Law Department

Evolutionary Perspectives and Projects on Harmonisation of Private Law in the EU

SONJA FEIDEN
and
CHRISTOPH U. SCHMID (eds)

LAW No. 99/7

EUI WORKING PAPERS

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EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

DEPARTMENT OF LAW

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FOREWORD

This Working Paper has been edited by a group of present and former EUI research students who all work in the field of European private law. The formation of this group was furthered by two seminars on the Europeanisation process which we held jointly over a number of years and 'formalised' following a conference on 'Private Law Adjudication in the European Multi-Level-System' on 2-3 October 1998 at the EUI. The editing of the contributions to that conference was, and continues to be, at the centre of the group's activities. But during the editing process the group again and again evolved into a deliberative forum in which ever new dimensions of the Europeanisation problem became apparent and inspired lively debates. We are quite confident that these co-operative efforts have very productive side effects for individual research projects. The 'Working Group on the Europeanisation of Private Law' will soon establish a website of its own and hopefully forge new links with its European environment.

Florence, July 1999

Marie-Jeanne Campana and Christian Joerges

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INTRODUCTION

The complex and multi-faceted issue of harmonisation of private law may be said to constitute one of the most intriguing legal challenges within the European Union. In line with Articles 3(h), 94, 95 (ex Arts. 100, 100a) EC Treaty according to which the Community is (only) competent to act in respect of 'the approximation of the laws of Member States to the extent required for the functioning of the common market', its activities have until now been confined to selective and rather narrowly focused legislative interventions, pursuing specific economic or social objectives in the overall process of market integration. Well-known examples include the EC directives on commercial agents, product liability, doorstep-selling, consumer credit, package holidays and tours, unfair terms in consumer contracts, time sharing, and, most recently, delay in payment and consumer guarantees in sales. However, as is becoming increasingly apparent, the beneficial, market-promoting influence of this piecemeal legislation is often relatively limited, whilst its disintegrative effects — owing to the partial overlapping of national legal systems by potentially conflicting fragmented supra- and international sources — frequently become hardly manageable.

Against this background, many private law scholars, inspired by successful national codification experiences, have long called for a more comprehensive harmonisation of core areas of private law such as contract and tort. Following this line of reasoning, the case for a European Civil Code is powerfully sustained in this collection's first contribution by *Ole Lando*. Professor Lando claims that a common market should be

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endowed with a common legal infrastructure of private law, since the existing variety of contract laws in Europe could be regarded as a non-tariff barrier to trade. The arguments of legal certainty, calculability of transactions and the protection of foreigners famously advanced by Anton F. J. Thibaut in 1814 in favour of codification are alleged to be equally valid in present times. Accordingly, the 'Principles of European Contract Law' — the well-known compilation of European contract law elaborated by a multi-national team of leading scholars under the aegis of Professor Lando — should be understood as a preliminary step towards codification.

However, as shown in *Kristina Preinerstorfer's* comment, private law harmonisation might hide more complex features. At the outset, this contribution argues that the social and economic conditions which made possible the 19th century formal law codifications are to a large extent no longer present. As a component of the emerging European multi-level polity, private law is obliged to accommodate the regulatory market-related interventions of European economic legislation. Moreover, in the wake of the globalisation of the economy, national codifications have been superseded by new categories of standard and mass contracts, as well as by a layer of autonomous transnational law created by the business community (often denominated 'lex mercatoria') which tends to disregard the nation state's constitutional, institutional and regulatory limitations. Therefore, Kristina Preinerstorfer concludes that codification may be too ambitious an enterprise, and that the Lando principles should rather remain an optional regime at the disposal of the parties to international contracts. When referred to in transnational judicial dia-

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logue, these principles may become valuable tools for co-ordination among the fragmented European directives, international uniform law and the remaining body of national private law.

Mauro Bussani's article presents the Trento 'Common Core Project' whose main goal lies in the drafting of a detailed comparative 'map' of Europe's private laws, without however wishing to push towards uniformity. As regards codification efforts, Professor Bussani raises objections on the grounds that, while being part of the European multi-level system, each national legal system is at the same time also characterised by an internal stratification of different socio-culturally determined layers. The bottom layers are constituted by ethical values, as evidenced in bonds of personal authority (e.g. family and kinsfolk relations) as well as by customary rules such as neighbourhood relationships (rarely resolved by means of formal adjudication). However, with the topmost layer being constituted by international commerce which is dominated by self-adjudication, there would appear to exist only one intermediary 'ordinary formal layer'. Only there is resort usually had to legal adjudication and, consequently, can harmonisation reasonably take place. However, in that layer too, harmonisation would depend on the prior development of a common legal culture, a culture which would need to be instilled in the future class of interpreters of the new rules of a European codification.

The gradual establishment of a common legal culture is also the predominant concern of the forthcoming series of '*Ius Commune* Casebooks for the Common Law of Europe' whose underlying rationale is presented in a well-structured way by one of its co-authors, *Pierre*

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Larouche. This project, which was begun in 1994 by former Advocate General Walter van Gerven, also pursues a 'bottom-up' approach to harmonisation, according to which the emergence of a new *ius commune* is to be fostered through a common legal education. To realise this objective, the forthcoming casebooks (the first volume of which, on the scope of tort law protection, has already been published) confront European students with the doctrinal basics, different styles and modes of reasoning of Europe's legal systems as well as with authentic cases translated into English and dealing with similar-fact situations (e.g. violations of personality rights). Alongside similar *ius commune* compilations by Hein Kötz on 'European Contract Law' and Christian von Bar on 'The Common European Law of Torts', this casebook series may indeed be considered as an important first step towards the Europeanisation of legal science and education, as an alternative to legislative harmonisation.

The review essay at the end of this collection reflects our own views on private law harmonisation. We, too, are essentially favourable to 'bottom-up' harmonisation as advocated by the *ius commune* projects. Although we would not go as far as to definitively preclude any future codification of European private law, we think that further groundwork and preparation is in any case needed at the present stage. This should be done with a view to overcoming legal obstacles, such as the current restrictive reading of the subsidiarity principle, as well as practical objections, such as the potential resistance of European lawyers who are forced to give up their venerable national codifications. Most importantly, we think that a future codification should convince by its quality;

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and therefore, it should result from competition among national solutions and doctrinal constructs, to be tested against each other in transnational discursive processes among legal communities.

To prepare the ground for such discourse, we suggest that the existing transnational scholarly projects should in a first step be co-ordinated, further extended and publicised among European lawyers. This could occur through the mechanism of a 'European Law Institute' which, following the successful American example, might be jointly established by academics and practitioners. Such an Institute might also elaborate 'Mosaic-type Restatements' of various fields of European private law which incorporate existing European and international legislation on private law as well as the national provisions and doctrinal constructs which find most acclaim. These compilations might become the primary tools, with the help of which transnational legal discourse could become a reality. In the end, we are convinced that, if a European code should actually be enacted one day, this should be done with the support and the participation of an emerging European legal community, and not only by virtue of hierarchical imposition from Brussels.

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With the exception of the last, the essays assembled in this volume are edited and enhanced versions of contributions to the conference on 'Private Law Adjudication in the European Multi-Level-System', held on 2-3 October 1998 at the European University Institute in Florence. All of them have been extensively discussed, in part together with the authors, by a group of researchers who meet regularly to analyse various issues within the Europeanisation process in private law. It is with this publication that we wish to address the European legal public for the first time. We hope that it stimulates readers' interests, and we would appreciate any comments or critique. Finally, we would like to thank our colleague Diamond Ashiagbor for correcting the manuscripts and Professors Marie-Jeanne Campana and Christian Joerges for including this collection in the EUI Working Paper Series.

Florence, July 1999

Sonja Feiden and Christoph U. Schmid

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Optional or Mandatory Europeanisation of Contract Law

Ole Lando

1 Should contract law be Europeanied?

The term to Europeanise the law, as used here, means to unify or harmonise European law, i.e. the law of those countries which are or will become members of the European Union. By optional Europeanisation, I understand a procedure by which it is left to the courts or arbitrators to decide whether they will bring the contract laws of Europe closer to each other. Mandatory Europeanisation is a unification or harmonisation which is imposed upon the parties and the courts by the Union authorities or by the legislators of the Unions countries.

I shall first address the question of whether an increased europeanisation of contract law is desirable at all, and then how it should be done, in the optional or in the mandatory way.

Against a Europeanisation, one could argue, first, that although neither the Maastricht nor the Amsterdam Treaties prevent the governments from agreeing on a Convention on Uniform European contract law, the Union treaties do not provide any clear mandate to proceed with the Europeanisation of contract law, and certainly not in a mandatory form. That such a unification should be considered, is not even mentioned.

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Second, Europe seems to live without unification of contract law and to live well. Why then change the laws? It will cost sweat, money, and among many lawyers, even tears. Think of a German lawyer who has worked all his life with his *Bürgerliches Gesetzbuch*; and of the Common lawyer who cultivates the refined techniques of his law of contracts as developed by the courts. Many lawyers will hate to see all that they have learned and practised disappear, and they will hate to become law students again, learning a new contract law.

Then there are the cultural considerations. Is not the law of contract part of each country's heritage?[1] Is there not a cultural value in both the intellectual thrill and joy which seize common lawyers when they study the cases and try to extract the rules of law which these cases hide? Is not the French *code civil* peculiar to the Gallic spirit? The French poet *Verlaine* read it in order to improve the beauty of his poems. The Scandinavians see their laws as expressing a specific Nordic mentality of soberness and simplicity. What is good law for one nation may be bad law for another. The truth about contract law is not the same for a Swede and an Italian, for an Englishman and for a German.

The arguments in favour of a Europeanisation of contract law are down-to-earth. They are mainly economic. The Union of today is an

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[1] *Von Savigny* has already stressed the connection between the *spiriti* of the people ('*Volksgeist*')and the law, see *von Savigny,* Von Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft, Heidelberg 1814, reprinted in *Hattenhauer*, *Thibaut und Savigny, Ihre programmatischen Schriften,* München 1973 , 95 ff.

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economic community. Its purpose is the free flow of goods, persons, services and capital. The idea is that the more freely and abundantly these can move across the frontiers, the wealthier and happier we will become. They move by way of contracts. It should therefore be made easier to conclude and perform contracts and to calculate contract risks. Those doing business abroad know that some of their contracts with foreign partners will be governed by foreign law. The unknown laws of the foreign countries is one of their risks. Foreign laws are often difficult for the businessmen and their local lawyers to understand. They may keep him away from foreign markets in Europe. It is the aim of the Union to do away with restrictions of trade within the Community, and thus the differences of law which restrict this trade should be abolished. The existing variety of contract laws in Europe may be regarded as a non-tariff barrier to the trade.

And contract law is not folklore. It is a question of ethics, economics and technique. It is possible to draft common principles favourable for the economy and technically expedient. It has even been possible to reach agreement on a world-wide basis. In 1980, delegates from all over the world succeeded in adopting the CISG, which came into force in 53 states covering almost every legal culture in the world, at the beginning of 1999.

The claim for uniformity should come from the people, notably the businessmen who eventually will find it bothersome, costly and risky to change law each time they cross a European border which is no longer a real border.

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Those in Europe who wish to see themselves as citizens both of their nation and region and of Europe will find it a reinforcement of their allegiance to Europe that private law, or an important part of it, has become European law.

2 Can we content ourselves with the existing Europeanisation?

In the last decades there have in fact been important developments of what may be called the Union contract law. Most important is perhaps the directive on Unfair Terms in Consumer Contracts,[2] but the EEC has also issued several other directives providing protection of the consumer as a contracting party[3] and the employee. Furthermore, the Union has established a law of competition which purports to prevent restrictive trade practices. Some rules of this law provide restrictions of the parties' contractual freedom by laying down which contract terms are permissible and which are not. A Directive of 18 December 1986 on the Self-employed Agent[4] contains mandatory rules most of which protect the agent in his relationship with the principal.

The Union legislation mentioned above has provided some Europeanisation of contract law. However, it is only a fragmented harmonisa-

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[2] 93/13 of 5 April 1993, OJEC L 95/1993, 29.

[3] See, for instance, directives on Doorstep Sales (20 Dec. 1985, no 85/577), Consumer Credit (22 Dec. 1986, no 87/102), Package Tours (13 June 1990, no 90/314) and Time Share Agreements (26 Oct. 1994, no 94/47).

[4] 86/653 EEC, OJEC 18 Dec 1986, No L 382/17.

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tion. It is not well co-ordinated, and, since the national laws of contract are different, it causes problems when it has to be adjusted to the various national laws. There is no European law of contract to support these specific measures.

The uniform choice of law rules of the Rome Convention on the Law Applicable to Contractual Obligations of 19 June 1980[5] lay down which legal system governs contracts with foreigners. These choice of law rules are now in force in all the Member States. Their purpose is to give the businessman the means to know when his contract will be governed by the contract rules of his own law and when it will be subject to the rules of a foreign law. Art 3 of the Convention provides that the parties may agree on which legal system to apply. A Greek seller and a Swedish buyer may, for instance, agree that Greek or Swedish law shall govern their contract. If they want a neutral system to govern their contract, they may choose English law. If they have not made such a choice of law the courts must apply the legal system with which the contract has its closest connection; see art 4. This is presumed to be the legal system of the party who provides the goods or services which the other party buys, in the example mentioned above it would be Greek law because the seller is a Greek.[6]

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[5] 80/934 EEC, OJEC 9 Oct 1980, No L 266/1.

[6] In some cases, the rules of the Convention will leave some uncertainty as to which law a court will apply; see on this issue *Lando* in the King's College Law Journal 1996-97 55, 67ff.

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However, the contracts which are to be governed by an unknown foreign law will cause the businessman problems. A Swedish party will generally not know what Greek contract law provides. If the parties have agreed on English law as a "neutral" system, they will both have problems in ascertaining what English law provides.

If the case is tried by a Swedish court, the Greek party will have no assurance that his or her own, Greek, law will be applied, even though the rules of the Convention provide that Greek law should be applied. In the courts of most countries, a foreign law will have to be pleaded and proved, and to prove its content is often expensive and difficult. As most lawyers and judges do not like foreign laws and thus try to avoid them, a party will often find that his or her own law will not be applied.[7]

It is therefore submitted that the Rome Convention's choice of law rules are poor tools of legal integration. They have not established the legal uniformity necessary for an integrated market. There is still some truth in what, in his colourful language, the Heidelberg professor *Anton Friedrich Justus Thibaut* said about the situation in Germany in 1814 when the country was divided in a multitude of legal systems : "If there is no unity of laws, then the terrible and odious practice of the conflict of laws will arise.....so that in their intercourse the poor subjects will be stuck and suffocated in such a constant maze of uncertainty and shock

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[7] See European University Institute, Integration Through Law, (eds *Cappelletti, Seccombe and Weiler)* Volume 1, Book 2, Part II, p 161ff, Conflict of Laws as a Technique for Legal Integration, by *Hay, Lando and Rotunda*, at pp 168ff.

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that their worst enemies could not advise them worse. Unity of law would, however, make smooth and safe the road of the citizen from one state to the other, and wicked lawyers would no longer have the opportunity to sell their legal secrets and thereby extort and maltreat the poor foreigners".[8]

3 The Commission on European Contract Law

Since 1982, the *Commission of European Contract Law* has worked to establish the *Principles of European Contract Law* (PECL). These principles are drafted as articles and supplied with comments which explain the operation of the articles. In these comments, there are illustrations: ultra short cases which show how the rules are to operate in practice. In addition, there are notes which tell of the sources of the rules. Part one of the *Principles* dealing with performance, non-performance and remedies was published in 1995.[9] In 1992 the Second Commission on European Contract Law began to work on the formation, validity, interpretation and contents of contracts and on the authority of an agent to bind his principal. Part two of the *Principles,* which will comprise a revised version of Part one, was sent to the printer in September 1998, and is scheduled to be in the book shops in early 1999. In 1997, the Third

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[8] See *Thibaut*, Über die Notwendigkeit eines allgemeinen bürgerlichhen Rechts in Deutschland, Heidelberg 1814, reprinted in *Hattenhauer*, *Thibaut und Savigny, Ihre programmatischen Schriften,* München 1973, 61ff, p 33f.

[9] *Lando & Beale* (eds) Principles of European Contract Law, Part 1. Performance, Non-performance and Remedies, Dordrecht 1995.

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Commission began to draft rules on illegality, set-off, assignment of claims, subrogation, assumption of debt, plurality of creditors and debtors, and prescription.

With a few exceptions, the members of the Commission of European Contract Law have been academics, but many of the academics are also practising lawyers. The Members have not been representatives of specific political or governmental interests, and they have all pursued the same objective: to draft the most appropriate contract rules for Europe.

The same spirit has governed in the Working Group which prepared the UNIDROIT Principles of International Commercial Contracts. These Principles, which were published in 1994 by the UNIDROIT in Rome, cover almost the same subjects as Part two of the PECL. They are meant for the world but are not intended to become a Code. They are optional rules, a World Restatement on the Law of Contracts.

The working methods of the two groups have many traits in common. Some of the members participated in both groups and the mutual give and take was considerable. There are some differences between the rules of the two texts, but most of them are similar, if not in formulation, then in substance. The rules on formation of contracts, and on performance, non-performance (breach of contract) and remedies for non-performance resemble those of the Vienna Sales Convention (CISG). As long as the PECL have not been codified, they will also operate as a Restatement, and there is a common core in the two texts which will have a considerable influence on the future laws of the world

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One of the rules common to the CISG, the PECL and the UNIDROIT Principles is that each party should act in accordance with good faith and fair dealing. Applications of this principle appear in several other rules, but it is meant to be broader than those specific applications and should, in general, govern the behaviour of the contracting parties. Another is that a party who has a contractual duty to achieve a specific result, such as a seller who is to deliver goods to the buyer, is bound to achieve that result, and will, subject to *force majeure*, commit a breach of contract and be liable to damages if he fails to do so. A third is that a party who has to pay damages for breach of contract will only have to cover the loss which he foresaw, or could reasonably foresee, which would follow as a likely result of the breach. A fourth is the principle of proportionality which *inter alia* governs the exercise of remedies for breach of contract; thus, only a fundamental breach of contract by one party should entitle the other party to terminate the contract.

Other rules are accepted by the UNIDROIT Principles and the European Principles only and not by the CISG. One such rule is the so-called *hardship rule* under which the terms of a contract may be modified or the contract brought to an end if the performance becomes excessively onerous to one party because of an unexpected change of circumstances. Another deals with the *battle of form* situation; when they made their contract, the parties were in agreement except that the offer and acceptance referred to conflicting general conditions. In this case, a contract is formed, and the general conditions form part of the contract to the extent that they are common in substance; in so far as they are in conflict, the implied terms of law (*das dispositive Recht, les règles supplétives du*

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droit) will generally govern the issue. A third is the rule on the *professional's written confirmation;* if professionals have concluded a contract but have not embodied it in a final document, and one, without delay, sends the other a writing which purports to be a confirmation of the contract, but which contains additional or different terms, such terms will become part of the contract unless the terms materially alter the terms of the contract, or the addressee objects to them without delay.

4 Is the Europeanisation of the contract law feasible?

Can the 15 or more States agree on a unified contract law? Europe is still divided by different legal languages, methods and rules. The Civil law countries on the Continent and the Common law countries on the British Isles have a different approach to the law and a different legal language, but even on the Continent itself, there are significant differences.

However, the members of the *Commission on European Contract Law*, most of whom were academics, shared the same legal values; there was a remarkable unanimity when it came to the question of how a case would be solved under the existing national laws. In the discussions, the participants would consider how the courts of their own country had or would have reacted to a case, and they often found that although the rules were different, the courts had or would have reached the same results. The consensus was greater than one would have expected when one compared the legal rules and techniques of the various countries.

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The Court of Justice of the European Communities has judges from all the Member Countries and some of these Judges have spoken of a similar experience. There is often agreement about the outcome of a case, although the reasons for the decision may vary considerably.

Very often, the members of the Commission had the same views with respect to how they thought the law should be. There were, of course, differences of opinion. A few of them reflected national attitudes, but most of them reflected the individual attitudes of the members. For instance, some members believed more than others that the parties should be given an extensive freedom of contract. Some wanted detailed rules, others preferred general principles which left more room for the discretion of the courts.

Several factors have caused this common attitude. The similar economic and political structure of the Member States is one. Another is their common cultural heritage. All Europeans share the Christian ethic, and have been influenced by Roman law and the great moralists. The milieu in which both judges and law professors are raised and live is also a factor. Most of the guardians and preachers of our law and justice grew up in well-to-do bourgeois homes with moral traditions. In Europe, the middle class has been the guardian of ethics, and so have the parents of the judges and professors. In school and at the universities the law-

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yers *in spe* were good and relatively virtuous students with strong ties to their home.[10]

Thus, the legal values of the European brotherhood of lawyers are very similar. And so are, it is submitted, the legal values of the European peoples who live in societies of a similar economic, and political structure and share the same ethics. This should make it possible to make a European Code of Obligations.

5 The two schools: the cultivators and the codifiers

Some lawyers, notably among the academics, realise that European contract law should be harmonised or unified. There are, however, two opinions as to how this should be done, two schools, which we will call *the codifiers* and *the cultivators*. What divides them is the question as to whether the uniform law should be imposed upon the peoples of Europe by way of codification (legislation) or lulled into them by a patient persuasion and cultivation.[11]

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[10] See *Kaupen,* Die Hüter von Recht und Ordnung. Die soziale Herkunft, Erziehung und Ausbildung der deutschen Juristen, 2d ed. 1971, and *Ralf Darendorf*, The education of an Elite. Law Faculties and German Upper Class. Transactions of the 5th World Congress of Sociology, Louvain-La-Neuve 1964, 259-274.

[11] See, for example, *Reinhard Zimmermann*, Savigny's Legacy. Legal History, Comparative Law and the Emergence of a European Legal Science, 112 Law Quarterly Review (1996) 576, and *Hein Kötz*, Gemeineuropïsches Zivilrecht, Festschrift für Konrad Zweigert, Tübingen 1981, 481. In several meetings, *Kötz* has advocated this view and has been supported by many European, notably German, lawyers.

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A European Contract Law, the cultivators say, should grow organically and slowly in the people, led by the academics who, in their writings, should establish the law. They should be helped by the international business community whose organisations should establish what they call common customs and practices. This new European law should then be taught to the law students, who, when they become judges, will apply it in their decisions. The cultivators refer to the proud tradition of Roman Law, which spread in Europe from the time of the glossators of the 12th century, and which reigned in Continental Europe till it was replaced by the codifications of the 19th century. The cultivators see the universities as the main platform for the debates on the future civil law of Europe. They imagine that the writings of learned scholars and Socratic seminars under the palm trees of the *academia* will distil the *ultima ratio* and establish a European Contract Law.

In the last decades, the EEC and the European Union have promoted a European regime of - mostly academic - lawyers whose platform is no longer their own country but Europe and whose writings and debates are on the future European law. This regime has established and promoted an interchange of law students, European law reviews and books, such as *Kötz & Flessner's European Contract Law.*[12]

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[12] The first of the two volumes of this book, *Hein Kötz, Europäisches Vertragsrecht*, *I*, deals with formantion, validity, content of contract, and contract and third parties. It was published in 1996. An English translation *European Contract Law* by *Tony Weir* appeared in 1997.

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This regime of lawyers is also necessary for the codifiers who wish for a European Contract Code. Furthermore, they need European text-books and articles to be discussed among academics, and European Contract Law to be taught in classrooms before and after it has been codified.

Several academics in Europe, notably in Germany, belong to the cultivators and wish European contract law to be developed in this soft way. They point to the fact that the CISG, the UNIDROIT Principles of International Commercial Contracts and the PECL all agree on a number of principles and rules which could form part of a European, if not a world *"Gemeines Recht"*.

One could now ask whether the writings of the academics and their discussions can bring about a Europeanisation of the contract law. Will the judges disregard a provision in their national code or change a well-established case law of their country in order to bring it in accordance with the Common Core? Would the French courts in civil and commercial matters introduce a rule on *imprévision* similar to the hardship rule just mentioned? Would the English courts adopt the good faith principle as a general principle of contract law?

Whether the courts will change the law depends upon several factors. In some countries the courts allow themselves more freedom to develop the law than in others. The German and the Dutch appeal courts have been more daring than the courts of other European countries which are less inclined to be so creative as to bring the law in conformity with to

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the new European *jus commune.*[13] And even in Germany and the Netherlands, the temperaments of the judges differs. Some regard themselves as social engineers, others as obedient followers of the statute or the precedent.

The Court of Justice of the European Communities has made an attempt to persuade national courts to give their own national law an interpretation which brings this law into accordance with community directives governing relationships between the citizens. The Court has ruled that, until they are implemented by the national legislator, such" horizontal" directives have no direct effect and cannot create rights and duties between citizens, even when the state has not implemented them when it should. However, in a ruling in *Corte Inglès S.A v Christina Blàquez Rivero*[14] the European Court advised the Spanish court to interpret Spanish law so as to bring it into conformity with the EC Package Tour Directive which Spain should have, but had not yet, implemented. However, in his judgment following the ruling, the Spanish *Juzgado de Primera Instancia Sevilla* refused to use this "interpretation" inviting it to violate the clear text of the Spanish civil code.

Although a certain *rapprochement* among the legislatures and among the appeal courts in Europe has been noticed in the last decades, it is

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[13]See on the problems caused by such 'hidden changes' of national law by way of "interpretation", *Irene Klauer*, Die Europäisierung des Privatechts, Baden-Baden 1997, 51ff.

[14] Case 192/94, ECR 1996 I 1281.

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doubtful how far the courts can and will go without any mandate from the national legislator. The main objection to the idea of the cultivators is, therefore, that the rules of the *New Restatement*s would probably not be adopted by the courts in the way the cultivators imagine. Today, neither on the Continent nor in the British Isles, will or can the courts free themselves of the fetters of the law laid down in the national codes, statutes or precedents. A unified law can only be applied by the courts of Europe if the legislator tells the court that they *must*. A European Civil Code has to be prepared, passed and promulgated. One will have to tolerate a certain polycentrism, but there should be certainty about the main principles. Together with the practising lawyers and the judges, the doctors should work these principles out, but they have to be passed, either by the legislatures of the Union Countries or by the Council and the Parliament of the European Union which, by the way, both in 1989 and 1994 requested the Commission and the Council to prepare a European Civil Code.[15]

Another objection which may be raised to a "soft" unification brought about by the academics is that it will be difficult to establish a system of simple and clear rules in this way. It will not be easy to base a uniform law on academic debates. European lawyers are still divided by different legal languages and methods. To the differences in the academic background of the European professors one must add that most academics are persons of a marked individuality. Many of the rules which are pro-

[15] See Resolutions of 26 May 1989, OJEC 1989 C 158/ 400 and of 6 May 1994, OCEJ 1994 C 205/518.

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posed in the UNIDROIT Principles and in the PECL are the same, but there are also differences which cannot be explained by the fact the UNIDROIT Principles are for the world and the PECL for Europe. Such are due to the fact that most of the members were different individuals. Already *Thibaut* has warned against a law which, like the Roman law, was based on the doctrine of the learned society: "There is nothing which we good jurists like more than to hold the opinions of others to be inadvisable for the very reason that they are the opinions of others".[16] When the Roman Law reigned in Europe, its many and contradictory sources created a great amount of insecurity. "It cannot be denied", said *Thibaut,* "that Roman law has been conductive for our learned endeavours, notably for the study of philosophy and history, and that this great enigmatic mass has sharpened the lawyers' faculty of combination and has given them ample opportunity to practice, and to glorify themselves. The citizen, however, may rightly claim that he was not born for the lawyers... The citizen's happiness does not ask for the learned counsel, and we would sincerely thank the heavens if simple laws would bring about that the lawyers were dissuaded from their learning..."[17]

The mess described by *Thibaut* was, to some extent, cleared when the French Civil Code was introduced in a number of European countries. Compared with the former law, the Code was clear and succinct, forceful in its language and free from detailed digressions. As was said by

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[16] *Thibaut,* op. cit note 8, p 21f.

[17] *Thibaut*, op. cit. note 8, p 23.

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Portalis in his *Discours préliminaire:* "The task of the legislation is to determine the general maxims of law, taking a large view of the matter. It must establish principles rich in implications (*féconde en conséquences)* rather than descend into the details of every question which might possibly arise". Like the French Civil Code, a European Code must strive at simplicity. When drafting the *Principles,* the Commission of European Contract Law has tried to follow the device of the authors of the French Civil Code.

A slow cultivation may have its advantages. It is easier to accustom lawyers to a slow, than to a sudden, reform. However, it will probably take a long time to achieve Europeanisation in this way as is shown by the experience of the United Kingdom. In almost 300 years, the English and the Scots have lived together in a Union. They have basically the same culture and speak the same language Most of the uniform law they have has been brought about by legislation, but since this legislation has not touched upon the basic principles of private law which is still unwritten, the Scots and the English each have their own system of law. The Union of today has at least 16 legal systems and 11 languages. If no legislative measure is taken, the peoples of the Union will probably continue to have different contract rules. Those who want to establish a European Contract Law by way of a natural outgrowth must arm themselves with great patience.

6 The future avenues

The future European law of contract may take several avenues. One is a continuation of the fragmented Union legislation and the optional Eu-

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ropeanisation which may follow from continued debates between members of a growing European *academia* on the principles of contract law, supported by the efforts of the business world to make uniform customs, standard form contracts and contract terms. In this way, an unwritten European *jus commune* may eventually emerge. It will be somewhat diffuse and polycentric, but it may straighten out some of the differences of the national laws. This is what the cultivators wish.

Another avenue is the mandatory unification, a European Civil Code covering the law of contracts. This is what the codifiers want, and I am, as you can guess, one of them. One must expect that intensive trade will create a need for the greater amount of legal certainty which a Code will provide. World trade has grown very fast, and this has brought CISG into existence. In the European Union, where trade between the Member states has increased even more since 1958, the more trade and communication continue to grow the more urgent the unification of the law of contract will become.

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The Work of the Lando-Commission from an Alternative Viewpoint

A Comment on Professor Lando's Exposition

Kristina Preinerstorfer

1 Introduction

One way to approach the complex issue of Europeanisation of Private Law is to focus on private initiatives. The Lando-Commission[1] is one of them; it has become one of the most noted 'non-governmental' unification projects within private law. For more than twenty years an ever growing number[2] of legal academics drawn from all the Member States

[1] I use the popular, though not official, expression 'Lando-Commission', referring to the chairman and initiator of the project, Professor Lando from Copenhagen Business School. The Lando-Commission's official name is 'Commission on European Contract Law' (CECL). For more information see the Lando-Commission's homepage at: http://www.ufsia.ac.be/~estorme/CECL.html

[2] To date the Lando-Commission consists of more than 20 members.

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of the European Community has been working on behalf of this project, elaborating common European principles of contract law.[3]

There is a clear and convincing reason why, in the early seventies, the Lando-Commission initiated a project to achieve a Community-wide uniform legal basis for contract law: the Lando-Commission begins from the supposition that the mere unification of international private law rules cannot satisfy the needs of the common European market. The unification of rules on 'choice of law' cannot avoid the fact that, for instance, for a Milan pasta producer, Palermo is closer than Munich.[4] This geographic/economic paradox stems from the fact that differences between the legal systems of the Member States give rise to transaction costs for businessmen. From this geographic/economic point of view, trading under the laws of one country seems more attractive than exporting goods under foreign and usually less familiar laws — even if the frontier might be near at hand. The example mirrors the problematical situation to which the whole idea of the European market integration must respond: divergent rules of contract law may give rise to distortions of competition or deter businessmen or consumers from cross-

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[3] The first results were published in book form in 1995: *Ole Lando/Hugh Beale* (eds.), The Principles of European Contract Law, Part I. Performance, Non-performance and Remedies, Dortrecht 1995.

[4] This example refers to Professor Lando's famous question to his students 'how many miles it is to the frontier'; further, *Ole Lando*, European Contract Law, in: Peter Sarcevic (ed.), *International Contracts and Conflicts of Law*, London, Dortrecht, Boston 1990, p.1.

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border sale or purchase of goods and services. Thus, in order to complete a common market without frontiers, one must eliminate such obstacles to cross-border contracts, created by differing national rules of contract law.[5] The unification of rules on 'choice of law', such as the EEC Convention on the Law Applicable to Contractual Obligations,[6] may have its merits but necessarily fails in terms of market integration. For, assuming the existence of different legal systems, the idea of unifying international private law cannot sufficiently respond to the practical needs of the common market.[7] The Lando-Commission proposes a Community-wide, uniform 'infrastructure' for the contractual relationships of parties doing business. It provides for a set of rules detached from national legal systems and thus facilitating cross-border trade within Europe. Apparently, projects such as the Lando-Commission provide a solution to very practical needs. By the same token, however, the presentation and analysis of the work of the Lando-Commission reveal the normative concerns behind such an initiative. In fact, the de-

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[5] *Cf. Ole Lando*, Principles of European Contract Law: An Alternative to or a Precursor of European Legislation?, (1992) 40 The American Journal of Comparative Law (Am.J.Comp.L.), 574.

[6] 1980 Rome Convention of the Law Applicable to Contractual Obligations, O.J. 1998 C 27/98, p. 34 ff. (consolidated version).

[7] That is why some authors speak of "second best solution" if they talk about the unification of rules on 'choice of law'; *cf.* for instance *Helmut Heiss*, Europäisches Vertragsrecht: in statu nascendi?, (1995) 36 Zeitschrift für Rechtsvergleichung (ZfRVgl.), 54 ff.

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mands of the business world for common European rules only indicate the tip of an 'iceberg' lying underneath.

What makes the Lando-Commission and their Principles of European Contract Law interesting is the fact that the project does not simply attempt to resolve the practical concerns mentioned; limited to its pragmatic function the effect of the Principles of European Contract law appears a little unrealistic; one may indeed wonder, if the collection of mere 'Principles' can at all meet the needs of the highly specialised and complex business community of modern Europe.

However, what at first sight seems to be too cautious an approach, acquires a rather complex dimension once we look at the range of controversial fundamental and policy issues underlying the Europeanisation process. The most striking development is the rise of a new scheme of governance distinct from traditional governance structures: the building of the European Union has brought about a system of 'multi-level governance' in Europe.[8] In transforming sovereign European nation states into members of a new political entity *sui generis*, the classical dualism of states and international organisation has been transgressed. New forms of non-national and non-state structures of governance have been established, regulatory policies have been Europeanised. Applying this

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[8] See *Christian Joerges, Oliver Gerstenberg* (eds.), Private Governance, Democratic Constitutionals and Supranationalism. Proceedings of the COST A7 seminar. Florence, 22 to 24 May 1997 (Luxembourg: Office for Official Publications of the European Communities, 1998).

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perspective to the field of private law, the impact of European integration on (systems of) national private law becomes discernible. Since the building of the European entity has been guided by strategies of market building, new institutional frameworks of economic and social regulation have been created. Market-driven regulations at European level have been increasingly intervening in national private law. Europe, and no longer the legislation of the Member States, determines the extent of the realm of private ordering. Thus, the efforts of the Lando-Commission have to be seen in the light of the emergence of this new scheme of governance in Europe. From this 'constitutional vantage point', the exemplary nature of the work of the Lando-Commission becomes visible.

It is this vision which I will elaborate in this paper. The essence of my argument is to perceive the Lando-Commission as working in two, at first sight contrasting, directions: a wide and a narrow one. The wide perspective on the one hand does not confine the project of the Lando-Commission merely to its pragmatic function; the Lando-Commission is more than just the answer to the practical needs of the business world. It serves, at the same time, to correct the deficiencies in such ongoing processes as the Europeanisation of private law and/or the transnationalisation of contract law. The narrow perception on the other hand limits the critical function attributed to the Lando-Commission to that of a 'non-legislative' project of contract law unification. This latter view

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differs from the Lando-Commission's self-perception as a 'legislative' project.[9]

According to these thoughts, the article is structured as follows. In the first part of the narrative (2) I will outline the wide view of the Lando-Commission's project, arguing that the Lando-Commission's endeavour represents a symptom of both the impact of European integration on private law (2a) and the general paradigm shift in contract law (2b). Drawing upon the conclusions from this more expansive account, I will turn to the narrow account of the Lando-Commission's project in the second part of the narrative (3), arguing that the Lando-Commission's desire for codification is too ambitious an outlook (3a) and that Europeanisation from 'below'[10] might be a more satisfactory response to the peculiarities of the Europeanisation process (3b). In light of the insights obtained, one wonders how the critical functions attributed to the Lando-Commission can be realised. In the conclusion, I devote particular attention to one institutional actor which might be able to fulfil this task: the European judiciary.

[9] See *Ole Lando* in *op. cit.*, note 3.

[10] See *Christoph U. Schmid* in the last essay of this volume.

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2 *Extended Perspectives on the Lando-Commission and Its Work*

a) European (Dis-)Integration of Private Law

In the process of European integration we are confronted with a striking paradox: on the one hand, the law has been the main tool for integration. On the other hand, this same law has operated as a disruptive factor when it comes to the coherence of national legal systems.[11] The impact of a body of supranational rules on the municipal level has sometimes had the effect of making the unity and rationality which are necessary for the efficient operation of the legal machine less attainable. The structure of national legal systems has being subjected to Community regulation, so that the basic orientation of our legal systems as well as individual legal fields have been affected; for legal academics in particular, confusion rather than order has gained the upper hand. In Europe one is thus dealing with a meta-national reshaping of private law rules, which can no longer be explained without giving serious consideration to the ongoing and pervasive number of disintegrative processes.

The background-logic of these influences is strongly characterised by rationales of an economic and social nature: since the building of the European entity has been guided by strategies of market building, new institutional frameworks of economic and social regulation have been created. These European activities in economic law and social regula-

[11] *Cf. Christian Joerges*, The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective, (1997) European Law Journal (ELJ) 378 ff.

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tion do not only affect the European economy but also the (national) development of private law. In this context, examples of market-driven regulations at the European level might be discussed which have had a selective impact on national private law, such as the Directive on Unfair Terms in Consumer Contracts.[12] The result of such an analysis (which I cannot undertake in this essay, since I am restricting myself to the work of the Lando-Commission) would clearly demonstrate that it is no longer the legislation of the Member States which determines the extent of the 'private', but European economic and social regulation, following a logic quite distinct from traditional law-making policies of nation states.

There are different ways to respond to these meta-national influences on our law. One is to accept them as anomalies. Another is to assimilate the resulting changes into the existing legal systems. However, the European machine is accelerating, producing an ever more confusing amount of supranational rules and thereby extensively affecting the deeper structures of our legal systems. It is becoming more and more doubtful whether our traditional legal systems are able to respond to these developments in a satisfactory way.[13] An alternative approach to the scenario outlined has been undertaken by the Lando-Commission.

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[12] Council Directive of 5 April 1993 (93/13/EEC), OJ L 95 of 21 April 1993, 23

[13] *Joerges,* The Europeanisation of Private Law as a Rationalisation Process and as a Contest of Legal Disciplines. An Analysis of the Regulation of Unfair Terms in Consumer Contracts, 3 (1995) European Review of Private Law (ERPL), 175-191.

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Their Principles of European Contract Law, to 'consolidate the rapidly expanding volume of Community law regulating specific types of contract',[14] provide for a legal framework of common European principles — a Community-wide infrastructure of contract law. The promising potential of the Lando-Commission is to reach a compromise between the obvious need for a common legal framework of contract law and the patchwork character of European legislative activities. The merits and fascination of such an approach seem to derive from an implicit scepticism: the Lando-Commission's initiative is a symptom of the failing process of integration as far as private law is concerned; *i.e.* the institutional incapacity, at both European and national level, to cope with the complexity of legal integration.

Considering both these levels (*i.e.* European and national) it is important to note that the initiative of the Lando-Commission does not belong exclusively to either of these levels; the group rather operates in a sphere detached from either. On the one hand, although aiming to discover 'European' principles of private law, the initiative is not a purely European one. For the Lando-Commission is neither dependent on the European authorities nor has it ever received a mandate from the European Union. On the other hand, the participants of the Lando-initiative, although representing different nation states, have no mandate from their national governments; rather, a new member is chosen and invited to participate by the common consent of the whole group. As members

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[14] *Ole Lando/Hugh Beale*, http://ra.irv.uit.no/trade_law/doc/EU.Contract.Principles.1997.preview.html

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of the Lando-Commission they are not political representatives of their national governments, but might be seen as 'scientific' representatives of their national legal systems. Each member's intention is to report on his or her respective national legal rules in order to facilitate the co-operative discovery of the common core of all European private law systems. To put it in other words: according to the Lando-Commission's analysis, common European principles shall be discovered by cross-border, non-governmental, scientific co-operation among jurists from all the Member States of the Union. This 'private' effort by legal experts is the crucial and distinctive feature of this project, thus rendering it remarkable. Whilst neither our national legislators nor our traditional legal systems (such as private international law) can any longer satisfy the needs of a united Europe, the thinking of the Lando-Commission allows the introduction of considerations of market integration or harmonisation of laws into the private law arena — without the underlying pressure of political considerations.[15]

This idea opens up a new way to mediate between the two levels of private law regulation, the national and the European, which at first sight seem to be irreconcilable. Thus, the Lando-Commission is more than a philanthropic enterprise by some legal academics meeting several

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[15] I am aware that this political independence is only one side of the coin and could also perceived as a lack of responsibility. Indeed, one could criticise the conception of the Lando-Commission as suffering a legitimacy deficit. In the conclusion I will argue that it might be task of the European judiciary to remedy this lack of control (see 4).

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times a year at their own expense in different universities across Europe. Keeping in mind the scenario established by the integration project (*i.e.* the regulatory functions of European legislation, the institutional framework of the European economy, their fundamental impact upon private law, the affect on the realm of private ordering etc.), one comes to appreciate the evolutionary and critical perspective on the Europeanisation process which the work of the Lando-Commission brings.

b) The Paradigm Shift in the Law Governing Contractual Relations

As indicated, the process of Europeanisation of private law is characterised by a re-shaping of private law rules at a meta-national level. Contract law in this respect offers an interesting example. For, crucially, contract law has been witnessing the phenomenon of denationalisation even before the process of integration had begun — and this development has been accelerating since the Europeanisation process. In fact, specifically in the area of contract law, transformations have been occurring for decades, leading to the phenomenon that codified law is highly divergent from the reality of contemporary contract practice. This development is due to the fact that, after the codification era, the functions of contract law have been subject to an irreversible paradigm shift. As the core area of private law closest to the market, the evolution of contract law must be seen in light of the expansion and internationalisation of trade and economics. There are indeed several factors on which the internationalisation (globalisation) process in the field of contract law is dependent: due to growing trade and economic relationships, the phenomenon of mass-contracts has appeared, the liberalisation and trans-

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nationalisation of contracts has increased, and there has been the rise of several new categories of contracts in order to regulate specific contractual relationships (such as consumer contracts), setting new standards of social justice in the private sector.[16] These factors mirror broader developments, for modern contract law is developing a dual commitment: *freedom* and *coercion*.[17] This paradigm shift has to be seen as an irreversible global development.[18] Contract law has been and will be further subject to a challenging process of globalisation.[19]

A very important feature of this process of trans-nationalisation is that, within their international organisations, business people have es-

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[16] In my LLM-Thesis, I entered into a deeper analysis *cf.* Kristina Preinerstorfer, Die Lando-Commission (Commission on European Contract Law). Rechtswissenschaft als Vermittler zwischen Europäisierungsprozeß und Privatrechtsentwicklung, LLM-Thesis, EUI Florence 1998.

[17] Cf. *Christian Joerges/Gert Brüggemeier*, Europäisierung des Vertrags- und Haftungsrechts, in: Peter-Christian Müller-Graff (Hg.), Gemeinsames Privatecht in der Europäischen Gemeinschaft, Baden-Baden 1993, S. 233ff (2nd edition forthcoming).

[18] Further, *Leone Niglia*, Contract Through Integration. The Impact of the EEC Directive in Unfair Terms of National Regimes of Law of Contract. Thesis EUI, San Domenico di Fiesole 1998, pp. 2 ff.

[19] Several national legislators have been trying to respond to this paradigm shift in contract law, but only the Netherlands, the Nordic states, Louisiana and Quebec have managed to reform their codifications, whilst for instance Germany's 'Schuldrechtsreform' has remained but a mere draft .

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tablished common customs and practices beyond their national contract laws; arbitrators have applied general principles of law to international commercial disputes. This phenomenon has often been equated with 'law' (*lex mercatoria*).[20] The deficiencies of such a 'law' are obvious: created by 'private' governance structures, it is not embedded in the traditional legal system. Hence, it is operating beyond the institutional frameworks and controlling influence of the traditional constitutional state. A new law has been emerging in a 'paralegal'[21] law-making process, without an official (supra-) national authority being involved. Given the above-mentioned trans-nationalisation of contract law and the irreversible intensification of international economic activities, the issue of the deficiencies of the *lex mercatoria* will not go away. A serious analysis of the work of the Lando-Commission therefore needs to take into account these current developments within contract law. In particular, one has to ask if the Principles of European Contract Law are able to correct deficiencies of 'private' governance structures as established by practice.

So far, we have seen that contemporary contract law has, for several decades, been affected by two important phenomena: codified national contract law has had to face the expanding trans-nationalisation of contractual relationships, especially of the business community; by the

[20] *Cf. Filip deLy*, International Business Law and Lex Mercatoria, Amsterdam, London, New York, Tokyo 1992

[21] *deLy*, p.244 (n.20).

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same token it has been increasingly subject to the European regulation processes. Therefore, contract law is doubly forced to react: on the one hand, it is still exposed to the trans-nationalisation paradigm, on the other hand it is also exposed to the Europeanisation paradigm; in a nutshell, to a colourful pervading collection of disintegrative processes. Both developments have in common that they are opposed to national contract law traditions. Against this background, the discovery or creation of a 'common' European contract law hardly seems conceivable. Nevertheless, what seems unimaginable in theory may be feasible in practice. The Principles of European Contract Law have potential to consolidate the practical needs of contracting parties in socially and economically developed systems, providing a 'common' basis for contractual relations and the patchwork character of European legislative activities. This incoherence is not just a 'technical' one. Rather, it is a normative challenge to traditional contract law. By way of meta-national reshaping of contract law rules, the Lando-Commission implicitly (rather than explicitly) responds to this normative challenge. The work of the Lando-Commission, thus, does not restrict itself to remedying the disintegrative interventions of European legislation; by the same token, it remedies the inability of national systems to respond to the paradigm shift in contract law. These observations have shown that the old patterns of justice are undergoing drastic changes. Through projects such as the Lando-Commission, a new law-finding process is emerging, able to tame and/or remedy the meta-national legislative interventions, in areas where traditional legislation is failing. But what exactly is this new law-

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finding process about? Let us focus on the working methods of the Lando-Commission and the final objective the group wishes to achieve.

3 A Narrower Perspective than the Lando-Commission's Perspective

a) Mandatory Europeanisation: Law-Making from "Above"

The specific intention of the Lando-Commission is apparently to focus on the creation of a Civil Code: the Principles of European Contract Law shall function as the first step towards a European Code of Contracts.[22] Such a perspective, as Professor Lando pointed out in his exposition,[23] echoes Thibaut's idea of abstract and homogeneous codification.[24] Accordingly, the idea of codifying divergent legal rules of sovereign countries is not new. What is new — since Thibaut and/or the era of codification — is the European context, together with the social and economic paradigm shifts which; as we have seen, are having a particular impact on concepts of contract law. Against this background, the project of the Lando-Commission can be perceived as 'codification' at a higher level or, more accurately, *mandatory Europeanisation* of law. Examples of mandatory Europeanisation are, in the first place, European

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[22] Lando/Beale (n.3), preface, p. xvii.

[23] *Cf.* Lando, in the first essay of this collection.

[24] Über die Nothwendigkeit eines allgemeinen bürgerlichen Rechts in Deutschland, 1814, reprinted in *Hans Hattenhauer*, Thibaut und Savigny, Ihre programmatischen Schriften, 1973, 61 ss.

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legislation, but also projects focusing on the objective of a European Civil Code. Its main character is the resolute applicability of legal rules once brought into force 'from above' *i.e.* by an official, legislative authority.

The question of 'European codification of private law or not?' is indeed at stake; the essence of all the arguments canvassed is the enforcement question. Among the supporters of mandatory Europeanisation, besides Lando, I might mention Tilmann,[25] Schulze,[26] Gandolfi,[27] and Sacco.[28] These authors doubt that the mere writings of the academics and their discussions can bring about the Europeanisation of contract law,[29] rather it must be 'installed' by a legislator. It is nearly ten years since the European Parliament, requesting a '*common system of private*

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[25] *Winfried Tilmann*, Eine Privatrechtskodifikation für die Europäische Gemeinschaft? In: Peter-Christian Müller-Graff (ed), gemeinsames Privatrecht in der Europäischen Gemeinschaft, Baden-Baden 1993 (2nd edition forthcoming), pp. 485 ff.

[26] Reiner Schulze, Auf dem Weg zu einem europäischen Zivilgesetzbuch?, (1997) 41 Neue Juristische Wochenschrift (NJW) 2742 ff.

[27] Giuseppe Gandolfi, Pour un code européen des contrats, 91 (1992) Revue Trimestrielle du Droit Civil (Rev.Trim.DroitCivil) pp. 706 ff.

[28] Rudolfo Sacco, The System of European Private Law. Premises for a European Code, (1992) Italian Studies in Law, 71 ff.

[29] *Lando*, (n.44) p.533

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law',[30] endorsed a European Civil Code. However, if we look at the present state of legislation, the enthusiastic pronouncement by Parliament seems to have remained mere wishful thinking. This enforcement deficit — even despite the involvement of a European institution — strengthens the arguments of those opposing codification. Such critical writers, such as Legrand,[31] Zimmermann,[32] and Kötz,[33] advance cultural arguments such as the paradigm of legal traditions and national mentalities. According to these authors, every nation is too greatly infused with its own *mentalité* (Legrand)[34] to accept an 'outlandish' law. A European Civil Code, in consequence, seems an illusory enterprise.[35] I do not want to elaborate further on this discussion nor on the reasons for the failure of the European codification idea, hitherto; what is important for me in

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[30] Resolution of the European Parliament of 26 May 1989 (Doc.A2-157/89, OJ 1989 C 158/401 p.400), cfr. Resolution of 6 May 1994 (Doc.A3-329/94, OJ 1994 C 205/94, p.518)

[31] *Pierre Legrand*, Against a European Civil Code, (1996) 60 MLR 44 ff.

[32] *Reinhard Zimmermann*, Savigny's Legacy. Legal History, Comparative Law and the Emergence of a European Legal Science, (1996) 122 Law Quarterly Review, 576 ff.

[33] *Hein Kötz*, Gemeineuropäisches Zivilrecht, in: Festschrift für Konrad Zweigert, 1981, 481 ff.

[34] *Legrand*, p.44 (n.31)

[35] *Pierre Legrand*, Against a European Civil Code, (1997) 62 Modern Law Review (MLR), 44 ff.

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the context of my paper is the enforcement question which this discussion raises. For the crucial enforcement of a Europeanised private law is feasible, and better achieved without the 'drastic' means of mandatory Europeanisation.

Hence, I believe that it is misleading to perceive the work of the Lando-Commission as an example of mandatory Europeanisation of private law. Even though Professor Lando is essentially right in reflecting, in his essay, on how his Principles can come 'into force'; furthermore, he is right in stressing the need for an institutional authority to fulfil this task, since the principles are a product of a mere 'private' initiative. Nevertheless, the enforcement of the Principles of European Contract Law must not necessarily be done by a national or European *legislator*. In my view, a European code may be a backward step.

b) Optional Europeanisation: the Alternative Approach from 'Below'

In fact, to perceive the Principles of European Contract Law as an example of mandatory Europeanisation of law might be barely compatible with the overall logic of the integration process. With a view to the objective of establishing a common market, the Community operates a flexible system which builds on regulatory competition, mutual recognition and selective harmonisation rather than a 'static' codex.[36] Thus,

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[36] See, *Karl Gleichmann*, Methoden der Rechtsangleichung und Rechtsvereinheitlichung innerhalb der EWG, in: Coing et al. (eds.), Methoden der Rechtsvereinheitlichung, Frankfurt 1973, p.35.

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the codification idea not only challenges national legal cultures (*mentalités*), but it also runs contrary to the incremental integration policy of the European Community. I would therefore argue that the Principles of European Contract Law are not necessarily a part of *mandatory* Europeanisation of private law, but might better be perceived as a promising example of *optional* Europeanisation, which stops one step before codification.

But what exactly is optional Europeanisation? It is a procedure which leaves it up to the actors involved (the parties) to decide whether they take an active part in the Europeanisation process. In the process of optional Europeanisation, the rules are not imposed by a legislator, but from 'below'. Distinct from national or European legislation, jurisdiction and international conventions, optional 'law' is not automatically applicable. Rather, it is made applicable from 'below'; the contracting parties decide if this alternative law shall govern their individual contract. For instance, Article 1.101 (2) of the provisional complete and revised version of the Principles of European Contract Law[37] states: '*These Principles will apply when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them*'. Thus, the Principles of European Contract Law leave it to the private parties to opt for them. Once adopted by private parties, the Lando-Principles come into force, and as a consequence, the parties are

[37] The official publication of this final text, including the second part of the Principles is expected this year. It is already available on the internet: http://itl.irv.uit.no/trade_law/doc/EU.Contract.Principles.1997.preview.html.

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subject to mandatory rules established by the Principles (Article 1.102)[38] or to mandatory law '*of national, supranational and international law which, according to the relevant rules of private international law, are applicable irrespective of the law governing the contract*' (Article 1.103 Principles). This solution suggested by the Lando-Commission renders the issue of a code dispensable. Thus, I believe that we can content ourselves with seeing the Principles of European Contract Law as a set of rules without ambitions to become a mandatory codification. In this sense, my interpretation of the Principles is narrower than that of Professor Lando.

If considered in this narrow way, the work of the Lando-Commission resembles a famous example: that of the American Law Institute (ALI).[39] The ALI is a private organisation of lawyers working on a systematic set of legal rules common to all states of the USA, published in several volumes: the Restatements on the Law. For, in the United States, as in the European Union, there are considerable differences between the contract laws of the individual states, and a common core has to be found. The American Law Institute began publishing Restatements as

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[38] Article 1.102 (1): '*Under these Principles, parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles*'.

[39] See further *Geoffrey C. Hazard,* American Law Institute, http://www.cnr.it/CRDCS/hazard.htm.

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early as the beginning of the 1920s. This non-governmental,[40] scientific initiative furthered a debate which has been based on common concepts and one common legal method. Without doubt a comparison between the Lando-Commission and the American Law Institute can be drawn; in fact, the Lando-Commission explicitly refers, in the introduction to the Principles of European Contract Law Part I,[41] to the Restatements as a model, and the Lando-Principles have been called 'European Restatements'.[42] Both initiatives provide solutions for lawyers and national courts in cases where their own law is silent or where their law is in need of reform, and such reform may be brought about by the courts.

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[40] There has never been a governmental order in respect of the American Law Institute. It was founded in 1923 with the support of the American Bar Association. As an initiative from legal science, it has been independent of official, governmental will. Nevertheless, the ALI has political importance and might be attributed 'quasi-legislatory' authority. I elaborated on this point in my LLM Thesis: Die Lando-Kommission (Commission on European Contract Law) Rechtswissenschaft als Vermittler zwischen Europäisierungsprozeß und Privatrecht, Thesis EUI San Domenico di Fiesole 1998, 43 ff.

[41] *Lando/Beale*, p. 9 (n.3).

[42] See *Christoph U. Schmid* in the last essay of this collection; see also *Helmut Heiss*, Europäisches Vertragsrecht, 36 (1995) Zeitschrift für Rechtsvergleichung (ZfRVgl.), p.56; *Thomas Schindler*, Die Restatements und ihre Bedeutung für das amerikanische Privatrecht, 6 (1998) ZEuP, 276ff.; Arthur Rosett, Unification, Harmonisation, Restatement, Codification, and Reform in International Commercial Law, 40 (1992) American Journal of Comparative Law (Am.J.Comp.L) 683 ff.

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What is important in the context of this essay is that the Restatements are not mandatory law. Thus, they are neither codified, nor enforced by any legislator. Nevertheless, the Restatements of the ALI are one of the most influential authorities in American law. In particular, the Restatement on Contracts[43] is one of the most successful products of the ALI, being highly appreciated by lawyers, courts and federal legislators and enjoying 'quasi-legislative' authority.

Hence, the example of the Restatements might demonstrate that, even where several divergent contract laws exist, the introduction of a code is unnecessary to 'enforce' common legal rules of private law, so long as the common rules are elaborated by legal experts and voluntarily accepted by official authorities such as legislators and courts. But the example of the Restatements also shows that institutional support is indispensable.[44]

4 Conclusion

The project of the Lando-Commission, taken as a point of reference, has revealed interesting insights into the needs of modern contract law and the demands of the Europeanisation process. They are very practical

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[43] *Cf. American Law Institute*, Restatements on Contracts 2nd, St. Pauls, Minnesota 1981.

[44] Additionally, Professor Lando has pointed to this problem in focusing on the institutional realisation of his project; see *Lando*, Why codify the European Law of contract?, (1998) 5 European Review of Private Law (ERPL) p.534

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needs, but cannot be answered through the medium of our traditional legal disciplines (such as international private law), nor can they wait and hope for the elaboration of a comprehensive code. That is why I believe — on this point dissenting from Professor Lando — that the Principles of European Contract Law should not be perceived as an example of *mandatory* Europeanisation of private law. But we should value the Principles of European Contract Law as an exemplary model of optional Europeanisation. They offer an alternative way to curb and remedy European legislative interventions and at the same time to remedy deficiencies of 'private' governance structures as established by practice (*lex mercatoria*). But how can the critical function ascribed to the Principles of European Contract Law be put into practice?

There is one institutional actor, namely the European judiciary, which deserves particular attention. We have already seen that the Lando-Commission offers a set of rules which, at present, is a mere suggestion. Article 1.101 of the Principles of European Contract Law leaves it to the private parties to opt for them. But there might be reasons why private parties hesitate to choose such an option. Not only does the set of rules offered by the Lando-Commission consist of mere principles, the scope of which is moreover limited to contract law — hence, it is not comparable with a coherent system of national private law. But also, the Principles of European Contract Law in their present state have not been proven to work in practice; private parties will hesitate to adopt a set of rules to govern their contracts which has never before been adopted. Furthermore, the political independence of the Lando-Commission (as discussed in point 2a) might make parties raise the question of control.

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Therefore, it is suggested that the judiciary could use the Principles of European Contract law when they are called to decide cases of contract law. In particular, the European Court of Justice could refer to the Principles of European Contract Law in deciding issues of contract law and in applying principles of contract law common to the laws of the national Member States. The judiciary is in a position to shape the rather general rules which the Principles of European Contract Law contain, and clarify their meaning. But given the above-mentioned multi-level situation in Europe, a dialogue has to develop between and among European and national institutions to guarantee a homogenous standard of application. Thus, national courts deciding matters of private law, can also refer to the Principles of European Contract Law. In addition, we will need to take account of the education of our judges, as Professor Lando does when he maintains that 'this new European law should then be taught to the students, who when they become judges will apply it in their decisions'.[45] Professor Lando's argument contains a very thoughtful and observant account of the *mentalité* aspect invoked by Legrand (see above, point 3a). Finally, it is important to require that every time a national judge decides according to 'European rules', he or she shall be subject to powerful criticism from the European judiciary and from supranational academic and institutional discourse.

To summarise: the work of the Lando-Commission does not only respond to the specifics of the Europeanisation process and to the interna-

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[45] *Lando*, Why codify the European Law of contract? (1997) 5 European Review of Private Law (ERPL), 525-536 (at 531).

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tionalisation and globalisation of contractual relations. It should also be understood as an effort to preserve the 'normative quality' of private law in an post-legislative era. Thus, the Lando-Commission becomes a crucial actor (of several) in a complex scheme of deliberation processes. Ideally, this picture should lead to a fruitful discourse culture between the actors within a system of multi-institutional governance; with the judiciary of Europe, and not a legislator, exercising the 'final say'.

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[illegible]

and clarify some meanings. But given the above-mentioned multi-level situation in Europe, a dialogue has to develop between and among European and national institutions to guarantee a homogeneous standard of application. Thus, national courts deciding matters of private law, can also refer to the Principles of European Contract Law. In addition, we will need to take account of the education of our judges, as Professor Lando does when he maintains that 'this new European law should then be taught to the students, who when they become judges will apply it in their decisions'.[illegible] Professor Lando's argument contains a very thoughtful and observant account of the mentalité aspect invoked by Legrand (see above, point 3c). Finally, it is important to require that every time a national judge decides according to 'European rules', he or she shall be subject to powerful criticism from the European judiciary and from supranational academic and institutional discourse.

To summarise, the work of the Lando-Commission does not only respond to the specifics of the Europeanisation process and to the Internat-

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[illegible] *Lando*, Why codify the European Law of contract? (1997) 5 European Review of Private Law (ERPL), 525-535 (at 533).

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“INTEGRATIVE” COMPARATIVE LAW ENTERPRISES AND THE INNER STRATIFICATION OF LEGAL SYSTEMS

Mauro Bussani

1 Introduction

The aim of this contribution is to put into context the cultural reasons which underpin a scholarly project. This project was launched five years ago by Ugo Mattei and myself, in light of both the current legal debate on European Legal Integration and the issue of the existence of Multi-Level-Legal Systems.

The Project we are concerned with is entitled “The Common Core of European Private law”.[1] To date, it involves more than one hundred

[1] The project was born as a child of two cultural parents, both of them very well known: the experience of the Cornell Studies directed by R. Schlesinger in the 60s (see the balance struck by Rudolf B. Schlesinger himself: ‘The Past and Future of Comparative Law’, 43 *Am. J. Comp. Law.* 477, 479 (1995)) and the dynamic comparative law methodology developed by R. Sacco in the last 30 years (see, in English, Rodolfo Sacco, ‘Legal Formants: A Dynamic Approach to Comparative Law’, 39 *Am. J. Comp. L.* 1, 343 (1991)). For a more extensive and complete presentation

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scholars mostly from Europe and the United States and should produce in due course the first published (by Cambridge University Press) results.

In the following pages I will first describe the immediate and long term goals of the project. I will then tackle the main differences between the "common core approach" and a series of apparently similar "integrative" (to use Rudolf Schlesinger's terminology)[2] comparative law enterprises. Finally, I will try to put forward some remarks, within the perspective of a European legal integration, on the need to consider legal systems as Multi-Level-Legal-Systems.

2 The Need for a Map

Put in very simple terms, the above mentioned project seeks to unearth the common core of the body of European Private Law, within the general categories of Contract, Tort and Property. The search is for what is different and what is already common, if anything, behind the different legal forms of the European Union Member States; legal forms which are differentiated not only along the lines of the civil law versus

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of the project see Mauro Bussani & Ugo Mattei, 'The Common Core Approach to European Private Law', 3(3) *Columbia J. Eur. L.* 339 (1997-1998).

[2] Supra, note 1, at 479.

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common law heritage, but also by a number of other western legal traditions, or sub-traditions, according to the taxonomy one wishes to adopt.[3]

The three principal areas of property, tort and contract are divided into a number of topics[4] and these are investigated through the key tool of the project constituted, as in the Cornell Seminars, by a questionnaire.

We have followed the general pattern of drafting our questionnaires with a sufficient degree of specificity to require the rapporteurs to answer them in such a way that all of the circumstances affecting the law in their systems are addressed — including also all the circumstances that whilst not playing any official role, nevertheless have a practical impact on the operative rules. This should guarantee that rules formu-

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[3] Scandinavian systems are considered as a tradition *sui generis* by Zweigert and Kötz: see Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law* (3d. ed. 1998). The civil law is divided into Roman-inspired and German-inspired systems by the same authors and, with some nuances, by David (see René David & Camille Jauffret-Spinosi, *Les grand systèmes de droit contemporains*, 10th ed. 1992; see also René David & John E.C. Brierley, *Major Legal Systems in the World Today*, 3d ed. 1985). Compare A. Gambaro & R. Sacco, *Sistemi giuridici comparati*, Torino, 1996. Scotland is generally considered a mixed legal system. See A. Gambaro & R. Sacco, *Sistemi giuridici comparati*, op cit.

[4] Contract, Tort and Property are not used in this project in any positivistic legal sense. Their role - besides being labels to help in detecting the areas of general expertise of the contributors - is to serve as metalegal containers of problems which are fairly easy to locate on operational grounds: the same grounds that show us how the whole of private law is indeed communicating to solve concrete problems.

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lated in an identical way (for instance by an identical code provision) but which may produce different applications, or even different rhetoric from commentators, will not be regarded as identical. This should also allow us to see the elements that may play an official and declared role in one system but which in another system may work in a more cryptic, unsystematic and unofficial way — the role of such cryptic elements being, of course, crucial when drafting a map of the applied law.[5]

This kind of research seems to be worth undertaking in order to obtain at least the main outlines of a reliable geographical map of the law of Europe.

What use will be made of this map is of no concern for the cartographers drafting it. However, if reliable, it may become indispensable for whomever is entrusted with drafting European legislation[6] — and this may be particularly so in the process which in Europe appears to lead incrementally towards the adoption of a general restatement and/or codification.[7]

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[5] See Rodolfo Sacco, 'Comparazione giuridica e conoscenza del dato giuridico positivo', in *L'apporto della comparazione alla scienza giuridica* 241 (R. Sacco ed., 1980).

[6] See infra sub 3.

[7] In respect of the huge work-in-progress of the group headed by prof. Giuseppe Gandolfi, based at Pavia University and consisting of more than seventy scholars from throughout the European Union, see P. Stein (ed.), *Incontro di studi su un futuro codice europeo dei contratti*, 1993; G. Gandolfi, 'L'unificazione del diritto dei

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For the transnational lawyer, indeed, the present European situation is like that of a traveller compelled to use a number of different local maps, each of them containing information which (due to the biased or hidden assumptions of municipal lawyers) is often misleading. We wish to correct this misleading information; but we do not wish to force the actual diverse reality of the law into one single map for the sake of uniformity. We are not drafting a city plan for something that will develop in the future and that we wish to influence.

This project seeks only to analyse the present complex situation in a reliable way. While we believe that cultural diversity in the law is an asset, we do not wish to take a preservationist approach. Nor do we wish to push in the direction of uniformity. This is possibly the most important cultural difference between the Common Core project and other notable enterprises — such as the Unidroit Principles, or the Lando Commission working on the feasibility of a European Contract Code — which may be seen as engaged in city planning rather than cartographic drafting.[8]

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contratti in Europa: mediante o senza la legge?', 39 *Riv. di diritto civile* 149 (1993, II); ID., 'Pour un Code européen des contrats', 91 *Revue trimestrielle de droit civil* 707 (1992); ID., 'Verso il tramonto del concetto di "obbligazione" nella prospettiva di un codice unico per l'Europa?', 41 *Riv. di diritto civile* 203 (1995, I).

[8] Whilst drafting the map is our immediate short-term concern, in the long run this experience may itself be part of the building of a common European legal culture. This task is shared by a number of projects, including the European Programmes of student exchanges and, in the non-official area, the creation of European

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Law casebooks. The idea of shaping a truly common legal education has prompted some leading scholars in the field of comparative and European law to launch a project for the preparation of a series of casebooks on the common law of Europe. This project was first proposed during a conference organized at the University of Maastricht in 1991 on "The Common Law of Europe and the Future of Legal Education". Among the members of the steering committee are W. van Gerven, B. De Witte, T. Koopmans, and H. Kötz. The example of the United States has inspired this enterprise. In spite of the many marked differences among the laws of individual States, US legal education is based on a single national model which produces lawyers able to move from State to State without insurmountable difficulties (see, e.g., Lawrence M. Friedman & Gunther Teubner, 3 'Legal Education and Legal Integration: European Hopes and American Experience', in 1 *Integration Through Law: Europe and the American Federal Experience*, 345, 351 (Mauro Cappelletti et al. eds., 1986)). The authors of the European casebooks project declare that it "wishes to uncover common general principles which are already present in the living law of the European countries... [besides,] rather than setting up a European law school, teaching materials are developed which can be used in such a law school, and in the curricula of *other* law schools as well, and by courts looking for rules and principles to decide a case, throughout Europe" (W. van Gerven, 'Casebooks for the common law of Europe: Presentation of the project', 4 *Eur. Rev. Private L.* 67, 68 (1996)). This initiative displays important similarities with the common core project, in the sense that they both investigate the common features of private law in the European national legal systems, but it is not their goal to impose new rules and categories. They both are analytical, not openly prescriptive. While this aim of developing culture is common to both the common core and to the casebooks approach, what renders them partially different is their target-audience. To begin with, the common core is aimed at scholars, while the European casebooks project is aimed at students. Producing suitable materials for didactic purposes implies that a careful choice must be made of materials that will provide students with the elements they need to un-

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3 The Common Core Approach in the European Context

Let me now delve a little more deeply into the differences between the common core research project and the projects I have just mentioned: namely those which seek, in various ways, to achieve uniformity of law.[9] This, hopefully, will cast sharper light on the methodological

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derstand legal systems different from their own. Making this selection is the province of academics. In fact, the idea of this group of scholars is to collect different materials in the form of a "cases and materials" text, i.e. to use cases, legislation, but also legal doctrine materials, particularly in the form of short notes situating the other legal materials in their context. Ultimately, the goal is to provide students with a grasp of foreign law whilst educating them as common European lawyers (the group has selected a number of subjects suitable for the study of common core principles: constitutional and administrative law, contracts, torts, conflict of laws, company and economic law, criminal law and social law. The casebooks will mainly concentrate on the English, French and German systems, including materials from other European systems only if they provide original solutions. The first book produced with this method is W. Van Gerven et alii (eds.), *Tort Law: Scope of Protection*, Hart, Oxford, 1998). The common core project, too, may provide some useful materials for teaching purposes, but this is not its primary task. It investigates more specific areas of law, delving deeply into technical problems. Moreover, it focuses on all European legal systems, avoiding - as with the other project - placing emphasis only on the areas which are or could be considered leading or paradigmatic. Nevertheless, these are apparently differences of degree and of timing rather than of nature: it seems likely that the two enterprises will share many common features, and that they may well profit from each other.

[9] For a description of the characteristics of different methods of attaining legal uniformity, see Arthur Rosett, 'Unification, Harmonization, Restatement, Codifica-

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and functional distinctions that characterize each initiative with respect to the others.

The "Lando Commission" and the "Unidroit Principles".

There is no doubt that the use of the comparative method will reveal many common features that have remained obscure in traditional legal analysis, but this is because the instruments and techniques provide more accurate and correct analysis, not because they impose convergence where this does not exist. Of course, more detailed knowledge may yield closer integration, so that common core research, too, may be considered as pushing indirectly towards more uniformity and less diversity.

It is also true that common core research may be a useful instrument for legal harmonisation, in the sense that it provides reliable data for use in devising new common solutions that may prove workable in practice.

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tion, and Reform in International Commercial Law', 40 *Am. J. Comp. L.* 683 (1992); R. Zimmermann, 'Roman Law and European Legal Unity', in A. Hartkamp et alii (eds.), *Towards a European Civil Code*, Ars Aequi, 1998, 21; P.-Chr. Müller-Graff, 'Private Law Unification by Means other than a Codification', ibidem, 71; Olivier Remien, 'Rechtseinheit ohne Einheitsgesetze', 56 RabelsZ. 300 (1992); L. Moccia, 'Les bases culturelles du juriste européen: un point de vue continental', in 49 *Rev. Int. Dr. Comp.* 799 (1997). On this issue cp. Rodolfo Sacco, 'Non, oui, peut-être', in Mélanges Christian Mouly 163 (1998); A. Gambaro, 'Perspectives on the codification of the law of property', 5 *Eur. Rev. Private L.* 497 (1997).

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Nevertheless this has nothing to do with the common core research in itself, which endeavours to produce reliable information, whatever its policy application might be.

This is what constitutes the main difference between our project and any Restatement-like enterprise. The latter involves the pursuit of the ideals of rationality, harmony and reform, and this task entails selection of the legal rules and materials best suited to the task. That which does not fit in with the Restatement-like framework is discarded. This is anathema to an analytical perspective such as ours: the very fact that rules and materials exist in a legal system requires that they must be taken into consideration by the analysis and become part of the final "map".

This also clarifies the distance between our research and the Lando project on the principles of European contract law, whose primary objective "is to serve as a basis for a European Code of Contracts. They are intended as a first step".[10] As Ole Lando himself explains, the principles of European contract law differ from the American Restatement on Contracts because they require a more radical approach. They do not simply select from among several solutions extant in a single legal system; because they must provide workable solutions for a widely diver-

[10] Ole Lando, 'Principles of European Contract Law: An Alternative to or a Precursor of European Legislation', 40 *Am J. Comp. L.* 573, 577 (1992) (the article is published also in RabelsZ (1992), 261 ff.).

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gent legal environment, they are designed to embody rules that do not exist as such in any European legal system.[11]

In spite of all these differences, however, the aims and the techniques of the two enterprises (Lando and the American Restatement) seem to be very much the same. They share the basic idea that they create new law (no matter how new it is with respect to the pre-existing legal situation), rather than simply analyzing the existing one.

This normative attitude is also shared by the Unidroit principles on international commercial contracts.[12] These are meant to be soft (i.e., non-binding) law, and in this respect they are opposed to the idea of "political" codification. They seek to promote a uniform legal environment, not to impose it through legislative means. Their philosophy assumes that differences among legal systems are so great that they would defeat any attempt to impose uniformity.

The characteristic of having recourse to persuasive authority is a further feature shared by the principles of European contract law project,

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[11] Id., at 579; Id., Guest editorial: European contract law after the year 2000, CML Rev. 35, 821-831 (I), 1013 ss (II) (1998).

[12] See Michael Joachim Bonell, 'The Need and Possibilities of a Codified European Contract Law', 5 *Eur. Rev. Private L.* 505 (1997). "Harmonisation will occur for reasons exogenous to the law. Our efforts to draft unified laws are symptoms and indications of the process of unification, not their cause": Rosett, supra, note 9, at 684

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which, although meant to be finally embodied in a code, provides a common framework that functions as a set of legal guidelines.[13]

The choice of a soft-law approach, however, does not eliminate the prescriptive nature of these projects: changes to the existing law must be attained by indirect means, but the final aim is still legal change.

Thus, if we are to sum up in one word the differences between the common core research and the common principles approach, that word might be "scepticism".

The common core project, like the Cornell project, uses value scepticism as its most important criterion: its aim is to provide as reliable and exact a picture as possible of the law existing in the European systems in a number of important areas. Whether this situation is legally efficient or rational is of no concern to the scholars involved. By way of contrast, the projects whose main task is to promote common solutions to legal problems must not only make a value-laden selection but are also inherently imbedded in non-sceptical values, owing to the tension between uniformity and diversity. Such projects seek to ascertain, on the basis of

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[13] See Lando, supra, note 10, at 577-578, 584; C. Castronovo, 'I "principi di diritto europeo dei contratti" e l'idea di codice', 93(1) *Riv. dir. comm.* 21 ff. (1995). Compare K.D. Kerameus, 'Problems of drafting a European Civil Code', 5 *Eur. Rev. Private* L. 475 (1997); J. Basedow, 'Un droit commun des contrats pour le Marché Commun', 50 *Rev. int. dr. comp.* 7-28 (1998); ID., 'A common law of contracts for the Common Market', 33 *CML Rev.* 1169-1195 (1996) See also Van Gerven, 'ECJ case law as a means of unification of private law', 5 *Eur. Rev. Priv. L.* 293-307 (1997).

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comparative research, which solution may best regulate certain legal problems in a common way, at the same time ignoring the possibility that core divergence may be justified on numerous grounds.

Moreover, normative projects are value-laden in another sense as well. Their choices cannot be made for nationalistic or chauvinistic reasons (as they can be for a piece of politically supported legislation), but of course they must be defended on the grounds of general acceptability and rationality.

By this stage, lacking strong and full political legitimacy, these projects end up by advocating seemingly neutral ideas which have so far confined them within the narrow limits of areas of law in which no open value choices are or seem to be made (mainly contract law).[14]

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[14] Nevertheless, these areas cannot be neutral from the point of view of values: the rules finally selected must be consistent with the values chosen as essential (or taken as a matter of course) by the participants, values which usually end up by corresponding to market ideology. Both the UNIDROIT principles and the first published outcomes of the work of the LANDO commission attempt to avoid every political choice, while striving to maintain a neutral tone. In spite of this, as made clear by studies on institutions (D. North, *Institutions, Institutional Change and Economic Performance*, Cambridge Univ. Press, 1990; Furbotn-Richter, *Neo-Institutional Economics*, Michigan Univ. Press, 1997; O. Williamson, *Organisation Theory: From Chester Barnard to the Future and Beyond*, New York-Oxford, 1996), there is no such thing as an institutional vacuum, because informal institutional arrangements and the most pervasive of all institutions (often the Market) immediately fulfil whatever is not politically decided as a formal institutional choice. As a consequence, avoiding political choices in the name of neutrality is itself a political choice

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The feature shared by the two kinds of enterprise ("common core research" on the one hand, "Lando" and "Unidroit" on the other) is their use of comparative methods. Yet this shared methodology serves diverging purposes, and consequently produces different results.[15]

4 Does History Matter?

The perspectives of scepticism and neutrality are also relevant when assessing the current debate on the feasibility and usefulness of a European civil code.[16]

There is strong disagreement among the expert participants in this debate. Some of them maintain that a code is absolutely necessary in order to shape a truly common European law, while others believe that this project is not workable, either because the divergences among the na-

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in favour of the strongest market actor. On this see U. Mattei, 'The Issue of European Civil Codification and Legal Scholarship. Biases, Strategies and Developments', forthcoming in 21 *Hastings L. J.*

[15] On the use of comparative law in an international environment see Richard M. Buxbaum, 'Die Rechtsvergleichung zwischen nationalem Staat und internationaler Wirtschaft', in 60 *RabelsZ.* 201 (1996); see also James Gordley, 'Comparative Legal Research: Its Function in the Development of Harmonized Law', 43 *Am. J. Comp. L.* 555 (1995); David Kennedy, 'New Approaches to Comparative Law: Comparativism and International Governance', *Utah L. Rev.* (1997); U. Drobnig, 'Scope and General Rules of a European Civil Code', 5 *Eur. Rev. Private L.* 489 (1997).

[16] On this point see e.g. Ewould Hondius, 'Towards a European Civil Code: The Debate Has Started', 5 *Eur. Rev. Private L.* 455 (1997).

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tional systems are still too strong (and this implies that the situation may change in the future, and a code may eventually be feasible), or because legal harmony can or must be achieved with means other than a code.[17]

In fact, many scholars argue that the principle of subsidiarity embodied in the Treaty of Maastricht precludes such an action.[18] The reference is to the principle which states that, in areas where the EU does not have exclusive powers (and private law is definitely one of them), the Union

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[17] On this debate see the contributions to the symposium 'Towards a European Civil Code' held in The Hague on February 28, 1997: in 5 *Eur. Rev. Private* L. 455 (1997). Pierre Legrand, 'Sens et non-sens d'un code civil européen', 48 *Revue International de Droit Comparé* 779, 800-812 (1996); ID., 'Against a European Civil Code', 60 *Mod. L. Rev.* 44 (1997), strongly argues in favour of legal pluralism, which provides a wealth of solutions and techniques to ensure flexibility. See also Hugh Collins, 'European Private Law and Cultural Identity of States', 3 *Eur. Rev. Private L.* 353 (1995); B. S. Markesinis, 'Why a code is not the best way to advance the cause of European Legal Unity' 5 *Eur. Rev. Private L.* 519 (1997); V. Zeno-Zencovich, 'The "European Civil Code", European Legal traditions and Neo-Positivism', forthcoming 6 *Eur. Rev. Private L.* (1998); Hein Kötz, 'Comparative Legal Research: Its Function in the Development of Harmonised Law. The European Perspective', in *Towards Universal Laws - Trends in National, European and International Law-making*, Uppsala, 1995; T. Weir, 'Divergent Legal Systems in a Single Member States', *ZEuP* 564-585 (1998).

[18] Treaty on European union [TEU], art. B; EC Treaty, art. 3B; on the principle of subsidiarity see G.A. Bermann, 'Subsidiarity: Does it Have a Future?' 26 *Centro di studi e ricerche di diritto comparato e straniero. Saggi, Conferenze e Seminari* (M.J. Bonell ed.) 1993; A. G. Toth, 'The Principle of Subsidiarity in the Maastricht Treaty', 29 *Common Mkt. L. Rev* 1079 (1992).

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may intervene only if the objectives cannot be sufficiently achieved through State action.

With regard to this debate, and whichever side one takes in addressing the issue of European Codification, one aspect which seems to be worth stressing, and which in any case should be kept in mind, is a methodological one.

Many scholars are currently engaged in a polemic that resembles in a somewhat vichian way the nineteenth-century dispute between Savigny and Thibaut on German codification. In the present debate, “Code” and “Culture” still appear to be perceived as antithetical and mutually exclusive, as if enacted law could exist in modern Western societies without legal culture, and as if the two could ignore each other.[19]

This perceived opposition is similar to that between “top down” and “bottom up” reform. Indeed, if there is one lesson to be drawn from the experience of the Western legal tradition it is that the contrast between top-down and bottom-up legal change is a false opposition. All legal changes have aspects of both. Law is in part politics (top down) and in part culture (bottom up). Put otherwise, institutional change is due in part to invisible and in part to visible hand phenomena. It is partially the

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[19] The importance of the role of legal science in shaping the basis for a common law of Europe is emphasized by Paolo Grossi, ‘Modelli storici e progetti attuali nella formazione di un futuro diritto europeo’, 42 *Rivista di diritto civile* 281 (1996, II).

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local evolution of institutions, and partially the recognizable work of a political or professional élite.[20]

Consequently, on the one hand, creating a code does not cancel out the existence and the importance of other legal formants. Nor, on the other hand, is academic opposition to codification likely to be effective if there are the political conditions to do so (and certainly, even if effective, such opposition will not give scholars supremacy over Brussels bureaucrats).

5 Legal Systems as Multi-Level Frameworks

There is another important issue to be emphasised when one is examining the feasibility of a European civil code. A cursory glance at the European Union law immediately reveals that it is a multi-level system.

Leaving aside the other legal formants — for instance, the impact of scholarship on the preparation, drafting and application of European law — we find treaties, directives (and the variety of transpositions by Member States), regulations, the implementation of these norms by national and sub-national administrative bodies, the enforcement of the rules by national courts, the supervising role played by the European Court of Justice, and so forth.[21]

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[20] See Alan Watson, e.g.: 'Comparative Law and Legal Change', 37 *Cambridge L. J.* 313 (1978).

[21] See L. Antoniolli Deflorian, *La struttura istituzionale del nuovo diritto comune europeo: competizione e circolazione dei modelli giuridici* (1996).

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We thus have different levels of elaboration, enactment, implementation, application, and enforcement of European rules. Moreover, there are citizens of some EU countries who are not subject to EU laws with which citizens of other countries must comply (because the legal systems of the former have not, or not yet, adopted EU rules that apply elsewhere). On the other hand, there are citizens of a given EU Member State who share only the core of a given EU legislation with the citizens of other States, since the statutory details, or the judicial interpretation, of the national provisions are very different in one State with respect to the other.

These features are very well known, and they are usually taken into consideration within the legal debate.[22] By contrast, this debate seems to be much less aware of another phenomenon: the presence of a multi-level-legal-system is discernible not only at the European level but also within each national legal landscape.

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[22] See, e.g., the proceedings of the Workshop organised by C. Joerges and M.-J. Campana 'Private Law Adjudication in the European Multi-level System' (held at the European University Institute, Florence, 2-3 October 1998, forthcoming in EUI Working Papers series; C. Joerges, 'European Challenges to Private Law: on False Dichotomies, True Conflicts and the Need for a Constitutional Perspective', 18 *Legal Studies* 146-166 (1998); ID., 'Integration of Private Law: Reductionist Perceptions, True Conflicts and an New Constitutional Perspective', in C. Joerges & O. Gerstenberg (eds.), *Private Governance, Democratic Constitutionalis and Supranationalism*, Luxembourg, Office for Official Publications of the European Communities, 1998.

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In saying this, I am not referring to Rodolfo Sacco's very famous theory of the dissociation of legal formants,[23] but rather to a phenomenon which is today much more evident outside the Western tradition[24] but nevertheless still at work in our legal systems as well.[25] The reference is to the survival, or the re-birth, of different legal layers in which legal solutions and practices flourish alongside, or against, the "official law" to be found in judicial rulings or in the written codes and statutes.[26]

These legal layers coexist, serving different purposes, and some of them usually avoid the mechanism of formal adjudication, in the sense that most of the disputes arising between the users of a given layer are not settled by the "formal" circuit of adjudication. I include therein the bulk of the "alternative dispute resolution" mechanisms adopted in re-

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[23] On this theory see Rodolfo Sacco, supra, note 1.

[24] See e.g. R. Sacco, *Le grandi linee del sistema giuridico somalo* (1985); ID. (with M. Guadagni, R. Aluffi Beck-Peccoz, L. Castellani), 'Il diritto africano, in Trattato di diritto comparato' (R. Sacco ed.) (1995); ID., 'Mute Law', 43 *Am. J. Comp. L.* 455 (1995); Doucet & Vanderlinden (eds.), *La réception des systèmes juridiques: implantation et destin*, Bruxelles, 1994; M. Guadagni, 'Il modello pluralista', in 5 *Sistemi giuridici comparati* (A. Procida Mirabelli ed.) (1996) and ibidem, esp. pp. 3-20, further bibliographical references.

[25] See e.g. Norbert Rouland, *Aux confins du droit*, Odile Jacob, 1991.

[26] See e.g. Norbert Rouland, cit. supra, note 25 (also for the first references to the same phenomenon considered from the economic point of view); Gunther Teubner, *Law as an Autopoietic System*, Blackwell, Oxford, UK-Cambridge, USA, 1993, 36 ff.; R. Sacco, 'Mute Law', cit supra, note 24.

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cent decades in many Western countries both in order to provide a just solution to certain kinds of legal conflicts which are hard to handle in the ordinary way, and to prevent people from deserting the congested ordinary justice system.[27] The latter phenomenon indeed seems to me worth stressing as a symptomatic fact, because: (a) by signalling the possible differences in the supply and demand process in the "law market"[28] it provides further evidence of the phenomenon that I am trying to describe; and (b) it gives an example of the variety of tools available to official law-makers in order to create room for manoeuvre in handling socio-legal phenomena, or to build new "integrative" legal devices.

Staying with the stratification to which I refer, it may be briefly sketched as follows. The first layer one can detect is that controlled by customary rules and customary devices of adjudication — rules and devices grounded upon both ethical and sentimental values, and informed by the principle of "personal authority". This seems to be a good representation of areas such as family and kinsfolk relationships.

The second layer is also controlled by customary rules and customary devices of adjudication, but these rules and devices have, at least in part, different natures and grounds — i.e.: traditional law, peacekeeping op-

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[27] On these mechanisms see, e multis, E. Grande & L. Nader, 'Current Illusions and Delusions About Conflict Management', forthcoming in W. Zartman, *Traditional African Conflict Medicine* (1999).

[28] On this perspective, see e.g. Yves Dezalay, *Marchands de droit*, Paris, Fayard, 1992

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portunism, trust in other people's compliance with social rules. This seems to be so in the case of neighbourhood relationships, in the exercise of property rights (mostly outside the urban context), of small value bargains, or of the usual settlement of disputes arising out of small accidental injuries.[29]

Another layer is what we may call the "ordinary formal layer", where most of human activities — to which legal discourses usually refer — are located and where behaviour, entitlements and disputes are most frequently controlled by the formal circuit of adjudication. Further to what was said earlier, it is worth remembering at this point that the "formal adjudication" has to be seen as the circuit which goes from authority-based rule (no matter whether local, national or transnational) to the enforced legal solution, via the various and different activities by all the legal actors of which the interpretive community consists.[30]

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[29] It is worth noting that the statement that the two layers just mentioned exist precisely because "formal" law allows them to do so, is based on a false premise. In the present context this set of rules would indeed exist anyway and formal law has simply recognized them.

[30] See e.g. M. Bussani, 'Choix et défis de l'herméneutique juridique. Notes minimes', in 50 *Revue internationale de droit comparé* 735 (1998); Id. (ed.), 'Diritto, Giustizia e Interpretazione', in J. Derrida & G. Vattimo (eds.), *Annuario filosofico europeo* (1998), where one can read contributions of G. Alpa, M. Barcellona,, M. Bussani, J. Derrida, M. Ferraris, A. Gambaro, O. Gerstenberg, Duncan Kennedy, U. Mattei, P.G. Monateri, R. Sacco, and G. Vattimo.

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I would add, to prevent any misunderstanding, that the two previous layers are also of course disciplined by "official" law and covered by the "formal circuit of adjudication". The point is, however, that not only do statistics (which can even give us an interpretive hint of the reality) but also social perceptions and the day-to-day administration of law show that these are layers in which the relevant and direct source of the social order — i.e. the historical task of the Law[31] — is something different from the "official" law and "formal" circuit.

The topmost layer is what we may call the "transnational business" one, where the substantive rules result from the customs of international commerce (the so called *lex mercatoria*) and where the business actors tend to adopt self-adjudication devices to settle disputes, and use their own judges and their own courts.[32]

6 The Autonomous Paths of the Different Layers

Whatever target is pursued as regards European legal integration, if such integration is to be effective, and not merely wishful thinking, this stratification into different levels must be taken into consideration. The need to take account of the multi-level system appears self-evident if we are to be fully cognisant of the legal relationships we want to bring

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[31] The building and maintenance of which can be viewed as the traditional duty of jurists: see A. Gambaro, *Il successo del giurista*, Foro Italiano, 1983, V, 85 ff.

[32] And it is from this perspective that one may admire the effort of UNIDROIT to capture and square this phenomenon within an overt framework of rules.

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about, or which are likely to be created, by a code or by any other authoritative regulation. Besides, such analysis seems necessary in order to understand what kind and level of integration to pursue, and also the correct balance to strike between, on the one hand, reducing transaction costs and, on the other, adopting alternative options grounded on, for example, maintenance of the status quo, enactment of a few directives, providing some sort of Restatement, and so forth.[33]

Considering all this, however, also means bearing in mind that not all the layers of a stratified legal system are like clothes that can be worn or taken off as desired. Indeed, very few of them are. Once a layer has been put on, it cannot be removed completely. To refer to a paradox, it would be impossible for the French or the Italian "formal" legal systems to decide overnight to become common law systems.

To be sure, in stratified legal systems, not all the layers have a degree of resistance comparable to that of the Civil Law tradition in France or the Common Law tradition in England.

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[33] The costs connected with the status quo are easy to specify: they take mainly the form of information costs. In a context where several legal systems may be involved in any particular legal transaction, diversity creates unpredictability and requires a specialized bar. As a consequence, a significant proportion of business resources must be devoted to paying specialized practitioners to give transactional and litigation assistance, rather than being invested in wealth maximizing activities. On these points see U. Mattei, op. cit., supra, note 14; A. Gambaro, 'Perspectives on the codification of law of property: an overview', in 5(4) *European Review of Private Law* 497 (1997).

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For instance, it is well known that the fourth layer (the "transnational business" one) is already strongly harmonized throughout Western legal systems.[34]

Besides, one might point out that during the last few decades the customary layer upon which family relationships are grounded has been converging rather strongly across legal systems, enabling individuals to accept almost instinctively the near-identical legislation being enacted within European countries.[35] As far as the second customary layer is concerned, one could maintain either that it will witness the same convergence, due to the widespread acceptance of shared values, or that the strength of historical roots and traditions affect the *mentalité* of individuals and lawyers in a way which makes it impossible to overcome by means of a "top down" effort towards integration.[36]

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[34] On (some of) the problems raised by the side effects of this harmonization, see Ch. Joerges, 'Disintegrative Effects of Legislative Harmonisation: A Complex Issue and a Small Example', paper presented at the Workshop 'Private Law Adjudication in the European Multi-level System', held at the European University Institute, Florence, 2-3 October 1998.

[35] See e.g. Rodolfo Sacco, 'Non, oui, peut-être', cit. supra, note 9, at 165.

[36] On this cp. e.g. P. Legrand, opp. cit. supra, note 17 and A. Gambaro, 'Perspectives on the codification of the law of property', cit. supra, note 10.

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The point, however, is that — as is made clear by historical and anthropological comparative legal studies[37] — for both of the above-mentioned layers, strongly embedded in customs, different values and traditions, any attempt at authoritative legal integration can only exist effectively through simultaneously adapting the extant rules to the new ones.

If one takes all this seriously, it will appear that it is only the third layer (which I called the "ordinary formal layer", and which is, at the present time, the most State-centred one, and therefore the most resistant to spontaneous convergence) which is likely to be concretely affected, and indeed it is actually affected, by the current debate on the feasibility of European legal integration by means of a code or through other authoritative legal instruments.[38] In other words, it is on this layer that

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[37] See e.g.: Paolo Grossi, *L'ordine giuridico medievale* (1996), passim; K. Von Benda-Beckmann, 'Why Bother About Legal Pluralism? Analytical and Policy Questions: An Introductory Address', in *Commission on Folk Law and Legal Pluralism, XXXIX Newsletter* 1997, 14 ff.

[38] It may happen that some of the legal routines on which the national "ordinary formal layer" is grounded cease to be perceived as optimal. Yet they are not changed, because the availability of an alternative is simply ignored; because the costs of modifying the institutional setting are wrongly assessed; or simply because the incentives to change the institutional setting are wrongly allocated in the given circumstances. It is true, however, that due to the complexity of the legal system as an aggregate of formal and informal institutions, every layer and every lawyer is fond of its/his own routine, and perceives a global change as inefficient or too complicated. Of course, there are some lawyers, and particularly more innovative aca-

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the choice and the endeavour of an authoritative integration is most likely to have the greatest impact, within the not too distant future.[39]

Should this happen, the effectiveness of this integration will, in any event, be inevitably determined by the capacity to foster and control the growth of a common background for all lawyers, practitioners and scholars alike.

In order to ascertain the degree of integration, for example, it will be necessary to analyse the complex relationship between all the "legal formants" of the given systems, i.e. all the formative elements of the rules of law from amongst statutes, general propositions, particular definitions, reasons, holdings, and so forth. None of these formative elements will be necessarily congruous with each other within each system, or in comparison with the same formant at work in other systems; to put

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demics, who do advocate some changes, usually in the domain of formal institutions. But whenever one deals with the deeper aspects of the legal framework (the aspects which shape and affect the lawyers' *mentalité*) changes are feared, or even considered impossible. This is what makes the legal tradition, or as some might prefer, the style of a given legal system remarkably "path dependent". On this see U. Mattei, op. cit., supra, note 14.

[39] As far as a possible code is concerned, there is no doubt that a great deal depends on the quality and the semantic level chosen by its drafters, on its capacity to codify common understandings, and on its ability to reflect the diversity of the legal cultures that operate in Europe today. See A. Gambaro, 'Codice Civile', in Digesto IV, Civile, II, 1988, 442, 443 ff. Moreover, a European Civil Code would not solve the problem of the need for a European interpretive community: the former and the latter, a common code and a common culture, call for each other.

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forward the most trivial examples, Italian scholars and judges can diverge remarkably in responding to a given issue, as is also the case within German and French case law.

Moreover, in order to monitor the degree of integration achieved, it will be necessary to know not only how courts act but also to consider the influences to which the judges are subject in the given system. Such influences may arise because scholars have given wide support to a doctrinal innovation, but they may also concern the judge's individual background — a judge appointed from an academic position will tend to place more stress on scholarly opinion than a judge who has always practised law. The text of a national statute is one of these influences, even if previous judicial decisions have disregarded it, because there is always the possibility that courts will return to the letter of the local statutory provision.[40]

Moreover, this complex dynamic may change considerably from one legal system to another, in particular, a legal formant may lead in different directions within each legal system, as well as from one area of the law to another.[41]

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[40] On all this see R. Sacco, op. cit. supra, note 1.

[41] There are indeed a huge amount of problems raised by the fact that the very structure of private law compels the "official law-makers", and the interpreters as well, to vary the approach of their integrative effort according to the needs of the different domains on which they focus. To provide some simple examples, it is obvious that it is one matter to work on certain subjects (such as the statute of limita-

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Thus, only awareness of those differences and of how they work, along with a full understanding of what the legal formants are and how they are related to each other, will enable us to ascertain the factors that affect the would-be "integrated" solutions, clarifying the influence of

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tions) in which a combination of legislative data, a glance at the case-law (and, if need be, some erudite reference to both the recent and distant history of law - elements whose permutation may vary from one side of the Channel to the other) promises at the outset to be crucial to solving the problem. It is quite another matter to have to deal with topics in which any integration-concerned jurist must have an enormous variety of instruments and data at his disposal: topics such as administrative law, for example; certain areas of property law, particularly as regards immovables; special statutory law as, for instance, in the often confused legislation on residential rent control, or agricultural contracts (see A. Gambaro, 'Perspectives on the codification of the law of property', cit. supra, note 10). Similarly, the functioning of local Stock Exchanges and financial markets must be considered with reference to the fields of corporation law, financial law, and security interests; fiscal law and contractual practices must be taken into account when considering new or "modern" contracts, and so forth. But the task is again different when one is dealing with parts of the system in which even the closest attention paid to sources external to private law can make the solutions lie remote, not only from any integrative achievement, but from those very problems the law has been called upon to regulate. One can think, for example, of the protection of the interests of subjects such as minors, the elderly, and the physically and mentally ill: indeed these are issues which cannot be considered without taking account of the reality of national and local institutions such as schools, hospitals, or workplaces, or the family planning clinics, or other social services, not to mention reformatories or jails. Cp. M. Bussani, 'Choix et défis', op. cit. supra, note.

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interpretative practices (based on scholarly writings, on legal debate inspired by previous judicial decisions, etc.) in moulding actual outcomes.

7 Conclusions

A concluding summary of what I have so far tried to expound may be presented as follows. First, awareness of the existence of legal stratifications is a factor which confirms the reasonableness of adopting, as the methodological framework of the common core research, the factual approach and a question-and-answer methodology, requesting information on all the relevant elements that affect the legal solutions of the given case, including policy considerations, economic and social factors, social context and values, as well as the structure of the legal process (organization of courts, administrative structure, etc.).[42]

Secondly, knowledge of all the relevant elements and factors at play seems crucial in proposing European legal integration (by means of a code or otherwise) which aspires to go beyond the nationality and the personal agendas of the decision-makers involved in it.

Thirdly, the existing stratification of the legal systems calls for awareness of which law should be integrated or codified, and necessitates a choice to be made in consequence.

Fourthly, any legal integration implies producing rules which are new for all, or at least for some, of the legal actors in the systems concerned.

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[42] See Bussani & Mattei, op. cit. supra, note 1, at 354 (Appendix 1).

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Implementation of such rules requires a class of interpreters — judges, practitioners, scholars — acquainted with the new rules and with their rationales. The absence of this knowledge in the short term, as well as (even in the long term) the strength of deeply rooted traditions in respect of different concepts, notions and their interrelations, may lead every "integrative" effort, not to mention a codification, to a dead end.[43]

Hence, certainly as far as European legal integration is concerned, the real issue seems to be the building of a common legal culture. This is an endeavour whose only tools appear to be a common legal education grounded upon knowledge of what is common and what is different among the different European systems.

After all, it remains beyond any doubt that in order to make a choice between pluralism and unity the first step is to gain reliable knowledge of what is at stake.

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[43] Or to a destiny not so dissimilar from that of many imported codes, the graves of which fill the legal cemeteries of many ex-colonized countries. See A. Gambaro, 'Codice civile', cit. supra, note 34, at 454 ff.

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? Constraints

[illegible] ...[65] [illegible]

[illegible] cations is a factor which confirms the reasonableness of adopting, as the methodological framework of the common core research, the factual approach and a question-and-answer methodology, requesting information on all the relevant elements that affect the legal solutions of the given case, including policy considerations, economic and social factors, social context and values, as well as the structure of the legal process (organisation of courts, administrative structure, etc.).

Secondly, knowledge of all the relevant elements and factors at play seems crucial in proposing European legal integration (by means of a code or otherwise) which aspires to go beyond the nationality and the personal agendas of the decision-makers involved in it.

[...]

Thirdly, the existing stratification of the legal systems calls for awareness of which law should be integrated or codified, and necessitates a choice to be made in consequence.

Fourthly, any legal integration implies producing rules which are new for all, or at least for some, of the legal actors in the systems concerned.

[65] See Bussani & Mattei, op. cit. supra, note 1, at 354 (Appendix I).

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Ius Commune Casebooks for the Common Law of Europe

Presentation, Progress, Rationale

Pierre Larouche*

1 History and aims of the Casebook Project

The Casebook Project was started in 1994 by Professor Walter van Gerven, Katholieke Universiteit Leuven and Universiteit Maastricht, who acts as General Editor, and Ms. Adriana Alvarez, Universiteit Maastricht, who is the Project Co-ordinator.[1]

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The Project aims to produce a collection of cases and other materials with accompanying notes, introductory comments and comparative overviews in each of the main fields of law. In the first phase (1996-2000) casebooks are to be prepared in the areas of Tort, Contract, Judicial Review of Administrative Action and Company Law. These areas have been chosen because they belong to the core of private and public law, and because each of them illustrates to a varying degree the mutual influences between the legal systems of European Union Member States, of the EU and of the ECHR.

A Steering Committee oversees the Project. For each casebook, an Editorial Committee has been brought together, made up of academics with an interest and experience in comparative law, coming from a number of legal systems.

2 Progress

Given that the concept was new, it took some time to elaborate an approach to the selection and presentation of materials, and develop working methods. These efforts resulted in the publication, in April 1998, of the largest chapter of the Casebook on Tort as a stand-alone work, entitled *Tort Law: Scope of Protection*. This work constitutes both the general part of the Casebook on Tort and the precursor to the Ius

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[1] For an early presentation of the project, see "Casebooks for the common law of Europe: Presentation of the project" (1996) 4 *European Review of Private Law* 67.

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Commune Casebook Series, setting out a formula for the presentation and the treatment of materials from multiple legal systems which the authors hope will be enriched and improved through use in the class-room and elsewhere. The Casebook Project invites all users — students, academics, judges and practitioners — to make comments or sugges-tions as to form or substance, particularly as to the length, or the ab-sence, of treatment of one or another subject.

At this point in time, work is well underway towards the completion of the full Casebook on Tort as well as the Casebook on Contract, both of which are set to be published in the course of 1999. The other case-books, on Judicial Review and Company Law, are also in preparation and should be available in 2000.

3 Tort Law: Scope of Protection

Co-authored by Professor Walter van Gerven, Mr. Jeremy Lever, QC (Oxford), Mr. Pierre Larouche, Professor Christian von Bar (Osnabrück) and Professor Geneviève Viney (Paris I), *Tort Law: Scope of Protection* sets out in a comparative fashion the extent to which civil liability is available as a form of redress, and outlines where and how general lim-its to its realm are drawn. In addition to the general overview of tort law, the book covers acts and omissions; life, physical integrity, health and freedom; personality rights and privacy; ownership and property rights; economic interests; collective interests as well as unlawful conduct of public authorities. In so doing, it addresses many substantive issues in tort law, including recovery for nervous shock, liability for wrongful life or birth, recovery of economic loss, professional liability, group and

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class actions, as well as liability for breaches of Community law. The book focuses on English, French and German law (with emphasis on the legal systems of other European countries where they show additional developments) and includes a substantial section on the influence of EU, ECHR and international law.

The casebook offers a selection of 125 documents, including the most relevant legislative provisions and leading cases from England (15), France (30), Germany (17), other countries (19) and supranational/international courts (12), all in English, with a series of introductory notes, annotations and comparative overviews.

4 Experience with Tort Law: Scope of Protection and with the other casebooks

a) Structure and selection of materials

Given the differences between legal systems, structuring such casebooks is not without difficulties. Basically, two conflicting objectives must be reconciled. One is to respect as much as possible the identity and structure, the genius and style of each of the legal systems. The other objective is to make those systems comparable by identifying similar cases and issues (leading to similar or contrasting solutions and principles) within each legal system and then bringing them together so as to allow similarities and differences to appear. This tension is reflected in the choice of materials: the cases and other documents selected should be "leading" in their respective systems, but on the other hand they should remain reasonably close to the materials taken from

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the other systems, so as to enable comparisons to be made not only in the course of annotating the materials, but also directly on the basis of those materials themselves. It may be that the need to follow such a harmonised structure has led to a certain distortion in the categories and concepts that the various systems traditionally use, since certain questions which are central to some systems are not discussed at the same length in others, and accordingly must be "amplified" in the presentation of those other systems to enable comparison.[2] Nevertheless, it is to be hoped that this has not occurred to the point where the characteristics of each system become unrecognisable.

As regards *Tort Law: Scope of Protection*, the very fact that such a chapter has been put together may already in and of itself be incomprehensible to scholars in the French legal tradition. For instance, the *Code civil* contains little if any *a priori* limits on the scope of protection, whereas in the BGB the principle of an exhaustive list of protected *Rechtsgüter* is used, in §§ 823 ff. BGB and elsewhere in German tort law, to impose a limitation on liability claims. Moreover, although English common lawyers would not recognise the concept of "subjective rights" as such, many of the issues and solutions dealt with in Germany under the heading "protected rights" resemble those dealt with under the

[2] For example, English and German law exhibit a reluctance to grant compensation for pure economic loss and *reiner Vermögensschaden*. French law does not appear to consider that pure economic loss should be treated differently from any other type of damage, and accordingly the issue is not dealt with at great length in French law.

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heading "duty of care" in England. The reason for this similarity is that both the German and English legal systems put emphasis on the necessity to limit tort claims. They both try to achieve this by using restrictive concepts at the outset which, although different in name and structure, fulfil the same function and very often lead to comparable results. In contrast, French law does not appear to apply any concept at all to limit damages claims *a priori*; it seems deliberately to be aiming at the protection of plaintiffs against all kinds of socially unacceptable behaviour the injurious effects of which plaintiffs cannot be expected themselves to bear. Obviously, not all claims succeed under French law, but claims without merit tend to be rejected rather on the basis of the actual circumstances of the particular case than because of some *a priori* criterion.

Further difficulties arose, for instance, with the compartmentalisation of English law into a series of discrete torts, where the tort of negligence plays a leading role. Negligence is difficult to categorise because the standard of proximity or remoteness that determines the limits of liability is defined, if at all, in relation to classes of persons and categories of behaviour,[3] in a way that makes comparison with other legal systems arduous, to say the least. Another source of problems was the relationship between private law and public law (ie State liability): there English law makes no distinction between the two realms and moreover ECJ case-law on State liability is likely to have consequences for the whole of tort

[3] Such as deeds, words and omissions.

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law.[4] Accordingly, State liability had to be part and parcel of the casebook in respect of French and German law as well, in contrast with the approach generally followed in the latter two systems. Finally, matters were further complicated by the need to factor in the numerous regimes of liability not based on fault, which are usually presented in a fragmented fashion in each system.

b) Space constraints

At a more practical level, space constraints also confronted the authors with difficult decisions. It is obvious that the judgments of the highest courts, which form the bulk of the materials included in the casebook, convey a sense of their respective legal system not only through their substance, but also through the form of their reasoning. While a limited number of key judgments have been more generously excerpted so as to give the reader a feel for the mindset of the legal system in question, it was unavoidable that Cour de cassation decisions would be presented without surrounding materials,[5] House of Lords speeches without the lengthy statement of facts and review of relevant

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[4] See in particular ECJ, Judgment of 19 November 1991, Joined Cases C-6/90 and 9/90, *Francovich* v. *Italy* [1991] ECR I-5357 and Judgment of 5 March 1996, Joined Cases C-46/93 and 48/93, *Brasserie du Pêcheur SA* v. *Germany* [1996] ECR I-1029.

[5] Such as opinions of the Avocat général or *rapports* of the Conseiller rapporteur.

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case-law and BGH decisions without the full extent of the doctrinal considerations found therein.

Electronic publishing offers a possibility to overcome space constraints, for instance by including full-text documents on a CD-ROM or on an Internet site. While users of the casebooks may thus have access to a larger range of materials, this does not obviate the need for extensive editing of those materials in order to propose a manageable amount of "essential" reading for users who may not have the time or interest to read through all materials.

c) Language

Language was also a challenge, since the casebooks are entirely in English. Accordingly, all materials in other languages than English have been translated, and all notes and comments have been written in English, irrespective of the original language of the annotated materials.

As is well-known, translation of legal materials presents specific difficulties, because the passage from one language to another is coupled with the passage from one legal system to another. At this point in time in Europe, there is still no established "legal English" independent of the common law, which would enable a meaningful discussion of other legal systems.[6] Since the casebooks are not meant for the English-speaking market exclusively, but rather for Europe as a whole, the tradi-

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[6] The same could have been said of other languages, had another language been chosen as the base language of the Casebooks.

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tional solution, involving a translation of consecrated French or German legal terms either with a new English term or with a — sometimes fairly rough — equivalent in the common law, did not appear fully appropriate. Indeed it could have left students from Continental countries guessing about a passage concerning their own system! Accordingly, non-English "keywords" were used fairly generously, firstly for the sake of conciseness,[7] secondly in order to give users from non-English systems a sort of *Aha-Erlebnis* when reading about their own system in English and thirdly so that users from other systems have some indication of the keywords in the original language, should they want to pursue further research. In practice, when these keywords were used for the first time, a note was included in the text to explain them to the reader, and specific indications were given in the subject-matter index in order to enable readers to find these explanatory notes quickly should they encounter the keyword again later. For instance, *Vermögen* or *patrimoine* was not translated and the explanatory note to *Vermögen* read:

> The *Vermögen* is the set of all "assets", i.e. all rights with an economic value (including ownership of real or personal property, money, contractual rights, etc.) relating to a particular person. The *Vermögen* corresponds to the *patrimoine* in French civil law. In common law terms, the *Vermögen* roughly corresponds to the estate.

[7] The translation is often longer and more elaborate than the original.

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Furthermore, electronic publishing can be used advantageously here as well. In order to enable those who are familiar with the original language of some or other materials, the original-language versions have been posted on the Internet.[8] A French student can thus with the Internet read the French Cour de cassation judgments included in the casebook in French directly should he or she so desire.

5 Theoretical underpinnings and comparison with other projects

a) A "bottom-up" rather than "top-down" approach to the emerging common law of Europe

The Casebook Project must be seen as a complement to other projects which endeavour to seek or set out the emerging common law of Europe. It follows a somewhat different route on the way to the discovery of a common European legal heritage. Rather than seeking to draft model principles, the casebook project wishes to uncover common general principles which are already present in the living law of the European countries, the European Union and the European Convention on Human Rights, as evidenced by legislation, case law and legal writing.

The Casebook Project therefore follows a "bottom-up" approach. This implies that the emergence of a common law of Europe, a new ius commune, should proceed through the progressive convergence of the legal systems. The casebooks put these systems together physically (under one cover), for teaching purposes. It is hoped that this will seep into

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[8] On the site of the Project at <http://www.unimaas.nl/~casebook>.

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mentalities, so that students, academics, judges and practitioners will increasingly think of national legal systems not in isolation anymore, but in relation to the other national legal systems and those of the EU and ECHR. A broad-based dialogue between legal systems, signs of which are already apparent in the decisions of the highest courts, should result. Indeed it can be argued that the convergence of European legal systems will only succeed if a critical mass of comparative- and European-minded jurists can translate and extend academic endeavours into the practical life of courts, law firms, business, organisations, etc.

Furthermore, the casebooks aim to demonstrate that a common law of Europe already exists in certain areas and is taking shape in others, thereby giving impetus to convergence. The Project therefore pursues a perhaps more difficult road to the Europeanisation of private law, but one which should ensure a solid basis.

b) A functional approach to comparative law

The Project takes a functional approach to comparative law, whereby the emphasis is put not so much on the difference 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 system.[9] Beyond exploring the actual outcomes reached by each

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[9] For instance, in the Casebook on Tort, it has been possible to include "cable" cases — where an excavation company typically cuts an electricity cable and forces a neighbouring plant to remain idle for a period of time — rescue cases, wrongful life cases, etc. from many or all of the legal systems studied.

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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".[10]

Accordingly, the casebooks help to provide users with a broader perspective on law, where it is seen that factual situations, at the one end, and policy considerations, at the other, have an impact on law. Furthermore, the comparative perspective shows how various systems may have reacted similarly or differently to these factual and policy elements, and thus emphasises the contingency of the "rules" to be found in a given system at a given point in time.

c) Language

The decision to prepare the Casebooks in a single language, yet with extensive use of keywords from other languages,[11] reflects a wish to

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[10] Policy considerations in tort law which are covered in the Casebook on Tort include, among others, the balance between the interests of the victim and of the tortfeasor, the impact of the constitutionalisation of certain interests such as life or freedom of expression, the hierarchisation of injury types, the — apparent — choice between fault or risk as a basis for liability, the use of general clauses as opposed to more detailed enactments, etc.

[11] As discussed above.

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take a balanced view. It is necessary to avoid the language of the Casebooks evolving into a form of meta-language that would be somehow related to each of the systems under study, yet foreign to them all. Conversely, the linguistic guidelines should not prevent the Casebooks from rising above each system and fulfilling their aim of laying the foundation for the emergence of the common law of Europe.

Indeed, it could be argued that the Casebooks would have been truer to each legal system if materials had been left in the original language. Yet the Casebooks explore three legal systems in a sustained fashion, and more than fifteen others[12] at some point or another, spreading over more than ten languages. From a strictly practical point of view, it was imperative to reduce the number of languages used in the Casebooks; using a single language would likely maximise the potential audience. English seemed a logical choice in the current European context, but it is to be hoped that the Casebooks can be translated into other languages as well, the important point being that the whole book remains in one language.

That choice of language cannot and should not be equated with a preference for the legal system(s) using that language. In fact, as was explained above, since the Casebooks are not meant only for an English-speaking common law audience, the English used in the Casebooks dif-

[12] Legal systems of immediate relevance, such as Swiss law, as well as the North American legal systems are taken into account, in addition to the systems of EU Member States and the EU and ECHR systems.

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fers from the English used in the legal systems in the United Kingdom and Ireland.[13] Nevertheless, it is certainly not the intention of the authors to develop a "new" language which would isolate the Casebooks from the legal systems studied therein. Rather, it is to be hoped that the Casebooks can contribute to reinforce the distinction between languages and legal systems, by showing that it is possible to have a meaningful comparative discussion of many legal systems without requiring a knowledge of each of the languages in which these systems may be couched.[14]

d) Legal education

The Casebook Project could also have an impact on teaching. The case method has proven to be an extremely useful instrument in introducing students and scholars to a given field of the law. It is hoped that the casebooks will be used in various universities in different countries. This will present the additional advantage that academics and students

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[13] The extensive use of foreign keywords is the most obvious difference, but some other commonly used terms are foreign to or rare in common law English, such as moveable/immovable, personality, absolute or relative rights, etc.

[14] The discussion may perhaps not be as deep as in a work concerned with one legal system only (or in a comparative work where multi-lingualism is assumed). This could reflect either practical limitations in space or perhaps a more theoretical difficulty, whereby certain languages would enable a legal system to become so sophisticated that it becomes very difficult to explain it in another language. The question then arises whether that difficulty denotes an inherent weakness in the comparative method chosen or rather an over-sophistication of the legal system in question.

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from across Europe will study and discuss the same leading cases and materials. In the long run, this may prove to be the most valuable contribution of the casebooks towards the emergence of a common law of Europe. In addition, the need to present a number of legal systems within a limited amount of space[15] and in a comparative fashion cannot but influence the approach to the subject matter. It is impossible to go into every detail of each system; instead, the materials and the notes must concentrate on the guiding principles and the policy choices that underlie each legal system. These constraints may actually prove to be a blessing. Indeed, it is submitted, the future of legal education may well lie in moving away from teaching the rules of law as they stand towards teaching the principle and policy framework behind the law, so that students are better prepared to work in a dynamic and multi-system environment.

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[15] Essentially around 1000 pages, i.e. the same size as casebooks focusing on one system only.

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from across Europe will study and discuss the same teaching cases and materials. In the long run, this may prove to be the most valuable contribution of the Casebooks towards the emergence of a common law of Europe. In addition, the need to present a number of legal systems within a limited amount of space[14] and in a comparative manner cannot but influence the approach to the subject-matter. It is impossible to go into every detail of each system. Instead, the discussion and the notes must concentrate on the guiding principles and the policy choices that underlie each legal system. These constraints may actually prove to be a blessing. Indeed, it is submitted, the future of legal education may well lie in moving away from teaching the rules of law as they stand towards teaching the principle and policy framework behind the law, so that students are better prepared to work in a dynamic and multi-system environment.

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'BOTTOM-UP' HARMONISATION OF EUROPEAN PRIVATE LAW: IUS COMMUNE AND RESTATEMENT

Christoph U. Schmid*

1 Introduction

'The future of European private law is too important to be entirely left to the European institutions'. This motto of Christian v. Bar's monumental *opus* on the 'Common European Law of Torts'[1] may equally be considered as the basic concern of non-legislative or 'bottom-up' harmonisation, which draws primarily on the harmonisation potential of the Europeanisation of legal science and education. Elaborating on this approach, this essay starts off from the current state of piecemeal legisla-

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* EUI Florence and University of Munich. I am grateful to Gráinne de Búrca and Christian Joerges for comments and critique. This contribution mainly draws on my essay "The emergence of a transnational legal science in Europe", forthcoming in the *Oxford Journal of Legal Studies*.

[1] *Christian v. Bar*, Gemeineuropäisches Deliktsrecht, Erster Band: Die Kernbereiche des Deliktsrechts, seine Angleichung in Europa und seine Einbettung in die Gesamtrechtsordnungen, Beck München (1996); English translation: *The Common European Law of Torts*, Beck München (1998).

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tive harmonisation through EC-directives and its disintegrative consequences. It then turns to the various strategies of legislative harmonisation, the most important one being the project for a 'European Civil Code', as called for twice already by the European Parliament. After examining the numerous disadvantages of this project, the essay's focus shifts to the strategies of 'bottom-up' harmonisation, and expounds at some length on the ideas behind the *Ius Commune* compilations recently published by Hein Kötz, Christian v. Bar and Walter van Gerven. As a conclusion, the essay suggests a further development of 'bottom-up' harmonisation strategies, through the establishment of a European Law Institute and the compilation of specific 'Mosaic-type' Restatements of European private law.

2 Piecemeal Legislative Harmonisation and its Disintegrative Consequences

The call for unification and harmonisation[2] of private law within the EC has been voiced from the early years of the Community.[3] However, while the Community's activities in the sixties and seventies focused more on public and economic law, it is only since the beginning of the eighties that the European Commission has been engaged in harmonis-

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[2] The term 'harmonisation' will be used here to encompass all forms of the approximation of laws, including unification.

[3] See the first president of the EEC Commission, Walter Hallstein, in his famous article 'Angleichung des Privat- und Prozeßrechts in der Europäischen Wirtschaftsgemeinschaft' (1964) 28 *Rabelszeitschrift* 211.

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ing several classic fields of private law. Examples include the directives on commercial agents, product liability, doorstep-selling, consumer credit, package holidays and tours, unfair terms in consumer contracts, time sharing, and, most recently, delay in payment and consumer guarantees in sales.[4] Yet these pieces of legislation are meant to fulfil specific economic, social or political goals in the overall process of market integration — precisely those which the competent Directorate General of the Commission has the duty to monitor. Therefore, the Directives are typically confined to rather small areas (what Hein Kötz called 'legal pointillism'[5]), and their inherent logic is that they do not purport to provide an exhaustive regulation of core areas of private law, such as contract or tort. EC law being directly applicable and enjoying supremacy over national law, the result is a partial overlapping of uncoordinated national, international and supranational layers of law which are rarely based on the same dogmatic structures, legal principles and socio-political understandings. A similar situation is the juxtaposition, within the national legal order and often even within one and the same piece of

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[4] For a survey and more references see, among a true flood of literature, U. Drobnig, *Private Law in the European Union* (1996); C. Quigley, EC Contract Law (1997); in German: Ch.-P. Müller-Graff (ed.) *Gemeinsames Privatrecht in der Europäischen Gemeinschaft* (1993); M. Gebauer, *Grundfragen der Europäisierung des Privatrechts* (1998); I. Klauer, *Die Europäisierung des Privatrechts* (1998); S. Grundmann, *Europäisches Schuldvertragsrecht* (1999); in Italian: N. Lipari (ed.), *Diritto Privato Europeo*, 2 vol. (1997).

[5] 'Gemeineuropäisches Privatrecht', in H. Kötz et al. (eds), *Festschrift für Konrad Zweigert* (1981), 481.

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national legislation, of provisions of purely national origin and provisions which have the function of implementing European law and, following the ECJ's famous doctrine of *interprétation conforme*, must be interpreted in line with the latter.[6] These problems are further aggravated by the fact that different pieces of EC legislation are not always consistent with each other and that, generally speaking, their quality is often not convincing.[7] As a result, private law in Europe may be said to have to serve "two masters",[8] the competences of which are not clearly delimited, as is the case for federal systems such as the German one. This constellation has been called a multi-level system or — more appropriately, since the term 'system' is generally reserved for unitary and

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[6] See M. Lutter, 'Die Auslegung angeglichenen Rechts' (1992) 47 *Juristenzeitung* 593.

[7] Thus, there is often no substantive coherence among various directives (e.g. there is no unitary concept of a consumer, but different directives contain different definitions; the conflicts of law rules of several directives are not in harmony with the 1980 Rome convention), and academic, in particular comparative, research is often simply not taken into account. See as to these and other defects of private law directives H. J. Sonnenberger, 'Der Ruf unserer Zeit nach einer europäischen Ordnung des Zivilrechts' (1998) 53 *Juristenzeitung* 984 as well as E.-M. Kieninger and S. Leible, 'Plädoyer für einen "Europäischen wisschenschaftlicher Ausschuß für Privatrecht"' (1999) 9 *Europäische Zeitschrift für Wirtschaftsrecht* 37.

[8] For the unfeasibility of a legal order serving two masters (i.e. two *Grundnormen*), see Kelsen's famous quote from *Matthew* VI, 24 in *Reine Rechtslehre* (in English: *A Pure Theory of Law*), 2nd. ed. (1960) 330.

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coherent orders — regime.[9] Therein, national private law may clash with pieces of EC private law ("vertical conflicts") or with any other branches of the EC legal order such as, in particular, the basic freedoms or competition law ("diagonal conflicts").[10] Such conflicts are at times even difficult to detect, let alone to resolve, and therefore may lead to chaotic situations.[11] It is obvious that, under these conditions, the value of a (relatively) coherent and harmonious system as a methodological

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[9] An instructive summary of the various features of the multi-level regime may be found in O. Remien, 'Einheit, Mehrstufigkeit und Flexibilität im europäischen Privat- und Wirtschaftsrecht' (1998) 62 *Rabelszeitschrift* 627.

[10] On this notion see C. Schmid, 'Vertical and diagonal conflicts in the Europeanisation process' in C. Joerges and O. Gerstenberg (eds), *Private governance, democratic constitutionalism and supranationalism* (European Commission, 1998), 185.

[11] One of many examples is the intractable question of the compatibility of Art. 9 of the second company law directive on the extent of a representative's power to bind his company on the one hand and national constructs such as the German doctrine on 'Mißbrauch der Vertretungsmacht' or the Common Law 'ultra vires' doctrine on the other. This question was decided by the ECJ on the reference of the Dutch Hoge Raad in Case C-104/96 (Rabobank). However, the German Bundesgerichtshof had in 1985 rendered a judgment on the identical facts without even recognising the problem of compatibility of the corresponding German provisions with the directive. See C. Schmid, 'Die gemeinschaftsrechtliche Überlagerung der Tatbestände des Mißbrauchs der Vertretungsmacht und des Insichgeschäfts' (1998) 43 *Die Aktiengesellschaft* 127.

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paradigm in Civil Law diminishes.[12] Although Common Law is probably more accustomed to legal fragmentation and the overlapping of different layers of law, the "two masters" constellation creates problems even there, since coherence between the various sources can no longer be established by the national legal order and the national legal community.[13]

3 Strategies of Legislative Harmonisation

As a response to this kind of legal disintegration and fragmentation, and more generally in order to provide businesses and citizens with a uniform and more transparent legal infrastructure, several leading scholars have, for quite some time now, called for greater legislative unification of private law at the European level.[14] Three basic options have been distinguished: a European *Sonderrecht* (special regime) for trans-

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[12] The German classic on the 'system' as a methodological paradigm is C.-W. Canaris, *Systemdenken und Systembegriff in der Jurisprudenz*, 2nd. ed. (1983). Implications of the European regime for national systems are described in C. Schmid, 'Europäische Integration und Privatrecht', forthcoming in *JURA*.

[13] When comparing this constellation to the former classic distinction between law and equity (when both were still applied by different courts), it should be noted at least that the ambits of application of European and national private law are far less clearly delimited than legal and equitable remedies.

[14] For instructive summaries of the various possibilities see Sonnenberger, supra note 5, and J. Basedow, 'The renascence of uniform law: European contract law and its components' (1998) 18 *Legal Studies* 121.

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border relationships among private parties only; a core of common European principles to be implemented by national private laws; and, most ambitiously and importantly, the elaboration of a European Civil Code.[15] The last option has been called for twice, in 1989[16] and 1994,[17]

[15] O. Lando, 'Unfair Contract Clauses and a European Uniform Commercial Code' in M. Cappelletti (ed.), *New Perspectives for a Common Law of Europe* (reports from the symposium inaugurating the European University Institute at the Badia Fiesolana in 1976) (1978). Later contributions include G. Gandolfi, 'Per un condice europeo dei contratti' (1991) 45 *Rivista trimestrale di diritto e procedura civile* 781 (in French: 'Pour un code européen des contrats' (1992) 91 *Revue trimestrielle de droit civil* 707); W. Tilman in Müller-Graff (ed.), supra note 3, 485; A.S. Hartkamp, M.W. Hesselink, E. H. Hondius, J.B.M. Franken (eds), *Towards a European Civil Code*, 1st ed. (1994), 2nd ed. (1998) with new contributions; J. Basedow, 'A Common Contract Law for the Common Market' (1996) 33 CML.Rev. 1169; O. Lando, 'Making a European Private Law' in K. F. Kreuzer, D. H. Scheuing, U. Sieber (eds), *Die Europäisierung der mitgliedstaatlichen Rechtsordnungen in der Europäischen Union* (1997), and the conference proceedings on 'Towards a European Civil Code: the debate has started', published in the *European Review of Private Law* vol. 5 no. 4; and *Vers un Code européen de la consommation: codification, unification et harmonisation du droi des Etats membres de l' Union Européenne* (1998); for a survey of current French literature see also A. Chamboredon, 'Le débat sur le code civil européen: pour une "texture ouverte"', EUI Paper 1999 (on file with author).

[16] Resolution on Action to Bring into Line the Private Law of the Member States, [1989] O.J. C 158/400.

[17] Resolution on the Harmonisation of Certain Sectors of the Private Law of the Member States, [1994] O.J. C 205/518.

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by the European Parliament. Yet the codification project appears to be not only extremely controversial, but also rather unrealistic for a number of normative and practical reasons.[18] First, the jurisdiction of the EC in respect of the subject matter in the traditional fields covered by civil codes is by no means clear, in particular in areas unrelated to a market rationale.[19] Thus, whilst contract and commercial law harmonisation might nevertheless be covered by EC competence, tort law is very likely to be a problematic case, and matters largely influenced by national culture, such as family law or the law of succession, should be completely outside the European legislator's sphere. However, the subsidi-

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[18] See the numerous criticisms from various perspectives: O. Kahn-Freund, 'Common Law and Civil Law - Imaginary and Real Obstacles to Assimilation' in M. Cappelletti (ed.), supra note 15, 137; B. Markesinis, 'Why a code is not the best way to advance the cause of European legal unity'' (1997) 5 *ERPL* 519; M. J. Bonell, 'The need and possibilities of a codified European contract law' (1997) 5 *ERPL* 505; P. Legrand, 'Against a European Civil Code' (1997) 60 *MLR* 44; G. Teubner, 'Legal Irritants: Good faith in British Law or How Unifying Law Ends up in New Divergences' (1998) 61 *MLR* 11; H. Collins, 'European Private Law and the Cultural Identity of States' (1995) 3 *ERPL* 353; on the latter topic see also J. Basedow, 'Rechtskultur - zwischen nationalem Mythos und europäischem Ideal' (1996) 5 *Zeitschrift für Europäisches Privatrecht* 379. For an earlier instructive summary of arguments pro and contra codification, see O. Remien, 'Denationalisierung des Privatrechts in der Europäischen Union? - Legislative und gerichtliche Wege' (1995) 35 *Zeitschrift für Rechtsvergleichung* 116 at 119 et seq., with rich references from all European countries.

[19] J. Basedow, 'A Common Contract Law for the Common Market' (1996) *CML.Rev.* 1169.

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arity principle, introduced by the Maastricht Treaty, might even stand in the way of a European Code of Contracts, and a high-ranking European Commission official has indeed stated that no codification efforts are being contemplated by Brussels at the present time precisely for this reason.[20] But even if this principle were interpreted differently in the future or if the EC were actually endowed with more competences (which seems hardly realistic at the present time), it is not at all clear that the economic cost of a code would outweigh its benefits.[21] In particular, it should be borne in mind that international economic actors have already created for themselves flexible legal instruments and procedures to deal with international contracts which seem to suit their needs well, such as standard forms and arbitration.[22] But even if it could be proven that more unification is actually needed in certain fields of private law, the difficulties of agreeing on novel uniform substantive law structures and concepts in traditional fields of private law, and of abolishing the existing national ones would seem to be enormous. Beyond that, the differences in legal style, reasoning, culture and education are anything but small — not only between Common and Civil Law — and they might even make it impossible for national courts to apply a code, if it were actually enacted, uniformly. To prevent such a scenario,

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[20] J. Timmermanns, 'Zur Entwicklung des europäischen Zivilrechts' (1999) 7 *Zeitschrift für Europäisches Privatrecht* 1 at 4.

[21] See U. Mattei, 'A transaction cost approach to the European Code' (1997) 5 *ERPL* 537.

[22] H. Collins, 'Formalism and efficiency', EUI Conference Paper 1998.

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a code would probably need to be monitored by a considerably upgraded European court system which, in turn, would also render necessary a profound reorganisation of the national court system. Finally and perhaps most importantly, it should not be overlooked that large parts of private law are embedded in still sensibly different national cultural, social and economic conditions which find their expression also in different public and constitutional law systems (the so-called "constitutionalisation" of private law).[23] Just as in the case of many existing pieces of EC legislation, a uniform code and a European judiciary could hardly do justice to all of them and, therefore, their imposition "from above" might be met with considerable resistance by the European people.

In view of these powerful arguments against legislative harmonisation, it seems to be worthwhile to examine the potential shown by strategies of non-legislative harmonisation.

4 'Principles of European Contract Law' and Ius Commune *Compilations*

As an alternative to greater legislative unification at this moment in time, but also with the aim of putting the existing 'pointilistic projects'

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[23] An illuminating account of the complexities of the constitutional embeddedness of private law in the European multi-level system of governance was presented by C. Joerges in 'European Challenges to Private Law: Reductionist Perceptions, True Conflicts and a New Constitutionalist Perspective' (1997) 3 *ELJ* 378 = (1998) 18 *LS* 146, with an annotation by G. Samuels, 'The impact of European integration on private law - a comment' (1998) 18 *LS* 167.

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of EC legislation into an overall framework and of preparing a common ground for future harmonisation efforts, other noted scholars have, since the beginning of the eighties, suggested alternative "bottom-up" approaches[24] *i.e.* through non-legislative preparatory work undertaken by legal scholars and practitioners in order to bring European legal systems closer together.[25] One such strategy relies on the potential for indirect harmonisation of a restatement of 'Principles of European Contract Law'. A compilation thus entitled was first presented in 1995[26] and has been re-issued in 1998 by the Lando Commission (named after its initiator and chairman, the well-known Danish professor Ole Lando). Confined to the more technical issues of contract law, this restatement is elaborated on a comparative law basis and consists, just as its American predecessors, of rules, illustrations and comments. Thus, the Principles try to show what a future code might look like and to provide a starting point for future debates.

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[24] The expression seems to have been coined by F. Hayek, *Law, Legislation and Liberty*, 2 vol. (1973 and 1976).

[25] In general see the contributions in B. De Witte and C. Forder (eds), *The common law of Europe and the future of legal education* (1992); with respect to private law harmonisation see also P.-Ch. Müller-Graff, 'Private Law Unification by Means other than of Codification' in A.S. Hartkamp, M.W. Hesselink, E. H. Hondius, J.B.M. Franken (eds), supra note 15 at 19; O. Remien, 'Rechtseinheit ohne Einheitsgesetze?' (1992) 56 *Rabelszeitschrift* 300.

[26] O. Lando and H. Beale (eds), *Principles of European Contract Law*, 1995 [part I]; a revised version of part I and the new part II is available on Celex.

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Another strategy, more basic but probably even more important, relies on the harmonisation potential of the Europeanisation of legal science and education through comparative synoptic compilations of what might become a new Common Law of Europe. It is based on the conviction that just as economists and politicians have been doing for some time, lawyers, too, should be encouraged to think in European and international terms. Thus, mutual observation and understanding might be furthered, social and economical commonalties and differences particularised, and legal concepts, legal reasoning and legal culture assimilated. The ultimate aim of this project is said to be the gradual reconstitution of a common approach to and a common vision of private law, which actually existed from the period of the reception of Roman Law until the eighteenth century, but was lost with the emergence of the European nation states and the enactment of national codifications.[27]

Three *ius commune* books have already been published: *European Contract Law* by Hein Kötz,[28] *The Common European Law of Torts*, by Christian von Bar[29] and, as the first book of a forthcoming series of Ius Commune Casebooks for the Common Law of Europe, *Cases, Materials*

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[27] See R. Zimmermann, 'Civil Code and Civil Law: The "Europeanisation" of Private Law within the European Community and the Re-emergence of a European Legal Science' (1994/95) 1 *Columbia Journal of European Law* 63.

[28] Vol. 1: Formation, Validity and Content of Contracts; Contracts and Third Parties, English translation by Tony Weir. Clarendon Press, 1997.

[29] See above n. 1.

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and Text on National, Supranational and International Tort Law: Scope of Protection by Walter van Gerven, Jeremy Lever, Pierre Larouche, Christian von Bar and Geneviève Viney.[30] These books represent the first attempts at compiling, in the classical fields of contract and tort, the foundations of a new European Common Law. Adopting a comparative functional perspective, informed by the historical genesis and the social and economic tasks of private law, they bring to light the many already existing common features of national laws in Europe which are mostly hidden behind different conceptual and technical frameworks. Existing substantive differences are only criticised if they entail an inferior standard of protection for citizens as compared to other laws — but never on the sole ground that they constitute minority solutions or simply obstacles to uniformity. Thus, the approach of these books may indeed be said to "strengthen the common legal heritage of Europe, not to strangle its diversity".[31]

To give a better impression of the *ius commune* approach, the basic conceptual structure of 'European Contract Law' by Hein Kötz will be briefly examined. This book covers the 'general' law of contracts, *i.e.* the fields of formation, validity, and content of contracts as well as the area of contracts and third parties. It describes the institutions of contract law, structured on a functional basis, in the form of general European "synoptic reports" supplemented by personal comments. Cases and

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[30] Hart Publishing, 1998.

[31] H. Kötz, *European Contract Law*, preface, p. VI.

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quotations from legislative materials, including supranational and international law (in particular the UN sales law convention), are mainly relegated to the footnotes. This method of presentation reflects the book's general approach that the positive rules of the various countries should be regarded only as local variants of the contract law of Europe as a whole. Only exceptionally, in fields in which greater differences were found, does the text provide for "national reports" before reverting to the common European ground; examples include the French jurisprudence on *indétermination du prix*, German law on *culpa in contrahendo* and English law on the avoidance of contracts for undue influence or misrepresentation. This presentation of contract law institutions is also meant to be a way of testing the effectiveness of national legislative and doctrinal constructs: the only concepts, structures and institutions which deserve to survive are those that pass "the acid test of international discussion".[32] Two examples may briefly demonstrate how largely common European solutions are worked out or, if incompatible with existing law, at least suggested by this book.

> In the section on liability for breaking off negotiations (p. 34ff), we learn that despite the Common Law's categorical denial of a duty to deal in good faith or of a special precontractual relationship of trust such as *culpa in contrahendo* (which

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[32] This idea has been taken up by J. Smits in 'A European Private Law as a Mixed Legal System' (1998) 5 *Maastricht Journal of Comparative and European Law* 328. This author advocates the development of a new *ius commune* through the "free movement of legal rules". However, apart from a reference to the books reviewed here, he does not make clear what kind of instruments he has in mind in order to realise such an exchange of rules.

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is often presented as one of the most striking differences with respect to the continental systems), the Common Law does in reality also protect the parties' legitimate interests in the negotiation of a contract. This is achieved, *inter alia*,[33] through the extension of the tort of negligence, which also allows compensation for pure economic loss, up to the negotiation phase (the leading case being *Hedley Byrne & Co. v. Heller & Partners* [1964] AC 465). In addition, it is shown that even the latest controversial case in which the House of Lords has again denied the existence of such a duty, *Walford v. Miles* ([1992] 2 AC 128) would very probably have been decided in the same way by a French or a German court. In this case, the plaintiff failed to obtain what is called in German law the 'performance interest' (Erfüllungsinteresse) for the failed conclusion of a contract; *i.e.* the economic advantage he would have gained had the contract been concluded and performed. This kind of compensation is however only exceptionally awarded by continental courts where, prior to the collapse of negotiations, the contract was confidently anticipated. The rule is that a party guilty of culpable conduct during negotiations must *only* put the other party in the position he would have enjoyed but for such conduct (the so-called 'reliance interest' — Vertrauensinteresse). Because of the availability of this more sophisticated distinction between proper and improper conduct in negotiations, so the author convincingly concludes, the House of Lord's rather wholesale dogmatic reasoning exclusively based on the non-existence of a duty to negotiate in good faith is unpersuasive. That notwithstanding, the fact that the scope of protection under English tort law was extended to the negotiation phase and that continental and English courts would both have denied the 'performance interest' in *Walford v. Miles* might suggest that at least a limited common European law with regard to sanctions for improperly breaking off negotiations might be argued to exist.

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[33] For other (American) Common Law equivalents of *culpa in contrahendo* see C. Schmid, *Das Zusammenspiel von Einheitlichem Kaufrecht und nationalem Recht: Lückenfüllung und Normenkonkurrenz* (1996) 238 et seq.

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Another example: under the functional label of 'tests of earnestness' (to be found also in Zweigert and Kötz' famous *Introduction to Comparative Law*), chapter 4 deals with different legal constructs which are meant to ensure that where the promisor seriously undertook a contractual obligation, the law should enforce it. German law, on the one hand, extended the Roman law model of 'consensual contracts', *i.e.* an obligation coming into existence through consensus only, to any ordinary contract. On the other hand, French, Italian and Spanish law insist on 'cause', English law on 'consideration' as additional conditions of "earnestness". However, 'cause' is argued to be a merely conclusory and therefore largely superfluous formula which makes no contribution to the proper grounds for reaching the conclusion: as a validity requirement, cause is used only when French courts hold a contract invalid as being contrary to good morals or *ordre public*. *'Absence de cause'*, on the other hand, refers to the counterperformance and means that this has no economic value for the other party who, as a consequence, need not submit to the contract. In this sense, 'cause' only restates the conclusion of a risk allocation assessment or that of invalidity by reason of deceit or mutual mistake (p. 56). By contrast, the doctrine of consideration is not a hollow formula, but means that a promise is generally binding and enforceable only if it is made in view of some sort of counterperformance by the promisee. However, the use of the concept in a set of special cases has been widely criticised in English academic literature (p. 76f): when the counterperformance is 'inadequate' or even only 'nominal' (the famous peppercorn may be sufficient); when the doctrine is relied upon to challenge the validity of an agreement in favour of one of the parties; when it leads to the denial of validity to a perfectly reasonable agreement to grant a right to a third party; finally, when it allows the revocation of an offer which was declared to remain open for acceptance for a stated period of time. The consequence of this analysis, even though not explicitly stated by the author, seems to be that neither the concept of cause nor the criticised features of consideration would pass the "European Common Law" test mentioned above.

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5 The next step: A European Law Institute and 'Mosaic-Restatements'?

Evaluating the current stage of non-legislative harmonisation, one may indeed say that it is the great merit of the *ius commune* books to have unveiled a common European *acquis* in private law whose scope is wider than many might have expected. This leads us to the issue of how this *acquis* could be rendered useful for further harmonisation of European private law. This issue is of course a complex and a highly speculative one, and it may only be briefly addressed in the present context.[34]

Three points seem to be crucial. First, whilst the idea of harmonisation "from below" seems to be the more promising option, the *ius commune* projects are only the first step in this direction. In particular, it would be premature to think that a growing awareness by lawyers of existing commonalties and the discursive competition among norms might overcome all the objections against codification mentioned above. This means that rather than striving for more legislative harmonisation at the present time, more advanced methods of 'harmonisation from below', building on the common European *acquis* in private law, should be designed. Second, in doing so, one should bear in mind that comparative law provides only one component of the common private law

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[34] For a detailed account see C. Schmid, 'Plädoyer für ein Europäisches Rechtsinstitut und für *Restatements* über Europäisches Recht' forthcoming in T. Ackermann et al. (eds), 10 *Jahrbuch Junger Zivilrechtswissenschaftler* (1999).

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acquis.[35] Therefore, further harmonisation efforts cannot realistically ignore, but should rather build on, all the components of the multi-level regime; they should in particular integrate the existing pieces of supranational and international legislation as well as the conflict of laws problems, into interconnecting different legal levels. As well illustrated in van Gerven's book, such efforts should integrate European law, conflict of laws and comparative law perspectives alike. Last but not least, practical concerns should be addressed. For further progress in 'harmonisation from below' may be presumed to depend crucially on the way it is technically organised, and it is becoming more and more obvious that the Commission has neither the political force nor the personnel and financial resources to develop and implement a coherent overall concept of European private law. More realistically than any institutional reforms at EC level, one might think of private initiatives of the European legal profession assisting the Commission in this task.

The inspiration one might draw from these provisos is that a sort of European counterpart of the American Law Institute, designing Restatement-like compilations of European private law, could be of great use.[36] Apart from minor, but very useful activities,[37] a European Law In-

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[35] Similarly recently Basedow, supra note 13 at 138 et seq.

[36] Such a proposal has already been made with respect to company law harmonisation by Werner F. Ebke (who is a foreign member of the AIL) in 'Company law and the European Union: Centralised versus Decentralised Lawmaking (1997) 31 *Int. Law.* 961 at 985; idem., 'Unternehmensrechtsangleichung in der Europäischen Union: Brauchen wir ein European Law Institute' in U. Hübner and W. Ebke (eds.),

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stitute could provide a suitable institutional framework for fertile co-operation with the Commission. For this purpose, it could assemble scientific committees in various fields of private law which, as already happens in regulatory law,[38] could assist in the drafting of European legislation.[39] Furthermore, a European Law Institute could arrange for the elaboration of Restatement-like compilations of entire fields of European private law. Two *caveats* should, however, be expressed here. First, in the EC context, the term 'Restatement' would indicate only the form of a compilation, composed of rules, comments and illustrations;

Festschrift für Bernhard Großfeld (1999) 189; with respect to European primary law consolidation by C. Schmid, 'Konsolidierung und Vereinfachung des europäischen Primärrechts - wissenschaftliche Modelle, aktueller Stand und Perspektiven' in A. v. Bogdandy and C.-D. Ehlermann (eds.), *Konsolidierung und Kohärenz des Primärrechts nach Amsterdam* (1998), *Europarecht*, supplement 2, 17 at 34 et seq.; an enhanced English version is available as EUI Working Paper, Robert Schumann Centre, No. 7/99, http://www.iue.it.PUB).

[37] Examples would include: elaborating a model of uniform quotation for academic literature (such as the "bluebook" edited by major American universities), organising exchanges, conferences and educational and vocational training of lawyers, gathering information on national legal systems and court decisions, co-ordinating the activities of the various ongoing academic research projects.

[38] See e.g. in foodstuff law C. Joerges and H.-J. Neyer (1997) 3 *ELJ* 273, stressing also the deliberative democratic potential of transnational committees.

[39] A "European Scientific Committee for Private Law" in order to assist the Commission in the drafting of new EC legislation was recently proposed by Kieninger and Leible, supra note 5.

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in substance, a European Restatement could not be a mere abstraction and clarification of the case law in a particular field like its American counterparts. Second, a European Restatement should not be a novel comparative law creation such as the Lando principles either; for such a device mainly adds a further new element in the already complex picture of European private law. Rather, it should be a compilation, building to the greatest possible extent on the existing common European *acquis* in private law — in other words, it could be described as a "mosaic-type Restatement" trying to put together the existing pieces of European and international legislation in the private law field, thus reconciling a comparative with a European law perspective. Such a compilation could benefit from the fact that, taken together, the UN sales law convention (to which all EC Member States except the UK are parties),[40] EC directives and regulations, substantive law implications of the 1968 Brussels Civil Jurisdiction and Judgments Convention and of the ECJ's jurisprudence on tort law and restitution (as examined by van Gerven), as well as general principles developed by the ECJ, already cover many important fields of private law. Thus, the attempt might be made to rearrange these sources systematically, into one coherent document. Its basic structure might follow the model of the UN sales law in contract law; an attempt might be made to compose a tort law structure out of EC directives, ECJ jurisprudence and common elements of national laws as described by the *ius commune* compilations. The, certainly numerous, gaps

[40] See on this the leading commentary by E. v. Caemmerer and P. Schlechtriem (eds), available now in English translation (1998).

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could equally be filled to the largest possible extent with common or similar national rules and, if such do not exist, with those national solutions which find most acclaim. Beyond that, a European Restatement should also contain a chapter on the conflict of laws problems in connecting together different layers of European, national and international law. This might even contain a kind of inventory of national provisions incompatible with EC law or to be interpreted in a particular way which conforms with European law. In respect of its legal validity, such a Restatement would of course be non-binding on the whole, but constituted by many parts of international or EC law which are binding. This might render it more appealing for courts and practitioners — for experience shows that they are hardly interested in academic exercises, but rather in existing law.

A European Restatement could, as with its American counterparts, first of all be used as a "secondary" source of law in legal practice. It could provide courts with a common and uniform European tool for interpretation, gap-filling and the concretisation of general clauses in EC *and* national law. In legal science and education, a Restatement produced by outstanding scholars and practitioners from various European States would promote a genuine European legal style, reasoning and mode of presentation, and could thus contribute to the overdue "Europeanisation of European Legal Science". After a long period of continuous up-dating, refinement and integration of new pieces of EC and international legislation, European lawyers and politicians might perhaps reach the insight that the area occupied by the binding international and EC law components of the Restatement is extremely vast, the "bridging so-

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lutions" for gaps derived from the *ius commune* compilations convincing and, last but not least, the daily problem of serving two masters when dealing with the multi-level regime and the conflicts, fragmentations and inconsistencies arising therein too cumbersome. Then, the time might actually be ripe to abandon the earlier reservations and enact the rules of the Restatement as a kind of model law, as in a European Uniform Commercial Code, in order to regain a more coherent vision of the law. Yet even before this could happen, and even if it were not to happen at all, the above-mentioned advantages of a Restatement would be desirable ends in themselves.

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