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THE EUROPEAN PRIVATE LAW MOVEMENT AND THE CHANGES IT REQUIRES IN LEGAL EDUCATION AND RESEARCH

1. Introduction

Today, we celebrate the first twenty years of the Faculty of Law of the University of Maastricht. Twenty years of innovation in teaching and research have been the fruits of this endeavour. In this paper, I wish to explore the changes in legal education and research which the next decade will require in terms of the commitment of staff, students and the administration. Maastricht likes to reckon in decades. The first decade of its existence saw the introduction of the functional approach in law teaching (1.1.). A decade later, in 1991, came the foundation of the European Law School (1.2.). The coming decade - on which this paper will focus - should be devoted to the introduction of European law in the regular curriculum (1.3.). What the decades of the future will bring, may only be speculated about (1.4., 1.5.). Let us take a better look at these decades, before coming to the subject of this paper.

1.1. 1981 – Functional Approach

In 1981, the University of Limburg, as it was then called - now: the University of Maastricht - began to offer a law curriculum.[1] The curriculum was highly innovative in being based on small groups, the absence of lectures, one examination for all, and a functional approach to the subject-matter. The ideas behind this new approach were not entirely novel, as the University of Limburg had earlier started a medical faculty based on the same ideas.

Classes were small. Students were put together in groups of ten. The groups would set their own educational target; 'instructors' would only be present at the group meetings to answer questions put to them by students. Their task was not to lecture. The subject-matter was not broken down in the traditional way into private law, administrative law, criminal law, et cetera, but in a functional way. In the

1 See B. De Witte and C. Forder (eds.), *The common law of Europe and the future of legal education*, Deventer, Kluwer, 1992.

medical faculty, students would deal with 'pain in the back' or 'pain in the neck', instead of traditional subjects. Likewise, law students would learn about housing law or – in the more abstract – regulation. Once every couple of months there was a single examination for all students, the idea being that students would gradually be in a position to obtain better results.

The ideals of 1981 are no longer adhered to in full by the present law faculty. 'Small' groups do no longer consist of ten students only. Lectures have been re-introduced. The functional approach is still the cornerstone of the curriculum, but it is under increasing pressure – it requires instructors to write their own textbooks every year, which imposes an increasing burden on the staff. And the single examination for everyone has been abolished. Still, it was and remains a highly interesting experiment, and parts of the Maastricht approach have found their way to other law faculties in the Netherlands and abroad.

1.2. 1991 – the European Law School

In 1991, Maastricht once again introduced a novelty: the European Law School. The idea was to bring students from various European nations together and to instruct them not in Dutch, English, French or German law, but in the principles common to these and other European legal systems. The language of instruction is English. The curriculum has the disadvantage that it is perhaps too futuristic: a common European private, administrative or criminal law simply do not (yet) exist. There are pockets of community law in these areas, but most of the law is still domestic. It has therefore been questioned whether it is a good pedagogical principle to focus the curriculum on utopia. Personally, I do not share the criticism. For centuries, European lawyers have been educated not with their own legal system, but rather with Roman law. Why then could present-day students, instead of being instructed in the law of the past, not be instructed in the law of the future?

1.3. 2001 – European Law in the Curriculum

The present decade witnesses the increasing impact of European law on the regular curriculum. Whereas an interest in European private law, administrative law, criminal law or the like was still considered somewhat eccentric some ten years ago, this is no longer the case. Those who covet the most interesting jobs nowadays would do well to study European law. Lecturers who are well versed in European law are extremely difficult to keep, since they are in high demand in all major areas of society. This development has major consequences for the regular curriculum (although not the European Law School, where it has already been taken care of). In some of the coming Chapters I hope to explore the development of a harmonized European private law in more depth. At the end of the paper I will try do draw some conclusions from the growing impact of European law for present-day legal education and research.

1.4. 2011 – Global Law

Although this paper will only deal with the coming decade, we should perhaps briefly venture into the longer-distance future. There is not much fantasy necessary to predict that the decade after the present one, that of the 2010s, will witness another revolution. At present, many lawyers find the focus on Europe already quite a challenge. In the 2010s, with the European Union having maybe upwards of twenty Member States, there will be a growing interest in the other parts of the world. Focussing on Europe will begin to appear provincial, just as an accent on domestic law is viewed nowadays.

1.5. 2021 – the Withering away of Law – was Marx Right After All?

What the 2020s will bring us becomes more speculative. It would not surprise me if the 2020s would bring us some withering away of traditional legal doctrine. After internationalization has completed its victory over Ihering's provincialism, a new challenge will be that of interdisciplinary research. Already at the present time there is much talk of interdisciplinary education and research, but traditional legal education and research remain highly mono-disciplinary. The new approach will require law faculties to give up the idea that their law students should know every single part of the main parts of the curriculum. Without doing away completely with knowledge, methods and philosophy will gain in importance.

2. Achievements in the Past Decade

Having set the scope of this paper, I now turn to its first leg, devoted to the development of a European private law. The past decade, running from 1991-2001, has witnessed a spectacular growth of interest in developing a European private law. This has happened not only on the official level – directives (2.1.), communications (2.2.) and case-law (2.3.), but also on that of private efforts: Lando (2.4.), Gandolfi (2.5.), Trento (2.6.), Spier and others (2.7.) and Van Gerven (2.8.) are some of the best known of such projects.

2.1. From Directive to Regulation

The European Union has four instruments available for harmonization: treaties, regulations, directives and recommendations. Until recently, directives were the main vehicle for the harmonization of private law. The many directives on consumer protection are a good example. Their main advantage was, and is, that they enable member states to integrate a directive's substance in the form of national legislation. The drawbacks are twofold: first, transposition is needed to implement these instruments, and second, the adaptation into domestic law may lead to major divergences. It is therefore of some importance that, of late, regulations seem to be in better favour in Brussels. Where directives are concerned, the European Court is now more strict in surveying their correct transposition.

2.2. *The Communication on Contract Law*

Although the 11th of September 2002 will probably be remembered much longer, 11 July 2002 was an important day for the development of European Private Law. On that day, the Commission published its 'Communication of the Commission to the Council and the European Parliament on Contract Law'.[2] With this Communication, the Commission seeks a discussion as to the desirability, the feasibility and the necessity of a European Law of Obligations, not only as between academics but also in business circles. To this effect, the Commission first sketches the present state of affairs. So far, the discussion is very academic, between partisans and antagonists, between those who advocate codification and those who seek a Restatement, technicians and advocates of a legal cultural identity. Four options are offered to us by the Commission. In the first place, we can simply do nothing and leave the conclusion of contracts to market forces, which may arrive at industry-wide model contracts for cross-border transactions. A second solution is to promote the development of Principles, such as the Principles of European Contract Law of the Lando Commission. In this respect, the Commission sees a role for itself (p. 17). In this respect one may also think of Europe-wide general conditions. A third option is the improvement of the quality of existing European regulation. In this respect, the Commission mentions two examples: the SLIM-project - which stands for 'Simpler Legislation for the Internal Market' - and the possibility of extending the scope of application of a number of consumer protection directives to non-consumer transactions. A fourth and last option exists in promoting a text with provisions on general questions of obligations (p. 19). Here, the Commission is considering a directive, regulation or recommendation, which may run from fully optional to wholly mandatory. The latter solution would replace domestic law, while an optional regulation would come next to it. The Commission does not exclude the existence of even more options.

Those who begin reading the Communication without any pre-existing ideas, will not fail to be disappointed. Is this all there is to say? The Communication numbers 64 pages, but 43 of these are annexes. In the remaining 21 pages, the Commission does mention four interesting options, but nowhere does it come to any conclusions. Could not the Commission have given some guidance to the discussion? And yet, to end with this impression, would not be correct. The major importance of the Communication is that it has put the subject of a European Civil Code on the political agenda. Something which so far had nearly only touched academics, may now turn into a political issue on which trade and industry and other pressure groups will take a stance.

Which of the four options will be preferred by which group seems self-evident. The Lando Commission (2.4.) has always, like its sister working group which drafted UNIDROIT's Principles for International Commercial Contracts, been in favour of a Restatement. The Study group for a European Civil Code directed by Christian von Bar may have opted for a Code (the fourth option), but the fact that

2 COM(2001) 398 final, <http://europa.eu.int/comm/off/green/index_nl.htm>.

this group is in fact the heir to the Lando Commission and the presence in its midst of a fair number of Restatement proponents, makes a compromise between the two strands plausible. Gandolfi's Academy (2.5.), finally, which like the Lando Commission is quoted in the Communication, quite clearly sees its draft as a draft codification and not as a Restatement. Gandolfi is only unclear as to the entry into force of his Code: 'le groupe de travail ne s'est pas expressément posé le problème de la voie par le truchement de laquelle l'avant-projet pourra devenir un code en vigueur pour les citoyens de l'Union européenne' (p. LVII). In short the discussion of academics, a solitary legrandist notwithstanding, will be focussed on the choice between a Code and a Restatement. My own preference lies with a Restatement (the second option): it would be contrary to all forms of respect (*comity*) to force a code down the throats of the English and the Irish.[3]

The non-thinking part of trade and industry will most probably prefer the option of not doing anything (option 1); the thinking part will look ahead and will choose between a Code and a Restatement. It finally appears useful not to opt for only one solution, but rather to extend the scope of application of a number of directives and to simplify the chosen terminology.

The Communication did achieve what it purported to do: it led to a highly interesting discussion. A major event was the conference organized by SECOLA (Society for European Contract Law) in Leuven, just two weeks before the Laeken Summit. The volume of conference papers, unpublished so far but available on the internet, contains reactions to the Communication from Josef Drexl (who favours total harmonization), Geraint Howells, Massimo Bianca (who is in charge of sales in the Gandolfi group), Christian von Bar ('Even law professors must learn to play in teams'), Mauro Bussani, Jürgen Basedow, Ugo Mattei ('The new European Code should be hard, minimal, not limited to contracts, and process oriented'), Hans-Peter Schwintowski ('Das *Europäische Zivilgesetzbuch* könnte ein zweiter Baustein - after the euro, EH - auf dem Wege zur Verinnerlichung der Idee *Europa* in den Herzen der europäischen Bürger sein'), Roger Van den Bergh ('Forced Harmonization of Contract Law in Europe: Not to be continued'), Hugh Collins, Norbert Reich, Stefan Grundmann and Wolfgang Kerber, U. Drobnig, Walter van Gerven, Jan Smits, Thomas Wilhelmsson, the European Consumer Law Group, and Bernard Tilleman and Bart Du Laing. Several of these reactions may also be found on the European Commission's website.

2.3. *Case-Law of the European Court of Justice*

Recent case law of the European Court of Justice shows the increasing importance of private law. Two examples are Heininger and TUI. In Heininger, a couple had taken out credit to the amount of DM 150,000 (approx. € 75,000) in 1990 for the purchase of an apartment. Eight years afterwards, the Heiningers cancelled the credit agreement, alleging that they had been led into the agreement by an intermediary who had visited them on his own initiative. This meant - according to the

3 See chapter 3 under (2) below.

Heiningers - that the German Door-to-Door Sales Act applied, and since the bank had not observed its duty to inform the borrower of his cooling-off period, that period still ran. The German courts totally disagreed with the Heininger contention, but they at least allowed them to ask the opinion of the European Court. The Court of Justice, in its wisdom, allowed the Heininger claim.[4]

TUI is perhaps even more interesting.[5] An Austrian family had booked a holiday in Turkey, where their ten-year old daughter Simone fell ill from salmonella. Simone had to remain in bed for the remaining part of the holiday and the parents claimed compensation. Compensation was duly awarded, but the amount did not include anything for the loss of enjoyment ('entgangene Urlaubsfreude'). The appellate court, the *Landesgericht* Linz, asked the Court of Justice whether this interpretation of the package travel directive was correct. According to the Court this was not the case. The notion of 'non-material damage' should be interpreted in a uniform way, preferably in a broad sense, so as to allow the compensation for 'entgangene Urlaubsfreude'.

The development of a European jurisdiction reminds one of the growth of American law. In the 1980s Cappelletti directed a European University Institute based research project into the question of what Europeans could learn from American federalism. In a recent English language publication, the Dutchman Van Erp has taken up this question again.[6] On the basis of the case law of the American *Supreme Court*, Van Erp analyses to what extent the European Court contributes to the development of European Private Law. In both instances, the author discerns a two-tiered approach:

> 'Only after examination of its own authority under the EC Treaty can the Court decide if it will create a substantive rule of private law itself or leave the matter to the courts of the member states, be it within certain limits. As such, this approach is not different from the common analysis of the US federal common law cases, where also a two-pronged test is used' (p. 57).

2.4. *The Lando Commission; its Unidroit Counterpart and the Von Bar Succession*

Of the various private efforts at harmonization of private law in Europe, Ole Lando's Commission on European Contract Law is no doubt one of the best known. The Commission started its well-documented work in the 1980's. It resulted in the publication, in 1995, of the first part of its Principles of European Contract Law, consisting of General Provisions, Terms and Performance of the Contract, Non-Performance and Remedies in General, and Particular Remedies for Non-Performance.[7] In 2000, Part II followed (integrated with Part I).[8] Meanwhile, in 2001 a third part has been finished. It consists of chapters on assignment, assumption of debt, compound interest, conditional obligations, illegality, joint liability, prescription and set off. This Part, which will once again integrate Parts I and II, is expected to be published in 2002.

By a strange coincidence, the Commission on European Contract Law was not the only group to embark upon a harmonization project. In Rome, the Institute for the Unification of Law (UNIDROIT) started a very similar project, which in 1994 resulted in the publication of Principles for International Commercial Contracts[9]. There has always been some competition between the two projects, and probably for the better. But the most striking conclusion from a comparison between the two is their obvious similarity. Not only are the adopted solutions often the same or similar, but the very choice of subjects dealt with, the style of drafting and the order of the chapters are all very much alike. This in itself is not so strange, if only because of the personal connections - at least five members served on both Commissions. Two formal points on which the two sets of Principles differ relate to their scope of application. The UNIDROIT Principles only deal with commercial contracts, whereas the PECL are applicable to all contracts, including consumer transactions and private contracts. An obvious difference is that the Lando Principles only cover (Western) Europe, while UNIDROIT has a global scope of application. This geographical feature does perhaps explain why the PECL's highly acclaimed system of national Notes could not work in the case of UNIDROIT.

On one point, the UNIDROIT Principles have met with more success than PECL: UNIDROIT and the President of its Working Group, Michael Joachim Bonell, have always succeeded in having the better publicity. This, and the fact that in the end the UNIDROIT Principles were published first, may explain the apparent edge that they still have with regard to their practical application. Indeed, there is a growing number of arbitral awards based on the Principles for International Commercial Contracts, and they have also influenced new legislation in Central and Eastern Europe.[10]

One of the weaknesses of the Lando project is that it is very much a one-man effort. At one time it was hoped that Hugh Beale would prove to be the successor once Ole Lando - born in 1922 - stepped down, but his appointment as a Law Commissioner prevented him from taking over. With the Commission on European Contract Law having held its final meeting in Copenhagen in February 2001, the

4 Case C-481/99, *Heininger/ Bayerische Hypo- und Vereinsbank.*

5 Case C-168/00, *Leitner/TUI.*

6 J.H.M. van Erp, *European Union Case Law as a Source of European Private Law/A Comparison with American Federal Common Law, preadvies Nederlandse Vereniging voor Rechtsvergelijking,* Deventer, Kluwer, 2001, p. 1-58.

7 O. Lando and H. Beale (eds.), *Principles of European Contract Law/Part I,* Dordrecht, Nijhoff, 1995.

8 O. Lando and H. Beale (eds.), *Principles of European Contract Law/Parts I and II,* The Hague, Kluwer, 2000.

9 *Principles of International Commercial Contracts,* Rome, UNIDROIT, 1994, also available in many other languages, including Arabic, Dutch, French, German, Italian and Spanish. See M.J. Bonell, *A New Approach to International Commercial Contracts/The UNIDROIT Principles of International Commercial Contracts,* The Hague, Kluwer, 1999.

10 See for Lithuania: V. Mikelenas, 'Unification and Harmonization of Law at the Turn of the Millennium: the Lithuanian Experience', *Revue de droit uniforme,* 2000, p. 243-260.

question was raised as to how to deal with practical issues such as copyright. For this purpose, a four-member commission has been appointed, consisting of Eric Clive (Scotland), Ole Lando (Denmark), André Prüm (Luxembourg) and Claude Witz (France).[11] More importantly, another group has presented itself - and been accepted - as the spiritual heir to the Lando Commission.

In 1997, under the then Dutch presidency of the European Union, a conference on a European Civil Code was held in Scheveningen, the seaside resort of The Hague. Although the conference was not in favour of drafting a European Code which would be binding upon all Member States, it was precisely that which Christian von Bar agreed to look into. The Study Group which Von Bar and his colleagues has set up includes several members of the former Lando Commission. Von Bar succeeded in securing sufficient funds to set up a number of teams of young researchers in Germany and the Netherlands.[12]

2.5. *Gandolfi*

So much publicity has been given to the *Principles of European Contract Law*, that one nearly forgets that there are other projects as well. Perhaps the second best known project is the one initiated by the Italian Romanist Giuseppe Gandolfi. In about 1990, Gandolfi started with his major work, a Code of Contract Law, based on the Italian *Codice civile*.[13] Until recently, the project was chiefly known for the fact that one of its members was acknowledged to have belonged to a mixed committee of the English and Scottish *Law Commissions* and to have elaborated a draft Contract Code. Gandolfi immediately saw to it that this 'MacGregor Code' was published and so spared it the fate of oblivion.[14] Another consequence was that next to the *Codice civile* the MacGregor Code would serve as the guideline for the work of the Gandolfi Academy. In 2002, the Academy published its Draft Code ('avant-projet').[15] The subject-matter is close to that dealt with by the Lando Principles. On three points, the Gandolfi Draft Code is different however. First, whereas the Lando Principles are a team effort, the Gandolfi Code has been drafted by one man, Giuseppe Gandolfi, albeit guided by his *Académie des privatistes européens*. Then, an attractive feature, the text enters into discussion with the two sets of Principles and with the ideas of Gandolfi's colleagues: 'Les contributions des Académiciens'. Finally, the project has been drafted in French.

11 The group also serves as the Editing Group.

12 See Ch. von Bar, 'Die Study Group on a European Civil Code', in *Festschrift Dieter Henrich*, Gieseking, 2000, p. 1-12.

13 Why the Italian Code (1942), and not the more modern Dutch Civil Code (1992)? Gandolfi's answer: because the Dutch Code has not yet generated case law and a code without cases like potatoes without gravy. (comparison by EH).

14 H. McGregor, *Contract code drawn up on behalf of the English Law Commission*, Milan/London, 1993.

15 G. Gandolfi (ed.), *Code européen des contrats/Avant-projet, Livre premier*, Milano, Giuffrè, 2001, 576 p.; see H.-J. Sonnenberger, 'Der Entwurf eines Europäischen Vertragsgesetzbuchs der Akademie Europäischer Privatrechtswissenschaftler - ein Meilenstein', *Recht der Internationalen Wirtschaft*, 2001, p. 409-416.

2.6. *Trento*

Another private project, is the Trento Common Core of European Private Law project, directed by Mauro Bussani and Ugo Mattei. The project is based on the ideas of the two Rudi's: Rodolfo Saco and the late Rudi Schlesinger. Every July, a large band of young - at heart - lawyers gather in the beautiful North Italian town of Trento. Each meeting begins with a plenary session,[16] but then it is back to the core business: the development of a common core of private law. Two volumes have so far been published. The first volume to be published as a fruit of the project, is the one on Good Faith edited by Zimmermann and Whittaker.[17] The volume comprises thirty cases, which all are dealt with from the point of view of sixteen jurisdictions - fifteen EU jurisdictions including Scotland (but excluding Luxembourg) plus Norway. This analysis is preceded by a general introduction by the two Editors, historical surveys by Schermaier on Roman law and Gordley on *ius commune*, and a comparative paper on the American reception of *good faith* by Summers. The book ends with concluding remarks by Zimmermann and Whittaker. What kind of cases does the book deal with? An example is the following:

> 'case 1, courgettes perishing: Barchester Chemicals Ltd is a producer of agricultural and domestic fertilisers. Cecil is a market gardener and buys directly from Barchester's a quantity of one of their products, "Growright 100", for use on his courgettes. Owing to the high content of salt in this product, the plants' vegetation perishes: it is clear that this would not have happened if Cecil had been advised to give the plants large quantities of water at the time of administering the product. What claims does Cecil have against Barchester?' (p. 171).

This has nothing to do with good faith, a Dutch reader may object, and indeed that is what the Dutch reporter Van Erp observes (p. 192). All the same, he concludes that Barchester was bound to inform Cecil, as is the case under Belgian, French and German law, but then on the basis of good faith. The common law reaches the same result by the technique of implied terms. This is in line with the general conclusion, that of the thirty cases, eleven are solved in exactly the same way in all jurisdictions, nine are solved in exactly the same way in most of the jurisdictions and only in ten cases are there clear differences. Surprisingly, to the Editors, it is not the common law, which is the odd man out.

> 'Instead, we often find a smaller legal jurisdiction out on a limb, this being particularly noticeable as regards the Nordic legal systems and Irish law. One possible reason for this may be that where a legal system by its size tends to engender less litigation there are fewer occasions on which courts are presented with facts suitable to test or to clarify the application of exiting legal rules' (p. 655).

16 See the collection of papers read at plenary sessions in M. Bussani and U. Mattei (eds.), *Making European Law/Essays on the 'Common Core' project*, Università degli Studie di Trento, 2000.

17 R. Zimmermann and S. Whittaker, *Good Faith in European Contract Law*, Cambridge, Cambridge University Press, 2000, 720 p.

A disadvantage of team work such as that in the Trento project, is that it may take a long time to finish. This is apparent from the fact that the national reports in the Zimmermann/Whittaker volume were concluded in 1997. Fortunately, the general report does reflect later developments. The disadvantage is also discernible in the second volume which was published on *Enforceability of Promises*.[18] The Editor of this volume is the American comparatist and legal historian James Gordley. The volume looks into the question of to what extent promises are binding. In modern continental law, this question is usually answered in the affirmative, as opposed to Roman law and the *common law* with its *consideration* requirement. The book comprises fifteen cases, which are dealt with from the point of view of twelve European jurisdictions (Denmark, Finland, Luxembourg and Sweden are missing, but Scotland once again receives special attention). Contrary to the Editor's expectation, the differences are larger than he had anticipated. An example is the gift. In most European jurisdictions its validity is still dependent upon the fulfilment of a form requirement. Usually, the form required is a notarial deed, but in Portugal, Scotland and Spain an ordinary deed is sufficient. In England, the promisor should make a 'deed under seal' - it is sufficient (but not in Ireland) that he declares the deed to have the object of being such a deed, or he must establish a trust. Gordley did find *something* in common: 'We did find that, generally, these results reflect similar underlying concerns' (p. 371).

2.7. *Spier and Koziol and Others*

One of the more active private groups engaged in the development of 'Principles' of European Private Law is the Spier/Koziol group.[19] Before publishing a set of Principles, the group sets out to discover common ground between the various jurisdictions. The questionnaire method used is very much akin to that of the Trento Common Core project, discussed in 2.6. It is highly commendable that the group does not keep the results of the questionnaire approach to itself, but is willing to share the finds with others through publication. In my earlier Survey, I already mentioned three of the group's publications. By 2002, another four were published. Number four deals with causation.[20] It contains ten national reports and a comparative analysis. The national reports deal with the same 24 cases each. The ten jurisdictions covered are Austria (Koziol), Belgium (Cousy, Vanderspikken), England (Rogers), France (Galand-Carval), Germany (Magnus), Greece (Kerameus), Italy (Busnelli, Comandei), South Africa (Neethling), Switzerland (Widmer) and the United States (Schwartz). The comparative analysis demonstrates how much the jurisdictions have in common, but also how much they differ on other points.

18 J. Gordley (ed.), *The Enforceability of Promises in European Contract Law*, Cambridge, Cambridge University Press, 2001, 478 p.

19 See J. Spier and O.A. Haazen, 'The European Group on Tort Law ("Tilburg Group") and the European Principles of Tort Law', *Zeitschrift für Europäisches Privatrecht*, 1999, p. 469-493. Meanwhile, the centre of the group has gravitated to Vienna (Helmut Koziol).

20 J. Spier (ed.), *Unification of Tort Law: Causation*, European Centre of Tort and Insurance Law, The Hague, Kluwer, 2000, 161 p.

I have given this overview by way of example. Outside the realm of Contract and Tort Law, various other private projects may be mentioned. Principles have also been developed for the Law of Trusts by the Kortmann group.[21] A set of draft directives on Procedural Law has been drafted by a group chaired by Marcel Storme.[22] The development of European Principles has even been proposed for Family Law.[23]

2.8. *Casebooks*

'I had a dream'. The Leuven - and formerly: Maastricht - based Walter Van Gerven would probably add: 'that there shall be a time when lawyers all over Europe share a common thesaurus of case law'. An era when Donoghue v Stevenson, Hühnerpest en Jeand'heur are not just known locally in England, Germany and France, but in all European countries. Van Gerven's dream has resulted in two case books. The first to appear was 'Tort Law'.[24] Here four jurisdictions are compared on the basis of annotated cases. These jurisdictions are England, France, Germany and Europe. Other European jurisdictions are mentioned only occasionally. Earlier, one single Chapter from this book had already been published separately - 'Scope of Protection' (1998). When that Part was published, the question could be raised how many thousands of pages the final volume would contain. The Editors have been able to limit the size to a little under 1,000 pages, first by limiting the number of decisions from other jurisdictions than the four major ones, and second, by referring to Maastricht University's website[25] for further information and for the text in the original language. The Chapters added as compared with the earlier book include General Topics, Liability for One's Own Conduct, Causation, Liability for the Conduct of Others, Liability not Based on Conduct, Defences, Remedies, Impact of Supranational and International Law.

This is a highly readable book. Tort law really comes to life through cases. A disadvantage, as with the teamwork involved in the Trento series mentioned above in 2.6., is that the outcome is very much dependent upon the punctuality of all contributors. This is very much evident in the second volume to appear in the series, the one on Contract Law, edited by Hugh Beale.[26] The book deals with the notion of Contract, the relation with Tort and Restitution, pre-contractual liability, the binding force of contracts, offer and acceptance, validity, *vices de consentement*, unfair contract terms, interpretation, *imprévision*, remedies, third parties and

21 D.J. Hayton, S.C.J.J. Kortmann and H.L.E. Verhagen (eds.), *Principles of European Trust Law*, The Hague, Kluwer Law International - W.E.J. Tjeenk Willink, 1999.

22 M.L. Storme (ed.), *Approximation of Judiciary Law in the European Union*, Dordrecht, Kluwer, 1994.

23 M.V. Antokolskaia, W.A. de Hondt and G.J.W. Steenhoff, *Een zoektocht naar Europees familierecht*, Report Nederlandse Vereniging voor Rechtsvergelijking, Deventer, Kluwer, 1999.

24 W. Van Gerven, J. Lever and P. Larouche (eds.), *Tort Law, Common Law of Europe Casebooks*, Oxford, Hart, 2000, 969 p.

25 <http://www.rechten.unimaas.nl/casebook>.

26 H. Beale and others (eds.), *Contract Law. Casebooks on the Common Law of Europe*, Oxford, Hart, 2002, 993 p.

assignment. As in the Tort volume, these subjects are illustrated by cases taken mainly from English, French and German law. Other cases have been taken from Australia, Belgium, Italy (6), the Netherlands (4), and Switzerland, but Austria, Greece, the Nordic countries, Portugal, Scotland and Spain remain unrepresented. Unlike the Tort volume, the one on Contract Law does not have a companion website with the original text. This is a handicap for those readers who prefer a text in the original language.

A third casebook yet to appear is a volume on 'Judicial Review of Administrative Action'

Van Gerven is not the only Editor of casebooks. The 'Casebook Europäisches Privatrecht' comprises 19 cases of the European Court of Justice in the area of private law.[27] Cases reported are for instance Francovich, Cassis de Dijon and Bosman. The interest of the casebook lies in the fact that these cases are annotated from a European, English, German, French and Italian perspective. Earlier, the same publishers published a 'Casebook Europäisches Verbraucherrecht'.[28] These are only some recent examples of casebooks which will most certainly contribute to a growing common thesaurus of European cases.

3. Non-Achievements

The achievements then, at first sight, seem overwhelming. A decade of efforts, especially at NGO level, have resulted in a common core of academic writing on most parts of private law in Europe. Still, much remains to be done. In this Chapter, I will indicate some non-achievements of the past decade.

3.1. Constitutional Competence

First of all, surprisingly, there is no consensus as to a firm basis for codification of private law in the European Treaty. The 1997 Scheveningen Conference, the results of which were published in the *European Review of Private Law*, clearly indicated the diversity of scholarly opinion on this point, with a slender majority being of the opinion that the Treaty offers no such competence.

3.2. Comity

The minority, which is of the contrary opinion, nonetheless would not wish to force a European Civil Code down British and Irish throats. The principle of comity argues against this. An alternative to the Code movement of Von Bar and others would perhaps be a Restatement. The Code v Restatement discussion is an ongoing debate, even within groups such as the Von Bar commission.

27 R. Schulze, A. Engel and J. Jones (eds.), *Casebook Europäisches Privatrecht*, Baden-Baden, Nomos, 2000, 425 p.

28 H. Schulte-Nölke, R. Schulze and J. Jones (eds.), *A Casebook on European Consumer Law*, Oxford, Hart, 320 p.

3.3. The Business Community

When in 1980 the Vienna Sales Convention (CISG) was adopted, the academic community welcomed this major achievement towards world trade. But world trade itself could not have been less interested. After the entry into force of CISG, most major businesses would opt out of the Convention. Only those businesses who were unaware of the Convention would be bound by it. This lack of interest in CISG has never failed to amaze academics. Why not be glad to have a neutral set of rules when one party is based in China and the other in Germany?

A similar unpleasant surprise – from an academic point of view – is the lack of interest of European trade and industry in the private efforts at harmonization presented above. So rare is the interest of the business community, that whenever there is an arbitral award in which the Unidroit Principles are referred to this is reported all over as another example of the importance of these Principles.

3.4. The Academic Community

Above I have suggested that the academic community is enthusiastic about the harmonization movement. I should now perhaps add that first not all scholars feel comfortable with the movement towards European harmonization and second that there is some outright hostility. First, perhaps the majority of University lecturers up until the present time prefer to stick to domestic law, often because of unfamiliarity with European law. I suggest that these lecturers will soon be forced by directives and case-law to readjust their classes or else they will find themselves out of place. The second group is more interesting. It consists of those who are familiar with the movement but rather – or in their views: because of that – are very much against the present ways of harmonization. Such opponents include a number of English authors – Hugh Collins,[29] Tony Weir[30] – , transatlantic-born jurists – the Canadian Legrand[31] –, and even some Dutch authors, such as Jan Smits[32] from Maastricht University. I would suggest that it is the essence of academia that there be debate, so the opponents actually do contribute to harmonization by making the partisans aware of their faulty reasoning.

4. We shall Overcome?

What to do with the non-achievements summarized above? The constitutional impediment only looks like a minor one: if a qualified majority so wishes, the Giscard d'Estaing commission could work out an amendment to the European

29 H. Collins, 'European Private Law and the Cultural Identity of States', *ERPL*, 1995, p. 353-365.

30 T. Weir, 'Die Sprachen des europäischen Rechts: Eine skeptische Betrachtung', *ZEuP*, 1995, p. 368.

31 P. Legrand, 'Against a European Civil Code', 60 *Modern Law Review*, 1997, p. 44-63.

32 J. Smits, *The Making of European Private Law*, Antwerp, Intersentia, 2002.

Treaty. The comity principle can be taken care of by offering member states a Restatement – or a Model Code – instead of making them swallow a code.

How to make business aware of the advantages of harmonization? Seminars and the like seem to be the proper answer. Easily readable commentaries equally may serve to raise the business interest. The academic community will finally be forced by market forces to provide the legal education and to do the legal research which lives up to today's requirements.

5. Some Concerns

Although there are ways to overcome the present non-achievements, there is reason for some concern.

5.1. Case-Law

First, although there is a growing body of community case-law on questions of private law, it is still very limited as compared with domestic case-law. What is now very important is that *domestic* case-law on questions of European private law be reported in other jurisdictions and other languages. Only in this way may lawyers of other nationalities learn of such cases.

5.2. Geographical

There is a number of ongoing research projects on private law in Europe, mentioned elsewhere in this paper. It is of major importance that these projects already take into account the forthcoming arrival of a number of new member states.

5.3. Subject-Matter

There is now little doubt that Contract Law is a major target of harmonization. Contract Law is close to two other areas: Securities and Tort Law. Once one harmonizes Contract Law, Securities are bound to follow. This then raises the difficult question whether or not the rest of Property Law (including transfer of Real Estate) should follow suit. Only in the case of *Intellectual* Property is harmonization self-evident. With the decreasing demarcation between Contract Law and Tort Law, it seems inevitable, as the Lando and Unidroit working groups found, that some Tort Law will also have to be harmonized. The problem here is the intermingling with Social Security, which so far remains very different in European jurisdictions.

When we talk about Contract Law nowadays, this includes Commercial Contract Law. As the Italians realized long ago, the distinction between a separate Civil Law and Commercial Law is no longer desirable.

Two growth areas of harmonization, after the Tampere summit, are Civil Procedure and Private International Law. On the other hand, the recent formation of a Study Group on European Family Law will still have great barriers to overcome. The law of Succession will likewise prove resistant to Europeanization for some time to come.

Finally, we should always be aware of the growing co-operation between Private Law and Anti-trust Law, which are already harmonized, and Administrative Law, which is not.

5.4. Technical

In the preceding text I have already mentioned a number of technical problems which will keep us occupied over the present decade, such as the form of harmonization: Regulation v. Directive, Code v. Restatement. There are other technical problems, such as the question of a single fabric – should we accept the increasing dichotomy between domestic law and European law within one legal system.

6. Role of Academics

This conference is about a European *ius commune* in legal education and research. Let me briefly and rather sketchily explore the role of academics in this development. Of first and foremost importance is the training of future generations of students. Erasmus has paved the way; the *Bologna* Declaration aims to do the same, but Dutch experience shows that the development of bachelor and master programmes may actually endanger some of the exchange programmes arrived at in the last century.

Academic staff should now engage in exchange themselves. I will develop this theme in the next Chapter. It is important to engage in an exchange of intellectual ideas in Europe. To this end, we should learn to express ourselves in other European languages.

In our teaching, we should promote the common stock of legal thinking: Savigny, Maitland and Pothier. We should also promote the development of a common stock of landmark cases and in the drafting of common projects. More generally, common research projects may be the cornerstone to increased harmonization.

7. The Maastricht Charter

The past Chapter leads to a set of rules which, with respect to the organizers of this conference, I would like to call the *Maastricht Charter of Legal Education*. The Charter embraces the following principles:

7.1. Every Law Student shall study at least one Semester Abroad

It is essential that every law student shall spend at least one out of his or her six semesters of bachelor studies abroad. Only in this way will it be ascertained that the student is sufficiently aware of the peculiarities of his or her own legal system. A European Law Faculty in one's own country is not exactly the same, although it

offers a somewhat similar experience. Likewise, taking courses in a language which is different from one's native tongue may be helpful in developing awareness, but only a five-month period abroad will fully succeed in the objective.

7.2. For Promotion to Senior Positions, Staff shall teach at least one Semester Abroad

Perhaps even more important is an obligation for senior staff to spend some time abroad teaching. It does not help very much if students are aware of their system's peculiarities and staff are not. Exchange agreements under Socrates arrangements may provide for financial possibilities for such exchanges.

7.3. Every Researcher shall publish at least once Annually Abroad

What is valid for legal education is also true for research. Only when publishing the results of one's research in foreign languages will researchers become aware of the shortcomings of their own language. It is of special importance to native speakers of English, who because of their language having become the *lingua franca* of international fora are very much in danger of becoming blind to the intricacies of their own tongue.

7.4. Every Lecturer (Teacher and/or Researcher) shall take part in continuing Legal Education, with Conferences abroad counting Double

It is a strange phenomenon that for many liberal professions, such as those of attorney and medical doctor, continuing education - 'éducation permanente' - is now compulsory, but for teachers and researchers of law it is not. In fact, most universities now offer their staff excellent financial opportunities to take part in such courses, but they are not compulsory.

7.5. Every Lecturer shall be entitled to a Sabbatical to be spent Abroad

Only when lecturers are offered regular possibilities to get to grasps with new developments, will their teaching and research remain of a good quality. A system of sabbaticals after the American model should be introduced to enable them to retrain.

7.6. Universities shall set aside Funds for Comparative Research Projects

Universities are now increasingly co-operating in international research projects. The University of Maastricht, with its co-operation in a project on mixed legal systems, its participation in the research school *ius commune* and in many other schemes, is a good example.

8. Conclusions

Private law is rapidly becoming European in outline. This requires a fundamental shift in both legal education and legal research. The Maastricht Charter purports to lay down a first blueprint for this shift in paradigm.