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# On the Need for a Progressive Harmonisation of Private Law in The European Union:

## The Role of Legal Science and Education

### 1. Introduction

Progressive harmonisation of private law in the European Union meets the requirements of contemporary European economy and societies. It appears to be in harmony with the historical process of development of private law in European countries, which have been largely shaped by three major traditions: the Romano-Germanic, the Scandinavian, and the Common Law tradition. This is why it seems useful to preface discussion of the questions under consideration by presenting some remarks on the historical trends of development of private law in Europe in order to show that we may return progressively to our common European roots.

The Romano-Germanic tradition is linked to the renaissance of the idea of law in the twelfth and thirteenth centuries in Western Europe. The new ideas favouring the renaissance of law originated in the centres of culture created in Western Europe, the most important of these being the universities. The university scholars progressively elaborated a common legal science and constantly adapted it to the requirements of a changing Europe. The Romano-Germanic tradition developed on the basis of the progress of a community of culture, independently of any political influences and ambitions.

The mediaeval universities aspired to distil and formulate the essence of justice. The law they taught was presented as a model for social organisation. The basis of this teaching was Roman law and canon law<sup>\*1</sup>, with the help of which university law faculties attempted to articulate the rules best expressing a sense of justice and a well-ordered society. Systematised and adapted by jurists to the needs of society, the law taught by the university founded on Reason was suited for universal application. The teaching of national law started at the universities in the seventeenth century. Swedish law was taught in Uppsala from 1620, and a chair of French law was created at the Sorbonne in Paris in 1679, but in most countries in Europe the

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<sup>1</sup> R. David. *Major Legal Systems in the World Today*. New York 1978, p. 37; R. David, C. Jauffret-Spinozi. *Les grands systemes de droit contemporains*. Paris 1992, p. 31 et seq.

national law was not taught in the universities until the eighteenth century: in 1707 at Wittenberg, the first university of the Empire to teach *Deutsches Recht*; in 1758 at Oxford; and in 1800 in Cambridge. Until the nineteenth century and the era of national codification, instruction in Roman law remained the main subject in the syllabus in all universities while national law occupied an altogether secondary place.<sup>\*2</sup>

## 2. The 1800s: Universalism gives way to a national focus

The Natural School of Law elaborated, at the end of the eighteenth century, a new concept of codification, very different from that of earlier compilations. This permitted achievement of the aim of transforming the taught but ideal law into a real, applicable body of law. Codification was conceived as a universal formula and technique serving to modernise and rationalise the law, which put an end to its fragmentation, as well as the multiplicity of customs and other archaisms involved. Thus, it helped to establish principles of a rejuvenated *ius commune*, adjusted to the circumstances of the European societies of the nineteenth century. However, the decline of the universalistic spirit and the rise of nationalism in the nineteenth century made the true achievement of this aim impossible.

Under these conditions, codification was used as an instrument of ‘nationalisation of law’, associated with the legislative sovereignty of each national state. As successive European states adopted their own codes, which resulted in fragmentation of European law, the very idea of a European *ius commune* virtually disappeared.

Nationalism in law-making, judicial decisions, and legal science brought about profound decline in the common European legal culture. University teaching was limited to national law. In their studies and research, writers concerned with doctrine concentrated on national law, showing no interest in foreign law, nor in writings outside the national milieu. Thus, the legal science lost much of its universal value, just as the legal education became particularised and national.

## 3. A return to the comparative

This picture has progressively changed over the last century. There has been a visible trend toward development of comparative law studies and research. Eventually, this facilitated discovery of significant similarities among various national legal systems arising from different legal traditions.

The development of comparative law teaching reintroduced elements of universalism in university legal education. The resurgence of a comparative approach to law contributed to the renewal of legal science, which in its very nature should be trans-national. This helped to deepen international understanding of various legal systems, which, accordingly, have progressively ceased to be treated in splendid national isolation. It also contributed to promoting international unification of private law.

Thus the development of a comparative approach to legal science has contributed to its transformation, and it introduced elements of universalism that have played an important role in the development of law in Europe.

## 4. The route toward EU harmonisation

Profound changes in the European political, social, and economic environment after World War II, which resulted in European integration, contributed to substantial changes in the European legal landscape. The complex process of integration in the framework of the EEC and subsequently the EU has had to be supported by progressive harmonisation of certain rules of law. Further development and consolidation of European integration should be accompanied by the development of European legal culture (based on shared fundamental values), without which the European structures would be deprived of any solid foundations.

Private law has always been an essential part of legal culture and civilisation. This is why its intra-European harmonisation and progressive unification appears to be of particular importance for the future of European integration more generally.

<sup>2</sup> R. David (see Note 1), p. 40; R. David, C. Jauffret-Spinosi (see Note 1), p. 33.

This need cannot be fully satisfied by multiplying European directives dealing with particular subject matter. Taken together, these works show a fragmentary picture, lacking a coherent legal background and framework, as the documents have been prepared in an internally non-harmonised law-making process. The existing directives can be improved by removing inconsistencies and clarifying concepts and rules.

Problems of differing or uncertain interpretation of directives can be resolved to a certain degree by the construction of a common frame of reference. Nevertheless, the directives cannot establish a solid, homogeneous, and properly structured system of European private law.

In these circumstances, practitioners of legal science, which made an essential contribution to the development of modern systems of private law in many countries, should intensify efforts to develop it in the framework of the European Union.

A number of legal thinkers have expressed willingness to contribute to the revival of the original concept of a universal (i.e. pan-European) codification and to see in the comparative law approach a means to discovering and progressively developing a contemporary European *ius commune*.

The technique of codification may well serve this purpose, as it permits opening for consideration in a systematic way — different from the ‘sectoral approach’ followed in European directives — the rules adapted to the requirements of contemporary European societies.

## 5. The first steps on the road

Among the various initiatives undertaken in this direction, the most successful was that of a group of experts organised as the Commission on European Contract Law under the chairmanship of Professor Ole Lando. The group which commenced its work in 1981. Composed of well-known specialists in civil law — and, in particular, in the law of contracts — from all of the then EU Member States, this group elaborated the Principles of European Contract Law. The principles aimed at, *inter alia*, creating a general contract law infrastructure to support specific European Community measures undertaken in the form of directives affecting some specific types of contracts.<sup>3</sup>

One of the immediate aims of the principles has been to establish a modern European *lex mercatoria* — in particular, in the area of intra-community contracts. The European Commission also expressed its hope for the principles to serve as a model for judicial and legislative development of contract law, both at a national and at the European level. The long-term objective of the Principles of European Contract Law has been to help bring about harmonisation of general contract law within the European Union.

Another initiative undertaken in this direction was that of a group of academic lawyers and judges from all European countries, organised in the framework of the Academy of European Private Lawyers. It began to draft a European Code of Contracts in 1995. A preliminary draft of Book One of the code, on contracts in general, was published recently.<sup>4</sup>

A number of other groups are working on restatements of common principles of various branches of European private law.<sup>5</sup> One example is the EC group on tort and insurance law founded by Professor Jaap Spier, and another is the team established by the late Professor F. Reicher-Facilides, and now chaired by Professor Heiss, which is working on insurance contracts.

The European Research Group on Existing Private Law (the Acquis Group) has been working on the principles and policies that underlie the existing *acquis communautaire*.

<sup>3</sup> See O. Lando, H. Beale (eds.), *Principles of European Contract Law*, Parts I and II. The Hague 2000, Introduction, p. xxii; O. Lando, E. Clive, A. Prüm, R. Zimmermann (eds.), *Principles of European Contract Law. Part III*. The Hague 2003; and *Principes du droit européen du contrat* (version française préparée par G. Rouhette, avec le concours de I. de Lamberterie, D. Tallon, & C. Witz), Paris 2003, as well as German text in C. von Bar, R. Zimmermann (Hrsg.), *Die Grundregeln des Europäischen Vertragsrecht*. The Hague, London, New York 2000 and 2003.

<sup>4</sup> *Code Européen des contrats. Avant projet, livre premier*. Milan 2004. See G. Gandolfi. *The Academy of Private Lawyers and the Pavia Draft of a ‘European Contract Law’*. Trier: ERA Forum 2003.

<sup>5</sup> See H. Beale. *The Development of European Private Law and the European Commission’s Action Plan on Contract Law*. — *Juridica International* 2005 (X), pp. 5–6. Within the EU’s Fifth Framework Programme, ‘Improving Human Potential’, the Department of Law of the University of Turin is co-ordinating the Uniform Terminology for European Private Law project. This initiative aims to build a research training network to facilitate the national reception of European Community policy within the field of private law. The network links seven universities: in Italy, the University of Turin; in Spain, the University of Barcelona; France’s University of Lyon 3; the University of Münster in Germany; the University of Nijmegen in the Netherlands; in the United Kingdom, the University of Oxford; and the University of Warsaw in Poland.

## 6. Today: The Study Group on a European Civil Code

One of the most important recent initiatives was the creation in 1999 of the Study Group on a European Civil Code by a group of legal thinkers led by Professor Christian von Bar. The founders of the study group were convinced of the necessity of a progressive Europeanisation of private law, which needs a strong foundation in legal thinking.

The study group has been composed of scholars from all EU Member States (many of them also practising lawyers or Supreme Court judges) who are devoted to the aim of reinforcing the European private law culture. They have expressed their willingness to contribute to the advancement of the process of progressive Europeanisation of private law. To this end, they have been creating a new school of legal thought, which gradually has been giving way to a concern for discovering and establishing the principles underlying coherent European private law.

The main areas of the current work of the group, based on extensive comparative law studies and research, have been:

- (a) developing rules for specific types of contracts in order to complete the Lando Principles of European Contract Law in their integration into the framework of future 'Principles of European Private Law';
- (b) developing rules for extra-contractual obligations — i.e. the law of tort (delict) — as well as the law of unjustified enrichment, and on the benevolent intervention in another's affairs (*negotiorum gestio*); and
- (c) developing rules for fundamental questions in the law on mobile assets — in particular, addressing transfer of ownership and security for credit.

The study group's ultimate goal is to prepare a detailed, coherent set of model European rules of patrimonial private law.

In 2005, the group formed the Network of Excellence, together with the Acquis Group and other European research groups and institutions, which will collaborate in the preparation of a 'Common Frame of Reference' as envisaged in the European Commission Action Plan document concerned with a more coherent European contract law and its follow-up Communication document 'European contract law and the revision of the *acquis*: The way forward' (2004).<sup>6</sup> This presents a new opportunity to contribute to the further development of European private law.

The Principles of European Contract law were the product of approximately 20 years of extensive work on the part of a group of experts from all member states. The Study Group on a European Civil Code expects to accomplish its task after at least 10 years of study, research, and work involving many experts from all EU Member States, who represent various legal traditions, schools of legal thinking, and areas of legal practice. Thus, the future Principles of European Patrimonial Private Law shall be a product of approximately 30 years of intensive study, consideration, and other in-depth work conducted by hundreds of experts from all EU Member States who are devoted to the common cause of development of the European private law culture.

The European lawmaker would not be able to devote even a small fraction of such time and effort to the task of progressive harmonisation of private law. Let us hope that those making the decisions make proper use of the results of this enormous undertaking based on profound expert knowledge and experience, which have been gathered through a long process of well-organised, extensive *travaux préparatoires*.

## 7. The role of education

The doctrinal promotion and support for the progressive harmonisation and unification of private law in the European Union should be accompanied by a progressive and extensive Europeanisation of legal education. A new approach to legal education is required. The universities' faculties of law may take advantage of their long tradition, stretching back to when teaching was of a universal nature, being based on a common legal culture and law. They should believe in the mission of law and its essential role in the development of the European Union and European societies.

<sup>6</sup> See C. von Bar. Working Together toward a Common Frame of Reference. — *Juridica International* 2005, p. 19 et seq.

Contemporary university teaching should no longer be limited to national law, the model that prevailed even into the last century. It has to regain its universal and European values. One of its most important aims should be to contribute to the development of a European legal culture and to provide the necessary grounding for a new generation of lawyers (*'formation juridique européenne'*) who are prepared well to work efficiently in the European legal environment.

## 8. Conclusions

Dynamic harmonisation and unification of private law in the European Union is of great importance for the development of European integration. Intensification of European integration (in both its economic and social dimension) should be supported by the growth of a European legal culture (based on shared fundamental values). Without it, the European structures would be deprived of solid and lasting foundations.

Private law has always been an important component of the legal culture. Therefore, its intra-European harmonisation and progressive unification is of great importance for the future of European integration. These processes should be inspired and supported by legal science, which has exerted a great influence on the development of the legal systems of the EU Member States. The developing current doctrine in the legal discipline, which may be described as the emerging European School of Law, may be placed in the historical context of development of legal science on the European continent, part of a more long-term trend. It aspires to formulate the essence of European private law culture. Mindful of common historical roots shared by contemporary legal systems of the EU Member States, it insists on addressing their similarities — a functional approach to law permits these to become more visible — and discovers the contemporary *ius europeae*.

This approach shows that different traditions and technical approaches can be reconciled in the efforts to bring about harmonised solutions. Thus, the law ceases to be considered only as a national phenomenon and is perceived also from the European perspective, as an important component of the developing European culture respecting different yet connected legal traditions.

The emerging European School of Law may be described as an 'applied legal science', as it attempts to articulate rules best expressing a sense of justice and that are adjusted to the requirements of the European economy and societies of the 21<sup>st</sup> century. It has created and expanded upon a new concept of codification different from both traditional Romano-Germanic codifications and American Common Law restatements. A new formula of codification may bring forth a technique that enables realisation of the ambition of a progressive Europeanisation of private law in the European Union. It may consolidate the evolution of European scholarship in recent decades and systematically illuminate principles of European private law of the 21<sup>st</sup> century.

Thus may a new stage in the development of European legal culture and European integration be ushered in.