A European private law as a mixed legal system

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A European Private Law as a Mixed Legal System

Towards a Ius Commune through the Free Movement of Legal Rules

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1. How to Arrive at a European Private Law?

The most striking development in private law over the past decade is undoubtedly its Europeanization. The desire to achieve a European private law has, apart from the much longer existing Directives legislation, resulted in an avalanche of scholarly publications,[1] a dozen or so new journals,[2] strong political stands by the various national and international organs and texts which are intended to serve as a first step towards a European *ius commune* of private law. If the tone set in these writings were all to go on, we would be inclined to think that the realization of a European private law may be just a matter of rules or principles drafted by designated committees or institutes. No longer the question as to *whether* a European private law is desirable, or even as to how such a law can be achieved, but rather the question as to *when* it will be realized, seems to prevail in many publications.

In this article, the desirability of a European private law is assumed. Its practical significance is evident: as a justification, it has been pointed out that if a proper internal European market is to be created, a uniform private law is a prerequisite.[3] This purely economic motive is usually exemplified by the situations in Italy and Germany in 1866 and 1900, respectively; in these countries, unification of the law came about after political and economic integration.[4] It is then said that integration and unification must go hand in hand. However, it is not just practical interest which makes unification necessary; it is also challenging academically to achieve a uniform private law which is capable of removing the alleged contradistinctions between Civil Law and Common Law.

What is disputed in this article, however, is *the way in which* a *ius commune*

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* A slightly different version of this article has been published in Dutch in 73 *Nederlands Juristenblad* (1998), p. 61 ff. I am grateful to Wies Rayar for helping me with the translation.

1 For an overview see E. Hondius, `General Introduction', in *Towards a European Civil Code*, (2nd. ed., Nijmegen, 1998), 13, supplemented by, e.g., De Groot/Schneider, in Bleckmann (ed.), *Europarecht*, 6 ed., (1997), 480 ff.

2 The following are published in the Netherlands: *Maastricht Journal of European and Comparative Law* (1994), *European Review of Private Law* (1993) and *Tilburg Foreign Law Review* (1991).

3 See, e.g., Taschner's and Hayder's articles in Müller-Graff (ed.), *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, (Baden-Baden, 1993), 155 ff.

4 Ole Lando, `Principles of European Contract Law', 56 *RabelsZ* (1992), 262.

must be achieved. It is in particular questioned if the way now commonly envisioned to arrive at a *ius commune* is the right one. To this end, first the current methods of integration and their inherent drawbacks must be examined. The major part of the article will be dedicated to pointing out an alternative road towards a European private law, a road much more in tune with the historical development of the *ius commune* which existed before the codifications, a *ius commune* so eagerly invoked by the present advocates of a European private law.

2. Current Methods of Creating a European Private Law: an Attempt at Categorization

Roughly speaking, the attempts at creating a European private law may be divided into three categories. All three are characterized by the authoritative imposition or formulation of rules or principles. The most familiar method is that of harmonization through Directives of the European Union. In the field of private law, this road has been followed, in particular, to effect uniform consumer protection: major examples are the Directives on doorstep selling (1985), product liability (1986), consumer credit (1986), package travel (1990), unfair terms in consumer contracts (1993) and time sharing (1993). It has been said that consumer protection is the motor of private law development within the European Union.[5] Its drive, however, is limited: directives result in European private law for a very limited area, which is also rather fragmentary. The result is `a Brussels brick here and there within the national private law building'.[6] The character of harmonization - the objectives are centrally formulated, but the way in which they are attained are at the discretion of the Member States - also entails that in first instance the Member States (read: their governments) are responsible for bringing their law in line with the directive. As a result of this embedding into national law however, it is difficult to establish, *after* a directive has been issued, whether and to what extent implementation and judicial interpretation have left uniformity intact.[7]

Incidentally, this first objection is not really felt within the various national private law systems. This is remarkable: one would expect isolated pieces of `European' law not only to be odd ducks among the national, organically grown private law order, but even to amount to viruses infecting the classical private law system. In practice, however, there is not such a big problem. Perhaps this can be explained as follows: on more than one occasion, it has been noted that consumer law has been conceived of as a collection of technical rules of a rather administrative law nature, rather than as `true'

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5 Winfried Tilmann, `Towards a European Civil Code', 5 *Zeitschrift für Europäisches Privatrecht* (1997), 595 ff. For an overview of directives see Peter-Christian Müller-Graff, `Private Law Unification by Means other than Codification', in *Towards a European Civil Code*, op. cit. 30 ff.

6 Oliver Remien, `Über den Stil des Europäischen Privatrechts', 60 *RabelsZ* (1996), 8.

7 See, for instance, Müller-Graff, op. cit., at 22 ff. For other objections to harmonisation through directives see Kapteyn/Verloren van Themaat, *Introduction to the Law of the EC*, 2nd ed., (Deventer, 1989), 478 ff.

private law.[8] If this line of reasoning is correct, the systematic organization of private law, which is mainly based on autonomy of the indiduals, is not affected by such rules. The argument that the pretensions to create a European private law have so far not gone beyond drafting rules of a more technical nature, *because* the traditional system is not affected by them, can however not be maintained. This brings us to the second way of establishing a European private law.

Secondly, more recently the idea has gained ground that a comprehensive European Civil Code (ECC) is feasible. The European Parliament has adopted resolutions, in 1989[9] and in 1994,[10] calling for unification of private law in the areas of major importance to the development of an internal market. As early as 1980, the Lando Commission, with financial support from the European Commission, has started the framing of the `Principles of European Contract Law.' The argument in favour of drafting these Principles, that thus the existing and future directives are provided with framework (`a common legal environment'), must however be taken with a grain of salt after what has been said earlier.[11] The true underlying reason is, of course, that unification is conducive to trade. The first article of the `Lando Principles'[12] states for that matter that they are meant as general principles of contract law in the EU, that they *will* be applied where parties so agree, and *may* be applied as an elaboration of the *lex mercatoria* or where the parties have not made a choice of law or where the applicable law does not offer a solution.

The Principles possess, therefore, the status of `soft law'. This is not saying much: the term `soft law' is a blanket term for all sorts of rules, which are not enforced on behalf of the state, but are seen, for example, as goals to be achieved.[13] The precise nature of the Lando Principles is not very clear. According to the Preamble, their purpose is rather modest, but in the majority of the now ample literature the Principles are treated as if they were a legal system, on an equal level with national law developed over centuries, which is capable by itself of resolving disputes. The solution offered by national law is in that case compared with the one provided by the Principles, although any applicable case law, based on the Principles, is still lacking. I do not shy away from defending the position that in the past few years, perhaps unconsciously, ideas on a European codification have taken a u-turn. Initially, the project of drafting Principles was seen as useful, be it without much practical value. Today, the Principles are considered by many authors as the forerunner of a European Civil Code, which will be not soft law, but a binding instrument imposed by the competent institutes of the

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8 See the discussion presented in Franz Bydlinski, *System und Prinzipien des Privatrechts*, (Wien, 1996), 718 ff. This is borne out by the fact that problems arise precisely in less consumer-oriented product liability regimes.

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

10 Resolution on the Harmonization of Certain Sectors of the Private Law of the Member States, O.J. EC 1994 C 205/518.

11 Lando, op. cit., at 265. Significantly, in the comments accompanying the Lando-draft directives are seldom cited.

12 Lando/Beale (eds.), *Principles of European Contract Law*, Part 1, (Dordrecht, 1995).

13 See Petar Šar_evi_, Unification and `Soft Law', in *Conflicts et harmonisation* (Mélanges Von Overbeek), (Fribourg, 1990), 91.

Union.[14]

Let me substantiate the above as follows: in the initial stages of the Principles project, there was not much concern for its possibly unifying effect. The Principles, it was thought, were not intended to create uniform law. But these days, perhaps because of the influence of the European Parliament's two Resolutions, the outlook is quite different. It is not just scholarly writers who are concerned about the Principles' `soft' status,[15] they are also a hot political item. At a recent conference entitled `Towards a European Civil Code',[16] which was held when the Netherlands was holding the Presidency of the European Council, almost the entire morning session was devoted to finding a possible legal base in Community Law for the authority to impose mandatory rules of private law; was a separate treaty needed, was article K3 of the `third pillar' the legal base, or could a legal base be found in Articles 100 and 100a EU Treaty? In short: the question was how to make mandatory law from soft law. The emphasis, therefore, was not on substantive private law aspects, but on the question of competence: the Principles could be incorporated, if necessary in an amended form, into a European codification *providing* a legal base was found in Community Law for *imposing* the Principles.

Thirdly, the more traditional unification method - through binding treaties - is also characterized by the imposition by the state of law on organs which have to implement it. I discuss this method in the last place, because virtually no uniform substantive property, contract or tort law has been created by this method. The reason for this is quite interesting: since, in order to be binding treaties, unanimity of the Treaty drafters and ratification by the national States are needed, they cannot play a major part in unifying private law.[17] Where, in a context other than a European, binding treaties have been entered into, this has resulted in either conforming to a single legal system (the Hague Conventions on the International Sale of Goods), or a flight into vague formulations by way of compromise (UN Convention on the International Sale of Goods [CISG]). It is quite remarkable that, whereas evidently where treaties were concerned the view prevailed that the differences between the systems were too great for achieving a successful unification through a *binding instrument*, now a quest has begun for a legal base in Community Law in order to coerce the ECC.

The current attempts to achieve a European private law can be characterized therefore as virtually totally *authoritarian*. The ECC is much more a political rather than a legal challenge. This is striking since, in the national systems, legal positivism has been given up for the most part. Even in The Netherlands, where with the introduction of the new Dutch Civil Code in 1992 a greater fixation on state-imposed rules could be expected, judges are afforded such a degree of discretionary freedom that it is in fact

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14 Cf. Daniela Caruso: The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration, 3 *European Law Journal* (1997), 12, who states that the ongoing project of European integration is now transforming the rediscovery of the ius commune from a mere intellectual curiosity to fashionable political discourse.

15 For instance, Müller-Graff, op. cit., at 27.

16 The Hague 28 February 1997. See on this *Nederlands Juristenblad* (1997), 637 ff. and *Zeitschrift für Europäisches Privatrecht* 5 (1997), 595 ff.

17 Cf. Gerhard Kegel, *Internationales Privatrecht*, 7th ed., (München, 1991), 60 ff.

the *courts* which determine the law. To accomplish a European private law by imposition is, in any case, not compatible with the legal *Zeitgeist*, because it is an expression of faith in a centralist political authority: the idea that the European Union is able to create uniform law, coupled to legal certainty and predictability, by merely introducing a uniform text, is - as Legrand has noted - a view straight from the Napoleonic era, a legacy of the simplified and mechanistic world view entertained by positivists.[18]

The mere fact that a mandatorily imposed European private law does not accord with the *Zeitgeist*, is not sufficient reason, of course, to give up the attempt to create a European private law. For further reflection, it is conducive to discuss below the arguments of the most outspoken opponent of a ECC, Pierre Legrand.

3. A Successful European Private Law?

Legrand, who, being a Canadian, has been privy to the strenuous relations between Anglo-American and continental-European law in his own country, has put forward his arguments against a European Civil Code in a number of articles.[19] His most important proposition is that merely drafting uniform *rules* does not result in uniform *law*. The law is, after all, much more than just formally uniformed rules: the meaning of a particular rule in a particular cultural and national context can only be established after studying that context. The legal *mentalités* within the various cultures are different, after all.[20] They are even irreconcilable in the case of continental and English law. Epistemologically, the reasoning in Common Law is inductive with an emphasis on facts and legal precedent; in Civil Law the focus is on systemization.[21] Whereas Civilian lawyers try to fit a legal decision into a logical system, Anglo-American jurists abhor formal rules and *consciously* choose to shun and counteract continental Civilian influence. This choice derives from unbridgeable differences: an English child is a *common-law-lawyer-in-being* long before it even knows whether it will read law.[22] No matter the degree of European legislation, an Englishman will see it with Common Law eyes, a Frenchman with Civilian. This has led Legrand to the poignant conclusion that `legal systems (...) have not been converging, are not converging and will not be converging.'[23]

Legrand backs up his argument that a uniform *text* lacking the necessary rationality and morality to effect it, will never lead to uniform *law*, with a number of

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18 Pierre Legrand, `Against a European Civil Code', 60 *Modern Law Review* (1997), 59: `the idea of a European Civil Code belongs to another era.'

19 Pierre Legrand, `European legal systems are not converging', 45 *International and Comparative Law Quarterly* (1996), 52 ff., same author, `Sens et non-sens d'un Code Civil Européen', *Revue Internationale de Droit Comparé* (1996), 779 ff, same author, `Against a European Civil Code', 60 *Modern Law Review* (1997), 44 ff.

20 Legrand 1996, at 60, cf. 1997, at 59: `jus is not reducible to lex'.

21 Legrand 1996, at 74, Legrand 1997, at 46 ff.

22 Legrand 1997, at 51.

23 Legrand 1996, at 61-62.

additional arguments.[24] For instance, the whole idea of a European codification is arrogant in his view, because it imposes on common lawyers the supposedly superior world view of continental lawyers. They each offer different accounts of reality and those preaching codification of private law consider the Anglo-American reality as without merit. A ECC is only in the interests of the European economy and consequently cultural differences must disappear. Furthermore, the suggestion that Europe with a ECC will return to a Golden Age of a true *ius commune* is misleading, because English law was never part of it.

What to say about this line of arguing? Legrand's argumentation can be assessed as correct in essence. There is indeed a difference between English legal style with its eye for detail and the continental style with its emphasis on abstraction. Legrand's observation that this is evidenced, for instance, by the way decisions are studied in the two *mentalités* is intriguing. Paraphrased and translated for the Dutch situation this means that for a Dutch person the facts and circumstances in *Lindenbaum* v. *Cohen* or in *Blaauboer* v. *Berlips* (two seminal cases of Dutch private law) are far less interesting than the Netherlands Supreme Court's decision in these cases. Those teaching at Dutch Universities (and the same is true for Germany, France or Italy) want their students to know the rule; the case itself comes second. Not so in England and the United States, where the legal rule cannot be separated from the facts. Beware the student who does not know the facts and circumstances of the case and is not able to compare it with other cases.[25]

On the basis of the above, Legrand rightly estimates that the chance of a successful ECC is very slight. As indicated earlier, a positivist world view does not fit with the times: how could uniform law spring from a single uniform text, where a common (legal) culture - the determining factor in the courts' construing and supplementing uniform provisions - does not exist in Europe? The requirement that the ECC must be interpreted according to its underlying principles rather than in conformity with national law, as is also customary in the case of treaties, is not very enlightning to legal practice.

Nevertheless, in my point of view Legrand's argumentation has a weak point. A more careful analysis reveals that he is not, in fact, against a European private law, but rather against a European Code imposed *authoritatively*, in which national cultural differences are `terrorized away' in a centralist fashion. The better part of his argumentation is aimed at this point.[26] Legrand's objections are thus to the point if a European private law were to be achieved in a centralist way, but not where other methods are concerned. Another method of establishing a *ius commune*, for instance through academic scholarship or European education, he feels, is illusory in view of the still present national legal positivism.[27] The third road, that of a European private law other than by centralism, is not really discussed by Legrand, apart from saying that

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24 Legrand 1997, at 56 ff.

25 Cf. Legrand 1997, at 49-50.

26 Although he also expressly denies the desirability (Legrand 1996, at 62). This does not seem to square with his own observations (Legrand 1997, at 62) where he questions understanding without `terrorizing' Civil Law and Common Law.

27 Legrand, 1996, at 53.

`difference (is) to act as the pertinent dialogical vehicle between European legal traditions.'[28]

I wish to prove in the subsequent section that a European private law *without* a centralistically imposed ECC, but without the loss of national cultural differences, is a feasibility. I will not refer to the alternatives presented earlier, such as the development of a new European tradition by scholars,[29] reverting back to the traditional *ius commune*,[30] mutual recognition by member-states of their national rules,[31] European legal education,[32] or the `discovery' of a *lex mercatoria*.[33] These methods have in common that they do not create European private law where it is needed - also in the vision of the European Parliament -: in *legal practice itself*. In my point of view, European private law must come into existence, because parties and courts applying the law, are convinced of its importance, and will develop it themselves.

4. Reception of Law: a Law and Economics Perspective

A remarkable feature of the debate on the feasibility of a European private law is that one aspect which would allegedly play an important role remains virtually undiscussed: the insight into the way in which a (private) legal system evolves and has evolved in the past, may raise awareness as to what is the most successful road towards a future European private law. Regardless of what a future common law may look like, it will certainly greatly change the national legal systems. Insight into the dynamics of such a change *in general* will then probably contribute to finding the best road towards a European private law.

This brings me to the subject of reception of foreign law into contemporary legal systems. Since the publication in 1974 of Alan Watson's book *Legal Transplants*,[34] in many European countries and in the United States attention for this phenomenon has grown exponentially. Legal `transplants', also referred to as `legal borrowing', involve the `implant' in a certain legal system of a rule or doctrine from another legal system. It is also possible to adopt an entire legal system. This may occur in an centralist way, as has been the case with the introduction of the *Code Napoléon* in many European countries, but in most cases foreign rules or doctrines are `borrowed' in practice itself, because they fill a gap in the importing[35] country. If another country has

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28 Legrand 1997, at 62.

29 Reiner Schulze, `Gemeineuropäisches Privatrecht und Rechtsgeschichte', in Müller-Graff (ed.), op. cit., 71 ff.

30 Cf. Reinhard Zimmermann, for instance, `Savigny's Legacy', 112 *Law Quarterly Review* (1996), 576 ff.

31 F. De Ly, *Europese gemeenschap en privaatrecht*, inaugural lecture, Rotterdam, 1993, (Zwolle, 1993).

32 Axel Flessner, `Rechtsvereinheitlichung durch Rechtswissenschaft und Juristenausbildung', 56 *RabelsZ* (1992), 243 ff.

33 Cf. the papers for the Conference `Alternativen zur legislatorischen Rechtsvereinheitlichung', 56 *RabelsZ* (1992), 215 ff.

34 Edinburgh, 1974. From the same author: *Society and Legal Change*, (Edinburgh, 1977).

35 The terms `import and `export' are taken from Eric Agostini, *Droit comparé*, (Paris, 1988),

already found a solution to a specific legal problem, it would after all be inefficient not to benefit from it in one's own.

Watson calls this phenomenon the most important factor in legal development: `most changes in most systems are the result of borrowing.'[36] The similarities that already exist among many legal systems are for the most part the result of legal transplanting. Untill the nineteenth century, they predominantly took place within Europe, where they resulted in the already mentioned *ius commune* of the 17th and 18th century, but subsequently legal transplants took place between European countries and (predominantly) the United States and Japan. There is an abundance of examples in private law: apart from the modern instruments of commercial law and finance, mainly imported from the United States, whose original English denotations, such as `trust', `swaps', `franchising' and `sale and lease back', have been preserved in continental Europe, there is a multitude of `classic' private-law concepts which became law by reception. From the post-war period, the distinction between an *obligation de résultat* (full performance) and an *obligation de moyens* (`substantial' performance) developed in Belgian law, was, or instance, received into the Netherlands and France; strict liability for defective products is based on the relevant American doctrine; the Dutch rules on unfair contract terms were inspired by the German *AGB Gesetz*; in the past few years, Dutch law has served as a source of inspiration for the new Civil Codes of the former East-Block countries.[37]

For my argumentation it is interesting at this point to determine what exactly brings about the reception of foreign ideas and legal rules: why does reception take place? Prestige, which, incidentally, is not much more than the quality of the rule, and the power wielded by a particular country are, of course, factors. For instance, the prestigious German *Pandektenwissenschaft* greatly influenced not only the continental systems, but also English law, and even, be it indirectly, American law. Pollock and Maitland considered themselves followers of Von Savigny.[38] In the past few decades, the reverse occurs. Transplants now mostly flow into the other direction, Europe deriving benefit from American law.[39]

Under the influence of the Law and Economics-movement, a tendency has grown, however, to seek the reason for a transplant in economic efficiency.[40] Only *efficient* rules are allegedly transplanted. Mattei regards the reception of legal rules, for

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243 ff.

36 Legal Transplants, at 94.

37 See on this F.J.M. Feldbrugge, `Het nieuwe Burgerlijk Wetboek van de Russische Federatie', *Rechtsgeleerd Magazijn Themis* 1997, at 43 ff, and Jan M. Smits, Systems Mixing and in Transition: Import and Export of Legal Models: the Dutch Experience, in E.H. Hondius (ed.), Netherlands Reports to the Fifteenth International Congress of Comparative Law (Antwerpen/Groningen, 1998), 47 ff.

38 See Michael H. Hoeflich, `Savigny and his Anglo-American Disciples', 37 *American Journal of Comparative Law* (1989), 17 ff. and Mathias Reimann (ed.), *The Reception of Continental Ideas in the Common Law World 1820-1920*, (Berlin, 1993).

39 Ugo Mattei, `Why the Wind Changed: Intellectual Leadership in Western Law', 42 *American Journal of Comparative Law* (1994), 199: Europe is now a "follower".

40 See, in particular, Ugo Mattei, `Efficiency in Legal Transplants: An Essay in Comparative Law and Economics', 14 *International Review of Law and Economics*, (1994), 3 ff.

instance, as the end result of a competition, in which each legal system provides different rules for the resolution of a specific problem. In a `market of legal culture', where rule suppliers seek to satisfy demand, ultimately, the most efficient rule will prove to be the winner.[41] An example is the concept of `trust', originally an Anglo-American legal concept, which is increasingly used in continental Europe, because it offers more possibilities, e.g. limited property protection by circumventing the continental *numerus clausus* of rights *in rem*, than can be achieved by continental concepts. In continental law, one has to fall back, as a rule, on contract law, which creates only rights *in personam*. That the `buyers' in the marketplace now have mostly opted for the trust is also evidenced by the existence of the 1985 *Hague Convention on the law applicable to trusts and their recognition*, which, incidentally, is an unnecessary private international law formality, in my view.[42]

It is a rule of Law and Economics that a correct choice can only be made if all necessary information is available. This also holds true in this instance: if one is not familiar with all the legal rules available, it will not be possible for the most efficient rule to come out on top. The more positivist the legal system and the more nationalist the country, the less efficient the law. Those who think that state-imposed law and state-recognized judge-made law are the only positive law are not able, when having to resolve a concrete dispute, to benefit from rules laid down elsewhere.

5. Towards a Mixed Legal System of European Private Law

What lessons can be learnt from the above with regard to the development of a European private law? One very important lesson, in my view: one of the effects of the process of legal development described immediately above is that the ultimate result will be *unification*: if the legal marketplace functions well, one rule will eventually be singled out by the `buyers' as the best. We may not be aware of this, but the fact that in the majority of European countries private law is now already more or less uniform, is also the result of this process. The traditional *ius commune*, which those adhering to a European private law like to evoke, originated in exactly the same way, rather than by having been mandatorily imposed by a centralist national authority. That precisely the position of English law is different, is the result of the insular position which this country has always had.

I argue that this `natural' process of reception should run its course. If trade partners, judges and others involved in shaping private law relations, such as attorneys and trade organizations, are capable of making a choice from the largest possible array of solutions, then, through trial and error, eventually the best rule will triumph. In the most dynamic area of the law, contract law, the process has virtually been concluded: it is significant that the Lando Commission was able to formulate principles which were generally approved of by scholars and practitioners. By taking this path, European

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41 Mattei, op. cit., at 8 and Ugo Mattei and Francesco Pulitini, `A Competitive Model of Legal Rules', in Breton *et al*. (eds.), *The Competitive State*, (Dordrecht, 1991), 207 ff.

42 Cf. also Mattei, `Efficiency....', op. cit., 9 and 10.

private law will eventually become a `mixed legal system': elements from the European-continental and the English legal tradition will blend, as happened earlier in South Africa and Scotland, countries commended on the flexibility of their legal systems.[43] Consequently, put more concisely, I argue for a *free movement of legal rules*.[44]

Unification through the free movement of legal rules has three important advantages over the centralist road which is advocated by most proponents of European private law. In the first place, unification happens in practice itself and not by an authoritatively imposed *text* which carries in it the risk of failure, since a text alone does not produce uniform *law*. Not imposition, but the law opted for by those organizations and bodies which will have to apply the rules in the future themselves, as the law of superior quality is what is needed. How can we expect the succesful acceptance of an *imposed* ECC, where in twelve years France even failed to implement a directive on liability for defective products? Inasmuch as European private law is created in practice itself, monopolization by the one legal world view of the other, so feared by Legrand, will not materialize.

In the second place, uniform law will only come about in those areas where it is really needed; this corresponds with the views of the European Parliament which called for a ECC only to the degree required by the internal market. Commerce, after all, determines to what extent national rules will be adapted. The economy, the motor of European integration, is also the motor of legal unification; it is not necessary, for instance, that a uniform law be drafted governing the typically real rights like *emphyteusis* (hereditary lease of real property) or common property of neighbours. In so far as unification along these lines has adverse effects, because it encroaches, in particular, on consumer interests, directives may be issued, as is currently done.

In the third place, the proposed mixed system lends itself for change, whereas changing centralistically imposed rules is much more difficult. The acceptance of the Lando Principles is partly the result of the fact that they express a *lex mercatoria*, in full conformity with the, mostly economic, objectives of the European Union. However, in a Europe which focuses more on social justice, other legal rules are desired. The perception of contract underlying the Lando Principles, stresses freedom of contract, which seems to be less compatible with modern ideas on `contractual justice'.[45] Should there be no codification, then adaptation by natural course as advocated here is simple. Formulated in terms of Law and Economics: the buyers in the legal marketplace demand legal rules which realize economic goals. However, free movement of legal rules guarantees that, whenever a different economic goal is desired, the marketplace can offer rules for that goal as well. To regulate contract there are both the classic rules

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[43] See the various articles in Esin Örücü *et al.* (eds.), *Studies in Legal Systems: Mixed and Mixing*, (The Hague, 1996).

[44] Pierre Legrand, `The Impossibility of "Legal Transplants"', 4 *Maastricht Journal of European and Comparative Law* (1997), 111 ff argues that since legal rules cannot be segregated from society and culture, legal transplants are impossible. In my view, about the possibility of a transplant one cannot say much in general: it depends on the uniqueness of the rule in question, i.e. its embedment in a particular country and culture.

[45] See draft article 2.101. See for a similiar criticism of the Union Principles and references to modern ideas my article in *Europees contractenrecht* (*BW-krant Jaarboek 1995*), (Arnhem, 1995), 127 ff.

on the binding force of contract and the mechanisms which allow a party to escape from contractual ties. A qualitatively superior supplier, in this context, is the Dutch Civil Code, which offers sophisticated considerations, for instance, in the field of *force majeur* (*overmacht*, Article 6:75) and the limiting effect of the rules of reasonableness and fairness (*redelijkheid en billijkheid*, Article 6:248 (2)).

One readily made objection to unification is that it may take a long time for a uniform rule to evolve through the free movement of legal rules. That will however not be the case: the `trust' is a typical example of successful reception within a short period of time. But more importantly, it is a spurious argument. As argued above, the alternative would be the imposition of a uniform text which will not automatically result in uniform law, but, conversely, will have an adverse effect, because the market will be distorted: those using a uniform text will be inclined not to consider possible other rules and solutions. This makes the answer to the question as to the fastest road to a successful European private law unequivocal: the choice is either for a European Code creating only a semblance of uniformity, or for no Code, but a law evolving from the free movement of legal rules that is both uniform and flexible.

6. In Conclusion

The view of uniform law defended in this article seems to express an unconditional faith in the play of societal forces, since in simplified form it says: in an internal market without trade restrictions, European law will emerge automatically. To those seizing upon this to criticize me I say that they must address the European Union, rather than this author. I only intend to offer a model for unification which is compatible with the Community objectives of economic integration, but which, I repeat, would also be compatible with other objectives. Furthermore, it is definitively possible, even requisite, to stimulate the emergence of a marketplace of legal rules. After all, part of the conditions for a free movement of legal rules have not yet been created. Legal science must, for example, proceed on the chosen path of making accessible the different solutions which in the various European countries have been adopted for one and the same problem.[46] Drafting Principles is also important, not just for contract law, but for the law of property and the law of torts as well. The Lando Commission accompanies the publication of its Principles with information of a comparative legal nature on the countries under study. This is to be welcomed, since those applying the Principles will retain the choice between either the proposed uniform rule or a national solution. The question as to how a centralist authority can *create* a new *ius commune* by mandatorily imposing it, should therefore not be posed. A truly European private law comes into existence where there is a need for it: in legal practice.

[46] Examplary is the book by Heinz Kötz and Axel Flessner, *Europäisches Vertragsrecht*, (Tübingen, 1996).