identity”.¹⁶⁴

Subsequently, however, Collins has undertaken some empirical work into aspects of contemporary contracting practices, such as quality assurance in subcontracting.¹⁶⁵ Secondly, he has dissected socio-legal studies, particularly into English firms’ use of arbitration, to contend that any European Civil Code should contain broadly phrased provisions. This should facilitate a pattern of dispute resolution similar to that preferred in arbitration, one dictated not only by the contract documentation itself, but also a more contextualised analysis of the business deal in question and the overall business relationship.¹⁶⁶ This work does not compare revealed preferences of firms in other European states, so Collins’ conclusion does not necessarily follow. And differences in subcontracting law and practices in Europe are not established directly in the former work, since it too focused on the situation in England. However, it was part of a broader comparative project.¹⁶⁷ Thus, a more encompassing view of law is again associated with sensitivity to differences and the obstacles to convergence, combined with a growing interest now in exploring empirically some of their determinants.

III. The Middle Way

At the risk of serious oversimplification, the primary orientation of the main commentators discussed above can be summarised along two dimensions, as depicted in the following Figure.¹⁶⁸ One dimension is whether attention remains

¹⁶³ H Collins “European Private Law and the Cultural Identity of States” (1995) *European Rev Private Law* 353, 364 (emphasis added).

¹⁶⁴ *Ibid*, 365. See also his “The Voice of Community in Private Law Discourse” (1997) 3 *European LJ* 407.

¹⁶⁵ H Collins “Quality Assurance in Subcontracting” in S Deakin & J Michie (eds) *Contracts, Co-operation, and Competition* (Oxford UP, Oxford, 1997) 285.

¹⁶⁶ Collins, above n 37.

¹⁶⁷ See H Collins and C Scott “United Kingdom” in G Brueggermeier (ed) *Rechtsprobleme von Qualitätsmanagementvereinbarungen und EG-Binnenmarkt [Legal Problems of Quality Assurance Agreements and the EU Internal Market]* (Nomos, Baden-Baden, 1998) 239

¹⁶⁸ Cf also B De Witte, above n 6, 106:

“Is Van Gerven’s line of moderate convergence [due to the ECJ in *Francoovich* setting a EU-wide norm regarding state liability] caused by the fact that he did what Legrand

primarily on rules and the law in books as opposed to the law in action. The former focus, arguably covering both main schools of comparative law scholarship already identified by Frankenberg by the mid-1980s,¹⁶⁹ can be termed a "Rules-Plus" orientation. Although this allows for some variation in how much "plus" is added – especially in practice – to the comparative analysis of rules, a qualitatively and often quantitatively different orientation is evident among those who begin with an expansive view of "law in context".¹⁷⁰ A second dimension is the extent to which these various commentators perceive – and, usually, advocate – similarities and convergence as opposed to difference and divergence.

	Rules-Plus	Law in Context
Convergence	Lando (recently) Markesinis Zimmermann (recently) Trento group Kötz (in practice) Casebook project Zweigert/Kötz (in practice)	Friedman
Divergence	Watson	Collins (recently) Joerges Teubner Curran Legrand

Reviewing broader theories about the evolution of European law advanced by Joerges and others, especially the emergence of new governance structures such as EU committees, Oliver Gerstenberg and Charles Sabel have recently provided an apt caveat which extends partly to the analysis presented above:¹⁷¹

...despite polemic flourishes, the debate on these matters is too frankly and invitingly exploratory to be usefully characterised through a contrast of positions that attributes to them more fixity than they pretend for themselves.

claims most comparative scholars do, namely to remain on the surface by looking merely at legal rules while disregarding legal culture? Or could it be that Legrand is attaching excessive importance to legal cultures, and in some cases new rules and principles (usually imposed by European Union legislation or case law) do provide for significant changes in national legal systems and may even contribute to slow changes in the legal *mentalité*?"

¹⁶⁹ Above n 104, 109.

¹⁷⁰ Cf S Paasilehto "Legal Cultural Obstacles to the Harmonisation of European Private Law" in V Heiskanen & K Kulovesi *Function and Future of European Law* (Institute of International Economic Law, Helsinki, 1999) 99, 100-103. She distinguishes those taking a "formalist approach to legal culture", focusing on legal rules and their cohesiveness (possibly disrupted when EU law impinges on national law); and those adopting a "sociological approach to legal culture", with the latter reflecting a certain identity and arising from the constant interaction between social practices and law. However, because "legal culture" has developed other nuances, primarily due to the work of Friedman (above n 122; see also D Nelken "Towards A Sociology of Legal Adaptation" in D Nelken & J Feest (eds) *Adaptation of Legal Cultures*, Hart, Oxford, forthcoming), it seems better to phrase such a dichotomy in terms of "law" as "rules (plus)" as opposed to "law in context". Similarly, Collins (above n 164) contrasts two rival conceptions of private law: "legal formalism" and a "sociological conception". Again, it seems better to substitute the latter category with "law in context" since Legrand's work is not really "sociological" (see Teubner, above n 139), while Joerges' work tends towards philosophy and political science.

¹⁷¹ "Directly Deliberative Polyarchy: An Institutional Ideal for Europe?" (forthcoming as a volume in the series published by the Academy of European Law at the EUJ, Oxford UP, 2001; draft available at <http://www.law.columbia.edu/sabel/papers/gerst-sabel1029.doc>) Part IV.

Related studies by Joerges and others on further aspects of the privatisation of European law, reviewed in Part II.D above, are still being elaborated as well. David Nelken has questioned whether Teubner's recent writing on the good faith principle, as a "legal irritant" in England, is really consistent with autopoietic theory generally.¹⁷² Other commentators discussed above seem to have changed their views over the years. These include Lando, now arguably more open to the possibility and legitimacy of unifying private law in Europe; Zimmermann, drawn away from legal history towards a revealed bias towards convergence and perhaps an even narrower focus on rules, through involvement in the Trento project; Collins, now more willing to examine socio-economic developments; and especially Legrand, whose early writings focusing on comparing legal rules present a vivid contrast to his present approach.¹⁷³

Nonetheless, situating in this way the approach revealed recently by these various comparativists illustrates firstly a central thesis of this paper, namely that *narrower views of law* tend to be associated with a focus on *convergence*; and *expansive views*, with *divergence*. However, as mentioned also above,¹⁷⁴ the work of Watson and Friedman shows that the correlation is neither a logical nor a necessary one. Further, this depiction should remind us that although "convergence theorists", focused mainly on the law in books, probably constitute the majority view, a significant body of scholarship has developed which explicitly or implicitly questions both major premises of their work. Finally, those (like Lando) now pushing for a European Civil Code probably see the legal world most narrowly in terms of legal rules and principles, and as revealing or promising convergence. But those seeking convergence through "softer" initiatives all take a distinctly narrower view of law compared to those arguing for "law in context", who tend also to be sensitive to diversity and divergence.¹⁷⁵

This conceptual framework and the present state of comparative scholarship – mainly dealing with comparative private law – reviewed above, suggest in turn the possibility of developing a "middle way" along both dimensions. Ultimately, a comparative *lawyer* must begin with some theory of what constitutes law, even if this comes to be reformulated in the light of an ongoing praxis in comparing legal systems. Few legal theorists now subscribe to a narrow positivist view of law as a system of rules, and many would add more to the picture than "Rules-Plus" comparativists. But few would conflate law with

¹⁷² Above n 153. The theory generally seems to have two implications relation to the issue of convergence versus divergence. On the one hand, autopoietic law "beyond the welfare state" is a paradigm derived from analyses of contemporary industrialised democracies. With rather minimal preconditions, one would expect its processes and structures to emerge in a wide variety of such countries. But because of the loose coupling of relatively autonomous legal systems implied by this theory, divergent solutions can remain or evolve. A similar tension emerges in other "neo-procedural" theories such as those of Habermas. See Nottage, above n 159. Thanks are due to Rostam Neuwirth for raising this methodological question.

¹⁷³ Legrand's initial work as an academic in Canada focused quite extensively on rules: see eg "The Case for Judicial Review of Contracts in French Law (and Beyond)" (1989) McGill LJ 908. A turning point seems to have come in the mid-1990s, paralleling his move to a succession of academic positions in Europe (eg to Lancaster University in England, when he published "*Attitudes v Aptitudes*: In re Faculty Hiring in Canadian Law Schools" (1993) 43 AJCL 385); and Tilburg University in the Netherlands, when he published eg a review of de Cruz' conventional comparative law textbook, "Comparative Legal Studies and the Commitment to Theory" (1995) 58 MLR 262. Whether such shifts stem from idiosyncrasies or broader academic environments, differing among countries and over time, deserves further research. One approach might be to interview Legrand and others mentioned in this paper, just as he has interviewed other prominent comparativists (eg above n 105).

¹⁷⁴ Above, text from n 21, 122.

¹⁷⁵ Cf also Paasilehto (above n 170, 101), who sees Schmid (above n 3) and seemingly even Joerges (above n 155) as taking a narrower view. However, as argued above (n 162), while Joerges has tended to focus on judicial decisionmaking in the evolving Europeanisation of private law, his work implies at least a much broader vision of law and legal reasoning.

culture, morality, or the like.¹⁷⁶ The middle way therefore justifies close attention to legal rules and normative discourse more generally, *as well as* their development and application in a range of institutional and transactional contexts which are often not usually defined – or explored – as “legal”, at least by “Rules-Plus” comparativists. Broader analysis also makes it more likely that new complex relationships between these components will be uncovered. It may remain possible to summarise these in parsimonious theories, and the admonition to “keep it simple” has long been the watchword of many (especially practising) lawyers, not just scientists and medieval clerics.¹⁷⁷ But we should resist the tendency to oversimplify, ignoring or downplaying phenomena which cannot be readily explained. The “Rules-Plus” comparativists who advance strong claims of convergence appear to be falling into this trap, even after having delimited the scope of their enquiries through the various practices described above. The warning of John Henry Merryman at an early international conference held at the EUI, in 1977, should be remembered:¹⁷⁸

In some cases the desire for convergence of legal systems merely expresses a yearning for simplicity. It responds to popular discontent with complexity and seeks to impose order where there is untidy diversity. This approach to legal diversity would hardly merit recognition and discussion, since it is little more than an expression of frustration at the fact that the world is complicated, disorderly and uncertain, were it not so firmly rooted in human psychology. It is closely related to an exaggerated demand for certainty in the law.

Thus, the wisest course for comparative private lawyers nowadays involves first directing equal attention to:

- (a) the exegesis of statutes, case law, and legal doctrine;
- (b) underlying patterns of legal reasoning, with their supporting institutional infrastructure; and
- (c) how this interacts with the broader socio-economic or political context.

Secondly, this probably will entail differentiated appraisals of convergence and divergence. This promises to link up nicely with nuanced recent reappraisals of “legal transfers” and “adaptations of legal cultures” by those beginning with strong interests in legal sociology and social theory,¹⁷⁹ as well as political economists examining broadly the contours and possible recent transformations in “varieties of capitalism”.¹⁸⁰

¹⁷⁶ See generally eg D Dyzenhaus “Positivism’s Stagnant Research Programme” (2000) 20 Oxford J Leg Studies 703.

¹⁷⁷ Cf N Rescher *Complexity: A Philosophical Overview* (Transaction Publishers, New Brunswick, 1998) 61. See also Barnett (above n 143, 1415), citing PJ O’Rourke *Eat the Rich: A Treatise on Economics* (Atlantic Monthly Press, 1998) 209: “Complexities are fun to talk about, but, when it comes to action, simplicities are often more effective.”

¹⁷⁸ J H Merryman “On the Convergence (and Divergence) of the Civil Law and the Common Law” in his *The Loneliness of the Comparative Lawyer and Other Essays in Foreign and Comparative Law* (Kluwer, The Hague, 1999) 17, 27; chapter reprinted from M Cappelletti (ed) *New Perspectives for a Common Law of Europe* (Sijtoff, Leyden, 1978) 195. The exaggerated demand for certainty in the law may also explain why comparative law is or can be “subversive”: H Muir Watt “La Fonction Subversive du Droit Compare” [3-2000] RIDC 503. All the more so, however, for comparative law which moves beyond a “Rules-Plus” focus into analysing the “Law in Context”. This factor might explain the predominance of the former focus even in contemporary scholarship.

¹⁷⁹ Nelken (above n 170) similarly begins by seeking a middle way between Watson’s focus on autonomous evolution of rules and Friedman’s legal sociology, and more broadly shows insightful sensitivity regarding convergence and divergence amidst globalisation.

¹⁸⁰ See eg Soskice (above n 141), and especially H Kitschelt et al “Convergence and Divergence in Advanced Capitalist Democracies” in *ibid* (eds) *Continuity and Change in Contemporary Capitalism* (Cambridge UP, Cambridge, 1999) 427. These political economists’ sensitivity to difference and divergence, despite pressures for convergence, in turn may be

Although doubtless with variable success, my own work has tried to follow both strictures: taking rules seriously while not neglecting context, and trying to uncover patterns of convergence and divergence.¹⁸¹ This would place me somewhere near the centre of the Figure above, although justifying this position admittedly requires considerably more elaboration than presented here and other publications. Nonetheless, my work probably draws closest to that of Joerges, with strong sympathies for the attempts by Gerstenberg and (especially) Sabel to develop a normative foundation grounded in novel analyses of contemporary economic institutions.¹⁸²

At the EUI generally, legal research has tended to take (a) almost for granted, perhaps too much so, but it has certainly made significant contributions especially in regard to (b).¹⁸³ As debate now intensifies about unification by means of a European Civil Code as opposed to looser harmonisation initiatives, it seems timely to develop new capacities in regard to (c), especially as there are so few other institutions in Europe – at least on the

related to their broader conception of both “politics” and (especially) “economics” compared to that adopted or assumed by more conventional analysts. However, this issue too is best left for separate research.

¹⁸¹ On contract law, see respectively eg (a) eg Nottage, above n 59; (b) “The Centennial of Japan’s Civil Code and the Future of New Zealand Contract Law”, paper presented at the Australasian Law Teachers Association conference, Victoria University of Wellington, 4-7 July 1999; (c) “Planning and Renegotiating Long-Term Contracts in New Zealand and Japan: An Interim Report on an Empirical Research Project” [1997] *New Zealand L Rev* 482. “Bargaining in the Shadow of the Law and Law in the Light of Bargaining: Contract Planning and Renegotiation in the US, New Zealand, and Japan” in J Feest & V Gessner (eds), *Interaction of Legal Cultures* (Pre-publications of the Workshop on “Changing Legal Cultures”, Onati International Institute for the Sociology of Law, 1998) 113. On product liability and safety law, see eg (a) “Global Harmony and Disharmony in Accident Compensation: Japan’s New Product Liability Legislation compared to the EC Directive and Part VA of the Australian Trade Practices Act” (1999) 66/2 *Hosei Kenkyu F1*; (b) “The Present and Future of Product Liability Dispute Resolution in Japan” (2000) 27/1 *William Mitchell L Rev* 215; (c) “The Still-Birth and Re-Birth of Product Liability in Japan” in D Nelken & J Feest (eds), *Adapting Legal Cultures* (Hart Publishing, Oxford, forthcoming), and (with Y Wada) “Japan’s New Product Liability ADR Centers: Bureaucratic, Industry, or Consumer Informalism?” (1998) 6 *Zeitschrift fuer japanisches Recht* 40.

This has encouraged me to explore new dimensions in formal versus substantive reasoning, bringing out similarities between English and New Zealand law on the one hand, and US and Japanese law on the other (these two often still being seen as worlds apart); and the possibility of an emergence of “neo-procedural” elements apparent in all four systems, albeit perhaps to varying degrees and without requiring that this lead to convergence even over the long term (see also eg “Proceduralisation of Japanese Law in Comparative Perspective: Product Liability and Contract”, paper presented at the annual meeting of the Law & Society Association, Chicago, 27-30 May 1999). However, because so much of the received wisdom from comparative lawyers – often unfamiliar with Japan (eg Mattei, above n 111; Zweigert & Koetz, above n 105) – stresses differences between “Western” and Japanese law, much of my writing on the latter has tried to balance this by identifying and scrutinising convergent elements and forces (see eg “Japanese Corporate Governance at a Crossroads”, paper presented at the conference on “Economic Law Reform in the Aftermath of the Asian Crisis: Experiences of Japan and Thailand”, Thammasat University, 20-21 March 2000, slightly revised for proceedings being edited by Thammasat University Law Faculty; but of a revised version subtitled “Variation in ‘Varieties of Capitalism?’”, prepared for the University of Victoria’s Centre for Asia-Pacific Initiatives).

¹⁸² See Gerstenberg & Sabel, above n 171, Part 1 (“Our core claim is that the exploration of difference, as it may occur in choosing among diverse solutions to the pressing problems of everyday life (the task of harmonization most broadly conceived) can provide the basis for protections for the economically vulnerable and the politically disdained that may become as effective under emerging conditions as the policies of redistribution and judicial determination of rights were in the world that is passing.”). See also the burgeoning collection of papers collected on Sabel’s website at <http://www.law.columbia.edu/sabel/papers.htm>.

¹⁸³ Cf generally C Joerges & C Schmid “Das Fach Rechtswissenschaft am Europäischen Hochschulinstitut” [2000] *ZEuP* 926; also in [Summer 2000] *EUI Review* 17 (with an English translation at <http://www.iue.it/General/EUI-review/law-EN/>).

Continent¹⁸⁴ – interested and able to do so. In particular, this implies more empirical studies of the broader context in which private law is or may be implicated, building for instance on pathbreaking studies into contracting regimes in various EU member states, or the political background to contemporary codification initiatives.¹⁸⁵

More generally, to truly understand the potential and challenges posed by developments in EU law for the harmonisation or unification of private law in Europe more generally, it will not be enough simply to examine the body of rules affecting consumer contracts which has now been promulgated by the EU.¹⁸⁶ Its now quite comprehensive scope might tempt comparativists to seek primarily to distill common principles,¹⁸⁷ or even an underlying ideology.¹⁸⁸ Following mainstream Rules-Plus comparative law methodology, they may now also want to consider some reported case law, along with growing academic commentary and ongoing results from projects like those originating from Trento. Yet the very limited numbers of reported judgments – at national as well as ECJ levels – should alert us to the sociological commonplace that such judgments represent only the tip of the “dispute resolution pyramid”. That is almost certainly not “where the action is”, especially for businesses in adapting their behaviour and contractual documentation in a complex socio-economic environment.¹⁸⁹ Extending the analysis to incorporate that broader world of the law, however, makes it more and more unlikely that blanket similarities or convergence will emerge, although the possibility cannot be excluded.

More specifically, what does this imply for the revived debate on enacting a European Civil Code? Expressly or at least implicitly, those scholars now advocating a Code assume that there exists sufficient convergence or similarities among private law regimes in EU member states to form a new *ius commune*, or at least that those tendencies will permit this to take root. A first lesson from the foregoing analysis is that this perception or advocacy of convergence is likely to be correlated to a narrower focus on the law in books. Part II.A has shown the limits of various approaches adopting this focus, suggesting at least that underlying differences in conceptions of contract or other general principles should be investigated more seriously, including the broader legal infrastructure which may underpin these features.¹⁹⁰ Procedural law needs to be considered in parallel with substantive law, and the boundaries reconsidered between “private” and “public” law, as mentioned in Part II.C.

Further, the most neglected – and hence the most urgent – task is to

¹⁸⁴ However, a book entitled *The Harmonisation of European Law* (forthcoming, Hart, Oxford) edited by Mark van Hoeke (Leuven) and Francois Ost (Brussels) promises contributions adopting an interdisciplinary approach, bringing together comparative law and legal theory.

¹⁸⁵ Deakin et al, and Burchell et al, above n 55; Hedley, above n 157; Mattei, above n 47. Generally, on the importance of adding political influences and contingencies to analyses of economic development and legal order, see eg T Ginsburg “Does Law Matter for Economic Development? Evidence from East Asia” (2000) 34(3) *L & Soc’y Rev* 829, 842-3, 851.

¹⁸⁶ See the list in Schmid, above n 1. More so than the Doorstep Selling Directive and even the Unfair Terms Directives, a major contribution is likely to be the Consumers Guarantees Directive. The Electronic Commerce Directive, enacted on 8 June 2000 (http://europa.eu.int/ISPO/ecommerce/legal/documents/2000_31ec/2000_31ec_en.pdf), also adds to this growing corpus, but a more diffuse fashion. Thanks to Bruno de Witte for raising this entire issue.

¹⁸⁷ This is implied by Schmid (above n 1) as a task for a new European Law Institute, although it would also try to synthesise national private law.

¹⁸⁸ Explaining, for instance, a perceived bias in favour of mandatory rules (Mattei, above n 42-3).

¹⁸⁹ See H Genn *Paths to Justice: What People Think and Do About Going To Law* (Hart, Oxford, 1999) 106-7 (empirical research shows that consumer problems in England involved the highest proportion – about sixty percent – of self-help, mostly direct contact with suppliers, but with a relatively high rate of success); text and notes above n 145 (the role and impact of the OFT, etc).

¹⁹⁰ See eg Hyland (above n 58); Koetz (above n 64).

undertake broader empirical studies of the roles of contract, tort and other private law rules in a variety of contexts in different member states. This paper has mentioned several important studies,¹⁹¹ which could be built upon quite easily by collaborators throughout Europe to tease out implications for codifications or other softer harmonisation initiatives. This is precisely what is happening now in the United States, in highly contentious debates about revising the Uniform Commercial Code.¹⁹² Legal scholars who prefer the law in books might object that in Europe such social scientific research might lead to inconclusive results and discussions; but one simply cannot know until this is attempted properly. Anyway, the quality of some research so far has been high; social scientists draw on sources of authority and other broader criteria to reach consensus, not unlike lawyers. Already, it can be expected that further empirical research into contract law rules will show that they are much less important in planning transactions, resolving disputes, and sustaining trust, than is expressly or implicitly assumed by those now advocating unification or harmonisation. One implication would be that it may not matter very much how “good” the rules developed in such initiatives are, from the viewpoint of comparative legal scholars or even practitioners. That conclusion would render unnecessary the costly further decade of research and discussion that von Bar now envisages.¹⁹³ Rather, it would favour those advocating looser, “bottom up” harmonisation initiatives.¹⁹⁴ But even the specifics of the latter may be relatively unimportant, compared to the “cultural” or “constitutional” message delivered to “European citizens” resulting from either harmonisation or unification, an impact which could also be the subject of empirical inquiry.¹⁹⁵ Indeed, a new “European Law Institute” might well a suitable body to sponsor such empirical and theoretical analyses, even if the EUI also increasingly rises to this challenge. Yet “private legislatures” like such an Institute, or indeed groups of eminent scholars like those who elaborated PECL, should themselves be subjected to the scrutiny of both political economists and social philosophers.¹⁹⁶

Bringing in the broader context of private law in these ways is a big task. Further, the outcome which may emerge *might* be that there is – or can be – convergence favouring even some form of codification of private law in Europe, although this is unlikely. Finally, the various Rules-Plus projects described above (Part II.A) can have their place if one follows the “middle way” outlined in this paper, even if some of these (like comparing how different factually litigated cases would be resolved in different jurisdictions) could be better left by academics to practitioners.¹⁹⁷

Avoiding extremes in these ways may also hold more universal appeal. The position was advocated not only by Ovid two millennia ago; moderation was advocated by both Solon and Gautama Buddha in the sixth century BC, and in a Japanese expression probably borrowed from China around this time; and

¹⁹¹ See especially Deakin et al, and Burchell et al, above n 55 (on contract); Genn, and Dewees et al, above n 72 (on personal injuries and tort law); Genn, above n 189 (on claiming patterns in civil disputes generally in the United Kingdom).

¹⁹² See eg Bernstein, above n 37. This consciousness of the need to examine (critically) the “law in action” before embarking on commercial law reform dates back at least to the days of Karl Llewellyn: see J White “The Influence of American Realism on Article 2 of the Uniform Commercial Code” in W Krawietz (ed) *Prescriptive Formality and Normative Rationality in Modern Legal Systems* (Duncker & Humblot, Berlin, 1994) 401.

¹⁹³ Above n 1.

¹⁹⁴ Schmid, above n 1, 3.

¹⁹⁵ Cf eg Collins, above n 163; Gerstenberg, above n 101.

¹⁹⁶ Text above n 29.

¹⁹⁷ Cf Markesinis, above n 11; and the Trento project (above n 32). It is questionable whether academic lawyers need to devote such intense effort in such a narrow endeavour when it is already undertaken for instance by meetings of judges from different countries, like those sponsored since 1983 by the International Association of Supreme Administrative Jurisdictions (see <http://ww.conseil-etat.fr/ce-data/index2.htm> under “La justice administrative dans le monde”). Thanks to Jacques Ziller for this point.

now the British Prime Minister seeks a "third way".¹⁹⁸ But my great-grandfather – whose family emigrated from England to New Zealand via Australia – apparently used to urge "everything in moderation, including moderation", which the family has interpreted as allowing the occasional bout of extremism.¹⁹⁹ And a German saying, popular in the student demonstrations in the 1960s, warns us that: "In danger and greatest need, the middle way leads to death".²⁰⁰ American political leaders are sceptical too. John Adams wrote in 1776 that "in politics ... the middle way is none at all", while George Shultz has cautioned recently that: "He who walks in the middle of the road gets hit from both sides".²⁰¹ More divergence, as well as convergence, in Europe and world-wide! QED.

¹⁹⁸ See respectively Ovid, above n *; "Nothing in excess" (also attributed to others around the 6th or 7th centuries BC: J Bartlett's *Familiar Quotations* (Little Brown, Boston et al, 16th ed 1992) 134); M Carrithers *The Buddha* (Oxford UP, Oxford, 1983) 72, 76; *chuyo* or "moderation"; T Blair *The Middle Way: New Politics for the New Century* (The Fabian Society, London, 1998). Thanks to Neil Walker and Seiji Morikawa for some of these.

¹⁹⁹ This appears to be an interesting variation on the rather ambiguous saying attributed to the British politician, Benjamin Disraeli (1804-81): "There is moderation even in excess". See J Bartlett's *Familiar Quotations* (Little Brown, Boston et al, 16th ed 1992) 501.

²⁰⁰ "In Gefahr und grösster Not, führt der Mittelweg zum Tod." Thanks to Christian Joerges for this.

²⁰¹ Quoted respectively in Bartlett, above n 197, 338; and K Mohler (ed) *Webster's Electronic Quotbase* (1994). Thanks to Peter Whisker for the latter.



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Luke NOTTAGE
Convergence, Divergence, and the Middle
Way in Unifying or Harmonising Private
Law

