

## The Gradual Emergence of European Private Law

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### **ABSTRACT**

*This article deals with the general argument as regards the possibility of discerning a progressive Europeanisation and convergence in the area of private law. On the basis of this argument our examination begins with the analysis of the traditional and contrasting view and discuss the so-called national character of private law. We then turn to the unification of private law by means of international conventions which is sometimes regarded as an antecedent to the present Europeanisation. Whoever wants to understand the impact of the European Union/European Community on private law must take account of the legislative bases in the founding treaties which explain not only the present state of the Union's/Community's achievements, but also the peculiar problems connected to the instrument of the directive in Community law and its implementation in the national legal systems of the Member States. Yet, within the context of this article it is submitted also that the Europeanisation movement is not limited to legislative measures; further important facets of the process are the contributions of the European Court of Justice and of legal scholarship which has turned to the analysis of general principles of private law in various fields.*

### **ÖZET**

*Bu makalede ulusal özel hukukların gittikçe artan biçimde Avrupa çapında (düzeyinde) yakınlaştığı ve Avrupalılaştığı saptamasında bulunmaktadır. Bu çerçevede, öncelikle geleneksel nitelikteki karşı görüşü oluşturan özel hukuk*

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sistemlerinin ulusal karakter taşıdığı iddiası incelenecektir. Bunun ardından zaman zaman mevcut Avrupalılaşmayı öncellediği değerlendirilmesinde bulunan ulusal hukukun uluslararası sözleşmeler aracılığıyla birleştirilmesi olgusu üzerinde durulacaktır. Avrupa Birliği/Topluluğu'nun özel hukuk üzerindeki etkisini değerlendirebilmek bakımından kurucu antlaşmalarda yer alan hukukî araçların dayanaklarının incelenmesi gerekmektedir. Böylece, bir yandan Birliğin/Topluluğun halihazırdaki kazanımlarını açıklamak mümkün olabileceği gibi, öte yandan da Topluluk hukukunda direktif ya da yönerge olarak adlandırılan tasarruf aracının kendine özgü özelliklerini ve üye devletlerin ulusal hukuk sistemlerinde ne şekilde uygulandığını değerlendirebilme imkânı doğacaktır. Ancak, bu makale bağlamında ortaya konan yaklaşım uyarınca, Avrupalılaşma hareketi yasama önlemleri ya da mevzuat ile sınırlı olmayıp, Avrupa Toplulukları Adalet Divanı içtihadının ve doktrinin de çeşitli alanlarda özel hukukun genel ilkelerinin incelenmesi suretiyle söz konusu Avrupalılaşma sürecine katkı sağlamakta oldukları görülmektedir.

#### **KEYWORDS**

*European Union, European Community Law, European Private Law, Unification of European Private Law, Europeanisation*

#### **ANAHTAR KELİMELELER**

*Avrupa Birliği, Avrupa Topluluğu Hukuku, Avrupa Özel Hukuku, Avrupa Özel Hukukunun Birleştirilmesi, Avrupalılaşma*

#### **1. About private law**

For lawyers educated in common law countries the concept of private law is perhaps less familiar than it is in the civil law world where the border line between civil law and public law is a kind of equator separating the hemispheres of the legal globe. While the common law uses concepts such as contracts, torts, real property or family law, the overarching notion of private law seems, if not alien, in any case useless to common law legal systems. About 30 years ago, *Tony Weir* pointed out that “nothing turns on it”<sup>1</sup> and in the 11<sup>th</sup> edition of *Dicey & Morris*, we still read that the similar term “civil and commercial matters” is not a term of art in the United Kingdom.<sup>2</sup> But this book also refers to modern developments which trigger the discussion and adoption of these general concepts in common law jurisdictions. On the one side there are in fact a number of international treaties such as the Hague Service Convention

<sup>1</sup> Tony WEIR, *The Common Law System*; **Int. Encycl. Comp. L.** vol. 2 ch. 2 1971, 115.

<sup>2</sup> DICEY & MORRIS on **the Conflict of Laws** vol. 1 11<sup>th</sup> ed. 1987, 267.

of 1965<sup>3</sup> or the Hague Evidence Convention of 1970<sup>4</sup> which are applicable only to civil and commercial matters and thereby require a border line to be drawn between this area of the law and other areas. On the other hand some common law jurisdictions have set up administrative tribunals whose jurisdiction has to be demarcated against that of the traditional court system which again requires a similar analysis. A certain convergence appears to take place, and it may be that the early distinction made by the Roman jurist *Ulpian* provides some guidance for the harmonising interpretation in both civil law and common law jurisdictions; in his analysis public law includes the rules dealing with the utility of the state, while private law relates to the utility of the individuals.<sup>5</sup>

On the basis of this understanding of private law it is possible to discern a progressive europeanisation in this area of the law. However, our following analysis will have to start with the opposite movement and discuss the pretended national character of private law (infra 2.). We will then turn to the unification of private law by means of international conventions which is sometimes regarded as an antecedent to the present europeanisation (3.). Whoever wants to understand the impact of the European Community on private law must take account of the legislative bases in the European Treaty (infra 4.) which explain not only the present state of the Community's achievements (infra 5.), but also the peculiar problems connected to the instrument of the directive in Community law and its implementation in the national legal systems of the Member States (infra 6.). But the europeanisation movement is not limited to legislation; further important facets of the process are the contributions of the European Court of Justice (infra 7.) and of legal scholarship which has turned to the analysis of general principles of private law in various fields (infra 8.).

## 2. What is national about private law?

Ever since the French revolution private law has been regarded as being deeply national in character, as a kind of core component of the national heritage. This had been different in the previous centuries when lawyers across Europe had some understanding of a *ius commune* which, being derived from

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<sup>3</sup> Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Done at The Hague on 15 November 1965, in: Hague Conference on Private International Law, Collection of Conventions (1951-1980) 76.

<sup>4</sup> Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Done at The Hague on 18 March 1970, Collection of Conventions (supra, n. 3) 152.

<sup>5</sup> D. I. 1. 1. 2: „...publicum ius est quod ad statum rei Romanae spectat, privatum, quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privatim...“ See Max KASER, ‚Ius publicum‘ und ‚ius privatum‘: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte – Romanistische Abteilung* 103 (1986) 1 seq.

ancient Roman law, was regarded either as a subsidiary source of law supplementing the local statutes and customs, or at the least as a common reference which provided guidance for the framing of legal concepts and classifications.<sup>6</sup> Since 1800 this model of the *ius commune* has given way to a nationally confined body of law for each independent country.

Although perceived less clearly this development has also grasped the common law world. While the split between the English and the American common law is more than a hundred years old the declaration of many Commonwealth countries to terminate the supreme jurisdiction of the Privy Council gives clear evidence of a nationalisation of the law including private law which takes place in many Commonwealth countries. But that linkage with the nation state is of course most visible in the codifications of private and commercial law which have been enacted in civil law countries all over the world, from Russia across Europe to Argentina and from Japan across the Muslim countries to Brazil and Quebec.

As pointed out above, history tells us that the administration of private justice is not by necessity confined to national boundaries. And it goes without saying that the national confinement of private law generates growing and tremendous costs in an era of flourishing transborder commerce. However, the resulting quest for the international unification of private law often meets basic objections derived from the alleged epistemological unity of the existing private law systems. The interconnections between the court system, the legal education, the structure of the legal profession, the hierarchy of the sources of law, the role of academic analysis, the method of legislation, and the way to think about law are said to be so much tied together in a given country that the resulting fabric is more or less immune against international harmonisation. Such harmonisation is supposed to be doomed to failure because it can only create uniformity of texts and not of the living law. In this view the resulting situation of the law would be a uniformity on the face while the basic differences of the legal systems subsist.<sup>7</sup> We therefore have to ask for the particular features of legal systems which may render their national confinement inevitable. Put in other words: is there an inherent national dimension in private law? One could think of several aspects of the law to which it is linked and which merit discussion:

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<sup>6</sup> For the different concepts of *ius commune* see Paul NÈVE, (Europäisches) *Ius Commune* und (nationales) *gemeines Recht*: Verwechslung von Begriffen? In: Gerhard KÖBLER/Hermann NEHLSSEN (eds.), **Wirkungen europäischer Rechtskultur** – Festschrift für Karl KROESCHELL zum 70. Geburtstag (1997) 871-884.

<sup>7</sup> See e.g. Pierre LEGRAND, **Fragments on Law-as-Culture** (1999) 77, 104; id., Counterpoint: Law is also Culture, in: Franco FERRARI (ed.), **The Unification of International Commercial Law** (1998) 245, 250 seq.; Geoffry SAMUEL, **English Private Law in the Context of the Codes**, in: Mark VAN HOECKE/François OST (eds.), **The Harmonisation of European Private Law** (2000) 47 seq.

- The interests of the parties. There are of course some types of litigation which typically involve public or national interests. This is true for review proceedings in administrative law where a public authority is always a party. Ever since the sovereign states have monopolised the prosecution of crimes, a similar observation can be made with regard to criminal law. But it certainly does not apply to litigation in private law or matters where the national interests are involved only by way of exception.

- The values expressed in legal norms. It was widely assumed throughout the 19<sup>th</sup> and in part of the 20<sup>th</sup> century that the national law gives expression to national preferences, that it is not just the result of a legislative process conducted in particular institutions but that it is deeply rooted in the national character. The legislative materials of the German Civil code give evidence of this line of argument. While the German population, before 1900, had lived with a great many different regimes of private law including the Austrian and the French civil codes which were in force in parts of Germany it follows very clearly from the legislative materials of the BGB that its authors were looking for solutions which could be said to be inherently German. A similar line of thought can still be traced in the first edition of the influential introduction to comparative law published by *Zweigert* and *Kötz*. In that edition they try to characterise the so-called legal families or legal traditions, not only by their institutions, the hierarchy of legal sources and some other general features of the respective legal systems, but also by specific legal rules and institutions which were thought to be peculiar and even characteristic for the respective legal tradition. Thus, the authors chose the trust as typical for the common law<sup>8</sup>, the so-called abstraction principle which separates the agreement on the transfer of title from the underlying sales contract as typical for the Germanic systems<sup>9</sup>, and the discriminatory treatment of illegitimate children as typical for the Romanic legal systems.<sup>10</sup> For good reasons these parts were dropped in later editions. While the trust may create some problems in civil law systems, the legislation of the principality of Liechtenstein<sup>11</sup> and the more recent ratification of the Hague Trust Convention by Italy<sup>12</sup> demonstrate that the trust can be accommodated in civil law systems. The discrimination of children born out of wedlock in the Romanic legal systems clearly was a consequence of the strong

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<sup>8</sup> Konrad ZWEIFERT/Hein KÖTZ, *Einführung in die Rechtsvergleichung* vol. 1 (1st ed. 1971) 328 seq.

<sup>9</sup> ZWEIFERT/KÖTZ (supra n. 8) 213 seq.

<sup>10</sup> ZWEIFERT/KÖTZ (supra n. 8) 148 seq.

<sup>11</sup> See arts. 897 seq. and 932a seq. of the Law on Persons and Companies (Personen- und Gesellschaftsrecht) of 20 January 1926, Landesgesetzblatt (LGBL.) 1926 Nr. 4 and LGBL. 1928 Nr. 6.

<sup>12</sup> See the Convention on the Law Applicable to Trusts and on their Recognition, Done at The Hague on 1 July 1985, approved by the Italian Law of 9 October 1989 n. 364, Gazzetta Ufficiale, Supplemento Ordinario no. 261 of 8 Novembre 1989, p. 135 with the authentic French and English version.

influence that the Roman catholic church had on those legal systems. When that influence diminished in the 1970s the modernisation of the southern European societies also implied the end of that discrimination. In summary, the impact of the national spirit on private law does not appear to be a significant factor for its particular content any more, or, as the Danish professor *Ole Lando* put it with regard to business law: “commercial law is not folklore.”<sup>13</sup>

- The language of the law. There is no law without language, and the content of a legal rule, i. e. the content of a prohibition or prescription very much depends on the words employed. It is therefore undoubtedly true that law expressed in several languages is less precise since the different linguistic forms are liable to divergent interpretations. But precision is not the only and ultimate goal of legislation and adjudication, and a multi-linguistic environment is not in itself an obstacle to the efficient unification or harmonisation of the law. This is not only demonstrated by a great number of international conventions which are authentic in several languages. A considerable number of highly sophisticated national legal systems such as Belgium, Canada, Finland or Switzerland give evidence of the possibility of multilinguistic legislation.

- Remains the institutional framework of legislation, adjudication and legal education, i. e. the network of legislative bodies, government institutions and interest groups surrounding them, of courts, tribunals and organisations of the legal professions, of law schools and scholarly organisations. As time goes by these institutions produce specific procedures and ways of interacting which become a distinctive feature of a legal system conceived as a framework of communication between lawyers. In this sense legal systems may indeed be regarded epistemological units which favour the internal communication, but sometimes impede communication between different units thereby making harmonisation more difficult. While this is true it follows from the same line of reasoning that these difficulties can be overcome to a great extent by the creation of a common institutional structure for legislation, adjudication and legal education. Unlike most other integration endeavours the European Community is endowed with such institutions.

In summary it can be said that there is very little in a legal system which could be characterised as a distinctive national feature immune against influences coming from outside. The most stabilising effects flow from the institutions and procedures which shape the way lawyers communicate and think about law. The harmonisation of laws therefore should be supplemented if possible by the creation of public or private institutions that watch over the application of the harmonised law and try to maintain the spirit of harmony.

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<sup>13</sup> Ole LANDO. *Unfair Contract Clauses and a European Uniform Commercial Code*, in: Mauro CAPPELLETTI (ed.), *New Perspectives for a Common Law of Europe* (1978) 267. 285.

### 3. International conventions

The reduction of private law to the nation state which occurred throughout the 19<sup>th</sup> century increased the consistency and uniformity of the law at the national level. But the price that had to be paid in turn was high: the communication lines with other legal systems were more or less cut off, and international trade which was flourishing in the aftermath of the industrial revolution was left alone with the problems created by the divergencies between national laws. All over the world the legal systems reacted in three ways:

- *Legal scholarship* turned to comparative law as a new scholarly discipline conceived to knit new communication lines between the national legal systems;

- *legal practice* tried to increase the foreseeability of the outcome of litigation in transborder cases. To this end it focussed on a new legal discipline which promised to overcome, if not the divergencies between national substantive laws, then at least the disturbing impact they might have on the stability of the legal framework of transborder transactions; the basic idea of the new discipline was that each case should be referred, by appropriate conflict rules, to one and the same national legal system which would be applicable irrespective of the country of litigation. Thus, private international law is a fruit of the same tree as the nationalisation of private law.

- Pushed by commercial interest groups *governments* try to improve the framework of international trade by negotiating treaties on the unification of certain areas of private law and in particular of commercial law. Here again, the impact of the nationalisation of private law becomes visible: while the interests involved in private litigation are those of private individuals and companies, they had to be translated as it were into national interests which form the object of negotiations at diplomatic conferences.

The unification and harmonisation of private law by means of international conventions can be regarded as a forerunner to the present europeanisation process. It goes back to the 1880s when the first uniform law conventions were adopted in the fields of industrial property law<sup>14</sup> and rail transport<sup>15</sup>. Ever since, uniform law has extended to other areas, such as bills of exchange and promissory notes, agency and the sale of goods, financial leasing and factoring, maritime and airborne transport, compulsory car insurance and innkeepers liability, road transport and copyright etc.<sup>16</sup> While the contracting states, in many of these conventions, have agreed on uniform laws, there are other treaties

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<sup>14</sup> Convention d'Union pour la protection de la propriété industrielle, Done at Paris on 20 March 1883, Reichsgesetzblatt 1903, 147; see Léon POINSARD, *Etudes de droit international conventionnel* (1894) 558 seq.

<sup>15</sup> Internationales Übereinkommen über den Eisenbahn-Frachtverkehr, Done at Berne on 14 October 1890, Reichsgesetzblatt 1892, 793; see POINSARD (supra n. 14) 151 seq.

<sup>16</sup> For a – partly outdated – collection of such conventions see Konrad ZWEIGERT/Jan KROPHOLLER (eds.), *Sources of International Uniform Law* vol. I-IV (1971 – 1979).

such as the so-called Hague Rules on bills of lading which rather provide for a harmonisation by allowing the contracting parties to implement the rules of the convention in a form appropriate to the national legislation.<sup>17</sup>

In the course of the 20<sup>th</sup> century, a great number of international institutions have been founded which deal with the harmonisation or unification of private law. Most of them are responsible for specific areas of the law; this is for example true with regard to the World Intellectual Property Organisation and the International Labour Organisation, both at Geneva, the International Civil Aviation Organisation at Montreal, the International Maritime Organisation at London, the International Telecommunication Union at Geneva etc. There are others such as the International Institute for the Unification of Private Law (UNIDROIT) at Rome or the United Nations Commission on International Trade Law at Vienna which bear responsibility across the whole area of private or commercial law to the effect that their work may overlap with that of other institutions. The institutionalisation has given considerable momentum to the unification process which may appear to some as a self-propelled movement.

On the other hand it is difficult not to see the limitations of the unification of private law by international conventions. The instrument of the international treaty needing national ratifications to take effect had been conceived as a tool for unification in the small and clearly arranged world of the so-called civilised nations in the 19<sup>th</sup> century. It proved more and more ineffective as the number of independent states grew beyond one hundred after the Second World War. Today, diplomatic conferences convened for the adoption of a universal treaty are attended by hundreds of people. Under such circumstances negotiations are less intense, and governments later do not necessarily feel an obligation to take the necessary steps for the ratification even if they have approved the treaty by their own signature. As a consequence, only very few conventions are ratified by a large number of states, and this only after tedious ratification procedures. Very often, the unification brought about by a treaty remains patchwork. Moreover, the great number of exceptions and reservations allowed by most conventions, and the lack of a uniform interpretation have given rise to serious doubts about the objective of unification as such.<sup>18</sup>

In the framework of the European Union the use of Community law instruments, procedures and institutions avoids many of the drawbacks outlined above.

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<sup>17</sup> See the Protocol of Signature of the International Convention for the Unification of Certain Rules Relating to Bills of Lading, Done at Brussels on 25 August 1924, English translation reproduced in Heinz PRÜSSMANN/Dieter RABE, *Seehandelsrecht* (3rd ed. 1992) 723.

<sup>18</sup> Cf. Hein KÖTZ, *Rechtsvereinheitlichung – Nutzen, Kosten, Methoden, Ziele: **RabelsZ*** 50 (1986) 1 seq.

#### 4. The bases of private law legislation in the European Community

It is not possible to understand the contribution of the European Community to private law without having some knowledge of its goal and of its constitutional structures. The initial objective of the European Community was not the harmonisation or unification of laws, but the integration of markets. This overall target is to be achieved by the implementation of the so-called basic freedoms, i. e. the free movement of goods, the free movement of workers, the freedom of establishment, the free movement of services and the free movement of capital. Single provisions of the Rome Treaty which are connected to these specific freedoms empower the community to enact implementing legislation which is above all designed to remove barriers imposed by national law. The basic freedoms are supplemented by a uniform law against restrictions of competition (arts. 81 and 82 EC) conceived to prevent private market actors from continuing national market barriers by private agreement. Here again, a specific basis of legislation authorises the Community to adopt implementing legislation. Later amendments to the Rome Treaty which were agreed in the Single European Act, the Treaty of Maastricht and the Treaty of Amsterdam have added further legislative bases for specific policy areas. The resulting picture of Community competences looks like a patchwork, at least at first sight. Unlike many constitutions of federal states the Treaty does not provide for a comprehensive legislative competence in respect of any familiar area of the law, whether contract law or company law, whether commercial law or private law. Instead, a great many isolated provisions confer legislative powers upon the Community whose scope is defined by language which is rather borrowed from economics and politics than from traditional legal concepts. It is up to the European Commission to find the proper legal basis for each of its legislative proposals.

The various legislative bases of the Treaty have two things in common: they determine the legislative procedure to be followed, and they define the type of act which may be adopted. As to the legislative procedure, the provisions usually lay down the right of initiative which in most cases is vested in the Commission, the type of majority that is required in the Council, and the involvement of the European Parliament which has a right of consultation, co-determination or co-operation as the case may be. The legislative bases of the Treaty also differ with regard to the type of enactment allowed. Some provisions do not admit the adoption of anything else than a directive which does not have direct effect, art. 249 (3) EC, while others authorise the Community to take "measures", a term which at least includes the five types of enactment listed in art. 249 EC and thereby also regulations having a direct effect in the Member States. It goes without saying that a comprehensive legislation and in particular a codification of any area of the law is only conceivable in the form of a regulation.

The Community's powers to legislate in the field of private law essentially flow from the following provisions. While art. 94 EC used to be the key basis for the approximation of laws that affect the establishment of the Common Market, the requirement of a unanimous decision of the Council has increasingly proven to be an obstacle as the number of Member States increased. The Single European Act therefore introduced art. 95 for the achievement of the internal market. As opposed to art. 94 this provision allows for the adoption of all kinds of measures which may be taken by a qualified majority. However, its scope is limited by the exceptions concerning the free movement of persons and labour law contained in art. 95 (2) EC. With regard to company law, art. 44 (2) (g) has served as a basis for a considerable number of directives<sup>19</sup>. Its scope is broad enough to include most issues of company law, but has to be demarcated from art. 95 EC in respect of matters relating to capital market law. By the Treaty of Amsterdam the new Title IV has been introduced into the EC Treaty. It includes art. 65 which explicitly empowers the Community to legislate in the field of international civil litigation, of private international law, and of the law of civil procedure.<sup>20</sup> According to the heading of Title IV that legislation should be related to the free movement of persons, but the acts which the Community has adopted so far go far beyond those limits<sup>21</sup>. The crucial question raised by art. 65 is whether it allows the Community to regulate the conflict of laws in relation to non-Member States or whether those relations are left to the competence of the Member States. Another more recent legislative basis is art. 153 EC which often is deemed to be essential for consumer protection. A closer look at art. 153 (3) reveals, however, that this provision is mainly conditional upon art. 95 EC and confers very few additional powers upon the Community. It is rather significant as a statement of principle than as a legislative basis. Finally, art. 308 EC has proven to be of particular relevance to private law. It is subsidiary to other legislative bases and therefore, in the light of arts. 94 and 95 EC, it is of no avail in matters concerning the approximation of national laws. But it does provide a useful basis for Community legislation implementing legal institutions like the

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<sup>19</sup> See the reproduction of the instruments in Jürgen BASEDOW (ed.), **European Private Law – Sources** vol. 1 (1999) 3 – 391; for the extent of that legislative competence cf. G.-J. VOSSESTEIN, *De bevoegdheid van de Europese Gemeenschap tot regeling van het vennootschapsrecht*: **Weekblad voor privaatrecht, notariaat en registratie** 2002, p. 247 seq.

<sup>20</sup> See e. g. Bernd von HOFFMANN, *The Relevance of European Community Law*, in: *id.* (ed.), **European Private International Law** (1998) 19 seq.; Jürgen BASEDOW, *The Communitarization of the Conflict of Laws under the Treaty of Amsterdam*: **Com. Mkt. L. Rev.** 37 (2000) 687 seq.; Oliver REMIEN, *European Private International Law. The European Community and its Emerging Area of Freedom, Security and Justice*: **Com. Mkt. L. Rev.** 38 (2001) 53 seq.

<sup>21</sup> See the first five Regulations in Jürgen BASEDOW (ed.), **European Private Law – Sources** vol. 3 (2002) 703 – 955.

Community trade mark<sup>22</sup> or the European economic interest grouping<sup>23</sup> which are created outside the existing institutions of national law.

### 5. Achievements of the European Community in the area of private law

It follows from the scattered legislative bases and their linkage to specific Community policies that Community acts in general do not respect the borderline between public law and private law. In this respect, many measures may be regarded as mixed acts. Thus, the directives implementing the internal insurance market are essentially focussed on public law, dealing with approval of premiums and conditions by state bodies, regulations of the investment practices of insurance companies, powers of the supervisory authorities etc.; at the same time they also rule on some aspects of the insurance contract such as the right of the insured to withdraw his/her consent and information requirements as between the parties.<sup>24</sup> In more recent years, however, the number of “pure” private law instruments has increased. A collection of those acts in three volumes contains about 70 regulations and directives.<sup>25</sup> They come under such diverse areas as company law, labour law, (consumer) contract law and liability, commercial communication, copyright and industrial property, data protection, private international law and international civil litigation. The most recent accomplishments are regulations on the statute for a European company<sup>26</sup> and on Community designs<sup>27</sup>. While some of the instruments such as the latter regulations are fairly detailed and comprehensive in style, others deal with single issues of a very limited scope arising in the context of contract law or labour law. While they appear as pointillistic and overly narrow the continuous increase in number of such acts has by and by evoked the impression of a growing general pattern of European company law<sup>28</sup>, European labour law<sup>29</sup> or European consumer law.<sup>30</sup> Such book titles should not obscure

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<sup>22</sup> Regulation 40/94/EC of 20 December 1993, O. J. 1994 L 11/1, BASEDOW (supra n. 21) 426.

<sup>23</sup> Regulation 2137/85/EEC of 25 July 1985, O. J. 1985 L 199/1, BASEDOW (supra n. 19) 316.

<sup>24</sup> See in particular the second and the third non-life insurance directives: Directive 88/357/EEC of 22 June, 1988, O. J. 1988 L 172/1; Directive 92/49/EEC of 18 June 1992, O. J. 1992 L 228/1, and the second and third life assurance directives: Directive 90/619/EEC of 8 Novembre 1990, O. J. 1990 L 330/50; Directive 92/96/EEC of 10 Novembre 1992, O. J. 1992 L 360/1.

<sup>25</sup> See Jürgen BASEDOW (ed.), **European Private Law – Sources** vol. 1-3 (1998-2002).

<sup>26</sup> Regulation (EC) 2157/2001 of 8 October 2001, O. J. 2001 L 294/1.

<sup>27</sup> Regulation (EC) 6/2002 of 12 December 2001, O. J. 2002 L 3/1.

<sup>28</sup> Vanessa EDWARDS, **European Company Law** (1999).

<sup>29</sup> Dieter KRIMPHOVE, **Europäisches Arbeitsrecht** (1996).

<sup>30</sup> Norbert REICH, **Europäisches Verbraucherrecht** (3rd ed. 1996); Stephen WEATHERILL, **EC Consumer Law and Policy** (1997).

the fact, however, that the European legislation in none of these areas is systematic and that each instrument has to be embedded in the contexts of different national laws which determine its significance to a large extent.

## 6. The implementation of directives

In the field of private law, only some of the Community Acts are regulations, most are directives. In terms of art. 249 (3) EC they are binding upon the Member States as to the result to be achieved, but “leave to the national authorities a choice of form and methods.” The European Court of Justice has pointed out that directives as opposed to regulations are not liable to be directly applied as far as horizontal relations which are characteristic for private law are concerned.<sup>31</sup> Put in other words it is not the directive alone that counts for practical purposes, but its implementation in the legal system of a given Member State. The legislative process is split up into two phases, the first at the Community level and the second within the single Member States. Only the first phase produces a uniform text whereas the second gives way to all kinds of national distortions. Although they are diminished by the duty of the courts to interpret the national law in conformity with the directive<sup>32</sup> the differences in form and content that remain after harmonisation has taken place are still considerable.

This can be illustrated by the implementation of Directive 93/13 on unfair terms in consumer contracts.<sup>33</sup> The directive has been implemented in very different forms: in the national civil code in Germany, Italy and the Netherlands; in a special consumer code in Austria, France, Greece and partly in Finland and Spain; in the General Contract Act in Denmark, Finland and Sweden, in special statutes on commercial practices in Belgium, on consumer contracts in Sweden and on general conditions of contract in Portugal and Spain, and finally in statutory instruments which almost literally copy the directive in the United Kingdom and Ireland.<sup>34</sup> While some of these instruments just like the directive are limited in scope to consumer transactions (e. g. France, Italy), others are equally applicable to commercial contracts (Germany, Netherlands). The annexe of the directive which contains “an indicative and non-exhaustive list of the terms which may be regarded as unfair” (art. 3 (3) ) has been transformed into a binding black list in Member States such as Germany or Austria while the Scandinavian countries have not implemented

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<sup>31</sup> ECJ, judgment of 14 July 1994, case C-91/92 (*Paola Faccini Dori vs. Recreb Srl*), [1994] E. C. R. I – 3325, paras. 22-25.

<sup>32</sup> ECJ, judgment of 10 April 1984, case 14/83 (*von Colson and Kamann vs. Land Nordrhein-Westfalen*) [1984] E. C. R. 1891, para. 26.

<sup>33</sup> Directive 93/13/EEC of 5 April 1993, O. J. 1993 L 95/29, BASEDOW (supra n. 25) vol. 2 (2000) 140.

<sup>34</sup> See the comparative survey in *Münchener Kommentar zum Bürgerlichen Gesetzbuch* vol. 1 (4th ed. 2001) **Einl. AGBG** nos. 22-38.

that annexe at all. It would be easy to give further examples of divergent implementation. As a result it still is difficult or impossible for a foreign lawyer to ascertain the state of the law in a given Member State even after harmonisation. All that can be said is that certain minimum standards are guaranteed across the Community. But it is by no means easy to find the law and to assess their true significance which often depends from general concepts and principles and systematic structures of the respective legal system.

Another consequence of the implementation of private law directives are tensions with the structure of the existing national legislation. An illustration is given by Directive 1999/44 on the sale of consumer goods and associated guarantees.<sup>35</sup> Under this directive which is only applicable to consumer transactions, the buyer has a right of repair of defective goods as the first and primary remedy. The former German law of sales which did not differentiate between commercial and consumer sales granted the buyer only the right of cancellation of the contract or of reduction of the price, but no right of repair. A correct implementation of the directive could have been effected by a special statute on consumer sales which however would have further undermined the practical significance of the civil code. The alternative implementation in the civil code was not possible without restructuring the code by introducing a new chapter on consumer sales which many regarded as contrary to the spirit of the civil code. Having the choice between two equally painful options the German legislator decided in favour of the latter and even went a step further; Directive 1999/44 has in fact triggered a general overhaul of the German law of remedies for breach of contract.<sup>36</sup>

These observations point to the need of a more general approach. The piecemeal legislation of the Community cannot cope with divergencies resulting from the context of national law and in particular with differences in structure, principles and concepts. The harmonisation of the general framework which accommodates specific instruments could be carried out by the courts (*infra* (7.) and by legal scholarship (*infra* 8.).

## 7. The contribution of the European Court of Justice

Even if the harmonisation by means of directives has serious deficits and encounters severe criticism it has one advantage for sure: it increases the so-called *acquis communautaire* which is subject to the jurisdiction of the Court of Justice. More and more national judges make effectively use of the reference procedure under art. 234 EC and submit preliminary questions concerning the

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<sup>35</sup> Directive 1999/44/EEC of 25 May 1999, O. J. 1999 L 171/12, BASEDOW (*supra* n. 25) vol 2 (2000), 452.

<sup>36</sup> Gesetz zur Modernisierung des Schuldrechts of 26 Novembre 2001, Bundesgesetzblatt I, 3138.

interpretation of directives and regulations to the Court in Luxembourg. Thus the Court of Justice is increasingly often enabled to state general principles which would allow to fill gaps of the single instruments and to interpret them in a consistent way. It is well known that the Court of Justice has in fact made important contributions to the development of Community law by referring to and developing further general principles of law.<sup>37</sup> While the treaty mandates the application of “general principles common to the laws of the Member States” only in the case of non-contractual liability of the Community for damage caused by its institutions or by its servants in the performance of their duties, see art. 288 (2) EC, the Court has repeatedly declared that those general principles form part of Community law in other areas as well. Thus, the Court has developed a doctrine of fundamental rights and principles such as proportionality or legal certainty which may generate rather precise legal rules as the case may be.

But so far the Court has appeared to be rather unwilling to use its creative powers when dealing with the interpretation of directives. The preliminary rulings on the secondary Community law are short and very often enigmatic; they seldom go beyond the text and the recitals of the single act to clarify its meaning. The Court clings to the preliminary question posed by the national judge and does not appear inclined to develop the terrain by what may appear to be *obiter dicta*. Arguments which draw upon the position of a specific enactment in the context of Community law as a whole or upon international developments as assessed by comparative analysis will usually be ignored. An illustrative example is given by the Court’s ruling in *Simone Leitner vs. TUI Deutschland*<sup>38</sup>. The Court had to decide whether a compensation claim against a package tour operator under Directive 90/314<sup>39</sup> included a payment for pain and suffering sustained by the Austrian plaintiff who was served bad food during her holiday arranged by the defendant tour operator in a Turkish hotel. In a well-founded opinion the Advocate General Tizzano had proposed an affirmative answer relying on the language of Directive 90/314, on arguments derived from other Community directives, and on an outline of recent legal developments as expressed in international conventions and national legislation.<sup>40</sup> While approving the proposal of the Advocate General the Court of Justice only took up the arguments inherent in the directive under scrutiny.

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<sup>37</sup> See Takis TRIDIMAS, *The General Principles of EC Law* (1999).

<sup>38</sup> ECJ, judgment of 12 March 2002, case C-168/00 (*Simone Leitner vs. TUI Deutschland GmbH & Co KG*), not yet reported in E.C.R., *Europäische Zeitschrift für Wirtschaftsrecht* 2002, 339.

<sup>39</sup> Directive 90/314/EEC of 13 June 1990, O. J. 1990 L 158/59, BASEDOW (supra n. 25) vol. 2 (2000) 94.

<sup>40</sup> Not yet reported in E.C.R., see <<http://www.curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>> and click case no. C-168/00.

Bone-dry opinions like that in *Simone Leitner* are not likely to arouse the reader's enthusiasm for European private law. What is worse, the Court forgoes the chance to guide the development of European private law by indicating principles of a general purview. As long as the Court continues to act with such a restraint the development of the badly needed general principles is exclusively incumbent on legal scholarship. It is to be hoped that the academic efforts reported below will encourage the Court of Justice sooner or later to look beyond the narrow questions submitted by national judges on the interpretation of private law directives.

### 8. General principles

Work on some kind of horizontal instrument in the field of obligations started as early as 1980. With the financial support of the European Commission a group of scholars chaired by the Danish Professor *Ole Lando* set out to deliberate upon and state a list of general principles of contract law.<sup>41</sup> The method employed by this group was that of the American Restatements of the law prepared since the beginning of the last century by the American Law Institute<sup>42</sup>. The primary purpose was to reproduce the common rules and principles of the law. In so far as the positive legal rules of the various legal systems differ, the reproduction by necessity implies a change of the law of some legal systems. In such cases the restatements do not necessarily follow the majority of the legal systems compared but try to improve the law by adopting what is thought to be the best solution.<sup>43</sup> The rules and principles which resulted from this work have been formulated and arranged in the rather succinct and systematic style of continental statutes. Parts I and II of the rules dealing with general contract law have already been published<sup>44</sup>, part III which will cover some issues of the general law of obligations is supposed to follow shortly<sup>45</sup>. Like their American counterparts, the rules are supplemented by comments which explain their content, purpose, and possible application. In addition, the European principles of contract law contain notes on the comparative background of the rule or principle in question.

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<sup>41</sup> See Ole LANDO/Hugh BEALE (eds.), **Principles of European Contract Law – Parts I and II** (2000), XI.

<sup>42</sup> See David CLARK, The Sources of Law, in Tuğrul ANSAY/David CLARK (eds.), **Introduction to the Law of the United States** (1992) 33, 45; for a closer analysis see Alan SCHWARTZ/Robert SCOTT, The Political Economy of Private Legislation; **U. Pa. L. Rev.** 143 (1995) 595 seq.

<sup>43</sup> Roy GOODE, International Restatements of Contract and English Contract Law; **Uniform L. Rev.** 1997, 231, 234.

<sup>44</sup> See above at n. 41.

<sup>45</sup> A part of part III dealing with prescription has already been published in German, see **ZEuP** 2001, 400 seq. and Reinhard ZIMMERMANN, Grundregeln eines europäischen Verjährungsrechts und die deutsche Reformdebatte: **ZEuP** 2001, 217-222.

While the Commission on European Contract Law has certainly made the greatest progress in its work it is by no means the only group of scholars devoted to the elaboration of general principles. There are other groups dealing with tort law<sup>46</sup>, with insurance contract law<sup>47</sup>, with the law of trusts<sup>48</sup>, and with private international law<sup>49</sup>. The most recent off-spring of this movement is a group on European family law<sup>50</sup>. They all seem to share the same basic approach: unlike previous research they are not restricted to a comparative analysis of the existing legal rules in the various Member States, but are openly promoting harmonisation or unification by drafting and discussing common rules. It is this shift of focus which may appear as a kind of scholarly activism. But it may also be interpreted as a kind of substitute for the scholarly preparation of laws and the formulation of long term policy perspectives which are essentially lacking at the level of the European Community institutions.

As of now, the final outcome of all this work is unpredictable. Will the European Court of Justice make use of the general principles of private law when interpreting regulations and directives? Will they be taken into account by the European Commission in its legislative proposals? It is too early for a clear answer, but some recent events give rise to a certain optimism.

### 9. Outlook: A European civil code?

While the European Parliament has repeatedly supported the idea of a comprehensive Community legislation on contract law or even private law in general<sup>51</sup> the power to initiate legislative proceedings leading to the adoption of such an enactment is exclusively vested in the Commission. The European Commission had however been sceptical about any kind of horizontal legislation in private law for a long time and had even questioned the Community's competence for such an act.<sup>52</sup> All the greater was the general

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<sup>46</sup> Cf. J. SPIER/O. HAAZEN, The European Group on Tort Law ("Tilburg Group") and the European Principles of Tort Law: **ZEuP** 1999, 469 seq.

<sup>47</sup> See Malcolm CLARKE, First Working Session of Project Group "Restatement of European Insurance Contract Law" on 10 September 1999 in Innsbruck, Austria: **Journal of the British Insurance Law Association** 2000 no. 102, p. 31.

<sup>48</sup> D. J. HAYTON/S.C.J.J. KORTMANN/H.L.E. VERHAGEN, **Principles of European Trust Law** (1999); see also "Principles of European Trust Law": **ZEuP** 1999, 748 with an introduction by HAYTON/KORTMANN/VERHAGEN.

<sup>49</sup> See the homepage of the European Group for Private International Law: <<http://www.drt.ucl.ac.be/gedip>>

<sup>50</sup> See "Gründung der Kommission für Europäisches Familienrecht": **ZEuP** 2002, 194; see the homepage: <<http://www.law.uu.nl/priv/ccfl>>.

<sup>51</sup> See the Resolution of 26 May 1989, O.J. 1989 C 158/400, and the Resolution of 6 May 1994, O. J. 1994 C 205/518.

<sup>52</sup> See e. g. the former Commissioner Martin BANGEMANN, *Privatrechtsangleichung in der Europäischen Union*: **ZEuP** 1994, 377, 378; concurring the opinion expressed by the former

surprise when the Commission published, in 2001, a communication on European contract law which for the first time openly asked whether and how the Community shall deal with contract law in Europe.<sup>53</sup>

The communication gives a comprehensive account of the existing legislation embedded in both Community acts and international instruments and outlines four options for future EC initiatives in contract law. While the first option is headed as “no EC action” it would rather consist of “business as usual”, i. e. a continuous piecemeal legislation in response to current needs. The second option suggested by the Commission was the promotion of the development of common contract law principles leading to more convergence of national laws. The third option would consist in the improvement of the quality of legislation already in place which would essentially come down to a consolidation of existing acts, e. g. in an EC consumer code. As a fourth option the Commission considers the adoption of a comprehensive legislation at EC level comprising provisions on general questions of contract law as well as specific contracts.

The communication of the Commission has triggered a lively discussion and more than 160 reactions from governments, business, consumer associations, legal practitioners and academics.<sup>54</sup> While most of them assess the perspective of a European contract act as overly futuristic, many responses display a favourable attitude towards some kind of consistent Community action in this field. The European Parliament is much more demanding. In a further resolution on the approximation of the civil and commercial law of the Member States it has suggested an action plan which would culminate as from the year 2010 in the establishment and adoption of a body of rules on contract law in the European Union.<sup>55</sup>

It is uncertain and not very likely that the European Commission will adopt this view. But there are Commission statements which indicate that the Commission will endorse a policy which aims at the elimination of those divergencies between national contract laws which have turned out to be impediments to the functioning of the Internal Market. In a recent report on the state of the internal market for services the Commission points out that the communication on European contract law has resulted “in the identification of numerous problems with the functioning of the Internal Market, resulting from

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Director of the European Commission responsible for the harmonization of laws Ivo SCHWARTZ, *Perspektiven der Angleichung des Privatrechts in der europäischen Gemeinschaft: ZEuP* 1994, 559, 570.

<sup>53</sup> COM (2001) 398 fin., O. J. 2001 C 255/1.

<sup>54</sup> See <[http://europa.eu.int/comm/consumers/policy/developments/contract\\_law/ comments /index\\_en.html](http://europa.eu.int/comm/consumers/policy/developments/contract_law/ comments /index_en.html)>.

<sup>55</sup> See the Resolution on the approximation of the civil and commercial law of the Member States (COM(2001)398), EP Document A 5-0384/2001 of 15 November 2001.

the legal regimes of Member States relating to contract law. These difficulties also affect services and especially financial services (such as the insurance sector in particular).<sup>56</sup> Given the work in progress conducted by the Restatement Group on European Insurance Contract Law it would not be surprising at all if the Commission gives its support to renewed efforts to harmonise insurance contract law in the European Community. This could be a first step which, in the long run, would almost certainly produce the need for a progressive harmonisation of general contract law.

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<sup>56</sup> Report from the Commission to the Council and the European Parliament on the state of the internal market for services presented under the first stage of the Internal Market Strategy for Services, COM (2002) 441 fin. of 30 July 2002, at 35 s.