

Towards a European Contract Law

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I. INTRODUCTION

This paper is about the development of a European contract law. In the past decades, EC directives have led to the introduction of some unified, or at least harmonised, contract law at a European level. A directive on unfair contract terms, which goes to the heart of contract law, has been transposed in most Member States¹. A directive on distance selling is now in the course of being implemented. And a draft directive on consumer goods and associated warranties is at present in the course of being adopted by the European Council of Ministers. These are but three of the best known objects of EU initiatives in the area of contract law. In the related area of tort, a directive on product liability has now been implemented in all Member States, as well as in some other states². A list of relevant directives is reproduced in the second edition of the book «Towards a European Civil Code»³.

¹ See the special issue of the *European Review of Private Law* 1997/2.

² See Monique Goyens (Ed.), *Directive 85/374/EEC on product liability: ten years after*, Louvain-la-Neuve 1996; X. Lewis and others, special issue *European Review of Private Law* 1994, pp. 183-266.

³ See «Towards a European Civil Code II», Chapter 5 by Müller-Graff.

The introduction of these directives has not always been uncontroversial. At the time, the constitutionality of the directive on product liability was doubted by some politicians⁴. The Single Act and the Treaties of Maastricht and Amsterdam have put an end to such doubts, but Maastricht has introduced a new theme: is civil law not something to be left to Member States under the principle of subsidiarity?⁵ There are other criticisms as well. Not everyone, even when convinced of the constitutionality, is attracted by the quality of EU directives. The draft directive on liability for services—which was later withdrawn—has been criticised on this count from every side, academics⁶, producers and consumers⁷ alike. These questions raise the issue whether or not the EU should contemplate the gradual build up of a corpus of civil law. Until recently, the emphasis has rather been on public law, but several of the prerequisites for a European civil law do already exist. The European Court of Justice has shown itself highly competent; it has brought into operation really from scratch a European administrative law, which in turn has influenced the development of national law⁸. And even though the impact of the Court on private law may be small rather than large⁹, this may change when more directives dealing with civil law are adopted. There is a European bar. What is lacking is consensus over the direction which this development should take. Should consensus not be arrived at as to the framework in which future directives in the area of civil law should find a place? Such framework might eventually be provided by a European Civil Code.

⁴ See Geraint Howells, *Comparative Product Liability*, Aldershot 1993, pp. 20 ff.

⁵ See Stephen Weatherill, *EC Consumer Law and Policy*, Harlow: Longman 1997, pp. 30-35.

⁶ Erwin Deutsch and Jochen Taupitz (Eds.), *Haftung der Dienstleistungsberufe - natürliche Vielfalt und europäische Vereinheitlichung*, Heidelberg 1993; Sigurd Littbarski (Ed.), *Entwurf einer Richtlinie über die Haftung bei Dienstleistungen*, Köln 1992.

⁷ The European Consumer Law Group, a network of consumer advocates, for instance was highly critical of the draft.

⁸ Two examples are the development of the law of legitimate expectations and the reception of the idea of proportionality into English law - see Jürgen Schwarze, *European Administrative Law*, London/Luxembourg 1992, pp. 869-870. The reception has met with scepticism from some authors who simply believe proportionality non transplantable as such - see Sophie Boyron, *Proportionality in English Administrative Law: A Faulty Translation?*, (1992) 12 *Oxford Journal of Legal Studies* 237-264.

⁹ Van Gerven, *Towards a European Civil Code II*, Chapter 6.

This issue raises several interesting questions. First there is the question already referred to above: is there a constitutional basis for a European Civil Code in the Treaty of Rome, as amended by the Treaties of Maastricht and Amsterdam? Secondly, is codification of the law, more specifically of the civil or private law, a worthwhile idea? And finally, is this feasible on a European level, and if so, what should be the contents of such a code? This paper basically aims at answering only the last question: whether the various domestic legal systems in Europe are not too far apart to even contemplate unification or harmonisation, and what direction the provisions should take.

This paper will argue that the various legal systems are indeed too far apart at present to contemplate unification straight away. However, in five or ten years time this may be different. The difficulty seems to be that the systems are apart not only where solutions to common problems are concerned but also as to the formulation of these problems, the notions used and the various ways of finding the law («law-making»). Not always is this the case. The Common law jurisdictions, England and Wales, and Ireland, are close. The same applies to the civil law countries France, Belgium and Luxembourg, and to the Nordic states Denmark, Finland, Sweden and the European Economic Space State Norway. As between civil law and common countries¹⁰, England and Scotland are an example of close co-operation. As these examples show¹¹, a common language or linguistic heritage in the case of the Nordic countries and a common legal culture often are the basis for such co-operation. It is indeed in this domain that the concept of legal families may still play a role¹². Another basis for co-operation is the *lex mercatoria*, a set of rules, usages and maxims which has developed in private practice.

¹⁰ See Zaphiriou, Harmonization of Private Rules Between Civil and Common Law Jurisdictions, 38 *American Journal of Comparative Law* (1990). See as to the position of Scots law various essays in *The Civilian Tradition and Scots Law / Aberdeen Quincentenary Essays*, Berlin: Duncker & Humblot 1997 and *Scots Law into the 21st Century - Essays in Honour of W. A. Wilson*, Edinburgh: Green/Sweet & Maxwell, 1996, 214 p.).

¹¹ Other examples include both North America —the harmonisation achieved by the Uniform Commercial Code and the Restatements is notorious— and Latin America. As to the latter see Alejandro M. Garro, *Armonización y Unificación del derecho privado en América Latina: esfuerzos, tendencias y realidades*, Roma 1992; the same, *Unification and Harmonization of Private Law in Latin America*, 40 *American Journal of Comparative Law* 587-616 (1992).

A common language —Latin— and a common heritage —Roman law— once did of course exist in Europe. Although the present situation bears little resemblance to pre-XIXth century Europe, and therefore a «return» to that period is highly unlikely, yet the present interest in a new European civil law is a fascinating challenge to legal historians. As a German author, Schulze, has observed:

«The present and the past are linked in the concepts of European legal culture and European legal history in two ways: the awakening of interest in research into European legal history is prompted by the experience of the present, namely the present-day efforts towards the development of a body of common European law. The resulting research can in turn influence present-day thinking in that, contrary to another tradition and present-day experience, namely the legal thinking moulded by the nation-state, it contributes from a historical standpoint to a consciousness of a shared European identity. The concept of European legal culture is thus directed at the definition of an identity for the present based on the past whilst research in European legal history is both defined by and directed towards the present»¹³.

Is all this academic speculation, designed at upgrading the profile of the law curriculum? A brief look at what the «actors of the law» are doing shows us that the interest in the development of a European (civil) law is very real. Attorneys all over Europe have formed alliances. Judges are discussing their European ambitions. The most important event is that future attorneys and judges, the law students of today, are very much affected. Many present day students are participating in various exchange programmes, of which SOCRATES (formerly ERASMUS) is the most succesful, and a common legal education is being contemplated —and in some cases has started— in various countries¹⁴.

Before embarking upon this exercise, I shall first have to limit the scope of this paper in No 2.

¹² Set out by Bollen and De Groot in Chapter 7 of the first edition of *Towards a European Civil Code*.

¹³ Reiner Schulze, *European Legal History - A New Field of Research in Germany*, 13 *Journal of Legal History* 270-295 (1992). See also the author's *Die europäische Rechts- und Verfassungsgeschichte - zu den gemeinsamen Grundlagen europäischer Rechtskultur*, Saarbrücken 1991, pp. 19.

¹⁴ See G. R. de Groot, *European Legal Education in the 21st Century*, in: Bruno de Witte and Caroline Forder (Eds.), *The common law of Europe and the future of legal education / Le droit commun de l'Europe et l'avenir de l'enseignement juridique*, Deventer 1992, pp. 7-30.

II. SUBJECT-MATTER OF THIS PAPER

The subject-matter of this paper is Contract Law. There is little doubt in my mind that a future European Civil Code should also deal with other traditional areas of civil law, such as family law, inheritance law, restitution, property and trust. A future European Civil Code should also encompass what is now dealt with in Europe's Commercial Codes. Did not Europe's impact on private law begin with the company law directives? Yet, for practical reasons, this paper will hardly touch upon commercial matters.

Procedural law and Private international law are also left out. Civil procedure is so important that it warrants treatment in a separate paper¹⁵. For a similar reason, this paper does not deal with private international law. Private international law and harmonisation of private law have often been considered rivals in achieving legal certainty for crossborder transactions. The rivalry between the Hague Sales Conventions and the Hague Treaty on Private International Law relating to the Sale of Goods is an example. Yet at present, both are rather to be considered allied forces¹⁶. A Conflicts of Law Convention has greatly contributed to the expansion of the common law institution of trust in civil law jurisdictions¹⁷. The unification of European private international law, as for instance in the Rome Convention relating to the applicable law of contractual obligations of 1980, is an important step. It has already been argued that a European codification of private law strictly for transborder transactions could greatly contribute towards a European Union¹⁸.

¹⁵ The scope for procedural unification is discussed by Konstantin Kerameus in I. R. Scott (Ed.), *International Perspectives on Civil Justice: Essays in Honour of Sir Jack I. H. Jacob Q C*, London 1991 and by Manfred Wolf, *Abbau prozessualer Schranken im europäischen Binnenmarkt*, in: *Wege zu einem europäischen Zivilrecht / Tübinger Symposium zum 80. Geburtstag von Fritz Baur*, Tübingen 1992, pp. 35-67. See also the proposals of the Storme Commission and the discussion thereof by P. H. Lindblom and J. Normand in the *European Review of Private Law* 1997.

¹⁶ H. U. Jessurun d'Oliveira, *Towards a «European» Private International Law*, in: Bruno de Witte, Caroline Forder (Eds.), *The common law of Europe and the future of legal education*, Deventer 1992, pp. 265, 282 sees Private International Law from a Community point of view as a halfway house to harmonisation and approximation of the national laws of the Member States.

¹⁷ Grimaldi and Barrière, *Towards a European Civil Code*, Chapter 36.

¹⁸ J. H. A. Lokin, W. J. Zwolve, *Hoofdstukken uit de Europese Codificatiegeschiedenis*, Groningen 1986, pp. 363.

An interesting issue is whether only transnational law should be treated or also domestic law¹⁹. A drawback of this approach is the disintegration of domestic law through partial harmonisation²⁰, which should be a subject for further research²¹.

Consumer protection is one of those areas, where discussion as to the question whether the law should be harmonised, is largely academic: consumer law simply is already harmonised.

Comparison of legal developments in Europe is often facilitated by the common heritage of Roman and canonical law²². The common heritage does sometimes extend to America, witness the influence of American developments on European law²³. It therefore seems appropriate to at least occasionally allude to —some— American developments. Nor should the European offspring be forgotten; a recent example is the Australian and Japanese adoption of Product liability legislation²⁴ after the model of the EU directive.

Community law, as we have just seen, is rapidly gaining ground in the area of contract law. Yet EU law still covers only a fraction of the contract law. It therefore is natural that the domestic law of individual European countries will be discussed. This raises the question which jurisdictions are to be covered. It will be obvious that these jurisdictions should include not only the Member States of the EU, and their autonomous regions but also the remaining EFTA Member States which have introduced the «*acquis communautaire*» in their law.

¹⁹ A case for the former is made in Wehrens' Chapter 35 in *Towards a European Civil Code II on the Eurohypotheque*.

²⁰ See Ch. E. Hauschka, *Grundprobleme der Privatrechtsfortbildung durch die Europäische Wirtschaftsgemeinschaft*, *Juristen Zeitung* 1990, pp. 290-299.

²¹ On this issue see also Christian Joerges, Gert Brüggemeier, *Europäisierung des Vertrags- und Haftungsrechts*, in: P. C. Müller-Graff (Ed.), *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, Baden-Baden: Nomos 1993, pp. 233-286.

²² See H. Coing, *Das Europäische Zivilrecht*, 1985/1989.

²³ For instance in the area of product liability: see L. Dommering-van Rongen, *Produktenaansprakelijkheid/Een nieuwe Europese privaatrechtelijke regeling vergeleken met de produktenaansprakelijkheid in de Verenigde Staten*, doctoral thesis Utrecht, Deventer 1991. For a more general approach see Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 *American Journal of Comparative Law* 229-248 (1991).

²⁴ For Australia by the Trade Practices Amendment Act 1992 - see Jocelyn Kellam, *Australian Product Liability Reform*, *Product Liability International* 1992, pp. 18-21, 25.

Because of the envisaged extension of the EU towards Central and Eastern Europe, an extension which has already taken place within the Council of Europe, it will also be of interest to look east and devote attention to developments in countries such as the Czech Republic, Estonia, Hungary, Poland, Slovenia and Russia. At the present time of recodification of East European law, civil law is in such turmoil there that for practical reasons it is difficult to deal with. Yet in years to come there may be something to learn from East European experiences when work on a future European Civil Code is to start in earnest²⁵.

III. CONSTITUTIONALITY

Does the European Union have the competence to adopt a European Civil Code? This paper will not provide an in depth analysis of this interesting question. Many protagonists of a European Code point to a resolution of the European Parliament. Article 1 of this «Resolution on action to bring into line the private law of the Member States»²⁶ reads:

«Requests that a start be made on the necessary preparatory work on drawing up a common European Code of Private Law, the Member States being invited, having deliberated the matter, to state whether they wish to be involved in the planned unification».

There is no doubt that this is an interesting opinion. For a Dutch lawyer, the fact that the 1992 recodification of Dutch civil law also began with what seemed an innocuous parliamentary question springs to mind. Yet not too much should be made of it. Nor, for that reason should too much attention be given to the answer of Commissioner Bangemann to a question raised by Mr Filippos Pierros. The question was: «What practical measures will the Commission take to achieve a minimum degree of harmonization between the Member States on such sensitive matters of substantive and procedural civil law?» On behalf of the Commission, Mr Bangemann answered: «The Honourable Member is correct in pointing out that discrepancies exist in the Member States as regards substantive and procedural aspects of civil law. While the

²⁵ See A. Harmathy and A. Németh (Eds.), *Questions of civil law codification*, Budapest: Hungarian Academy of Sciences, 1990.

²⁶ *Official Journal of the European Communities* 1989, No C 158/400. The resolution was voted again in 1993.

Community has no direct power in terms of the EEC Treaty to intervene directly in the matters cited by the Honourable Member, Article 220 of the Treaty does permit Member States, where necessary, to enter negotiations with each other to make Conventions with a view to securing benefits for their nationals»²⁷.

The Commissioner's answer pointed to the fact that the European Community has a vast array of instruments available to reach its aims. Subsidiarity may however thwart attempts to use these instruments²⁸.

More recently, the question has been discussed if codification of European private law is possible under the so-called third pillar. At a conference held in Scheveningen in 1997 on the invitation of the Dutch government—the then president of the EU—a majority view seemed to be that codification, even if technically possible, should not be forced down the throat of unwilling Member States, while at the same time it should be possible for non-Members to join the codification work²⁹.

IV. CODIFICATION

Ever since the famous debate between Thibaut and Savigny in early XIXth century Germany, the question has remained on the civil lawyer's agenda: to (re)codify the law or not.

Germany eventually got its codification, after Belgium, France, Luxembourg, the Netherlands, Portugal and Spain had preceded it. Greece was still to come and then Italy (1942), Portugal (1966), East Germany (1975) and the Netherlands (1992) recodified their civil law. The most recent reform proposals in Germany only have a limited impact, but it should not be overlooked that in the shadow of large scale recodification, updating projects on a far smaller scale have brought most other codes in line with modern times. One therefore cannot really say that the codification idea is dead.

And what about the common law countries, one may object, what about the Nordic countries? Are not the common law countries especially

²⁷ *Official Journal* C 32/7 of 4 February 1993.

²⁸ Waldemar Hummer, *Zeitschrift für Rechtsvergleichung* 1992/2.

²⁹ The papers of the Scheveningen conference have been published in *European Review of Private Law* 1997/4.

radically opposed to any codification whatsoever? In the first edition of the book «Towards a European Civil Code», Van Erp indeed argued that the adoption of a European *Code* is not possible for England. Yet, one should not forget that as recently as the 1950's, with the establishment of its Law Commissions, the United Kingdom did contemplate the adoption of a codification of at least its law of contract³⁰. And as Howarth sets out in Chapter 27 of *Towards a European Civil Code*, provided the Code allows some degree of variation and acknowledges the possibility for experimentation and diversity, some degree of approximation may have economic advantages.

Thus, the codification idea does have some chances of being adopted Euro-wise. This does not mean that such codification should necessarily be European, but by all means regional efforts of harmonisation now seem to have better prospects than global efforts.

Should it be along the traditional division of the law in private and public law, in substantive and procedural law, that European law be codified? So far, codification along social-economic lines seems to have been a better way. However, with the advent of more harmonised private law, it is important to preserve the rich European tradition in this area and this can best be done by keeping intact traditional divisions, even though in most countries these are not as sharp as they may once have been. The one exception is the division of private law in civil and commercial law. As the Italian and the Dutch examples show, this distinction is no longer warranted.

Yet, the practical difficulties of codification, even along traditional lines, seem to be large. With the Italian writer Mengoni one is apt to

«riconoscere che «un codice per l'Europa» non è un'alternativa realistica»³¹.

It is therefore worthwhile to consider alternatives to codification. One such alternative may be the elaboration of Principles of European Contract Law, Tort Law, Procedure, etc. In doing so, inspiration may be drawn from the American example of *Restatements of the Law* and of *Uniform Laws*.

³⁰ More recently, the present chairman of the English Law Commission came out in favour of codification of English Commercial Law: Dame Mary Arden, *Time for an English Commercial Code?*, *Cambridge Law Journal* 56 (1997), pp. 516-536.

³¹ Luigi Mengoni, *L'Europa dei codici o un codice per l'Europa?*, Roma 1993, p. 3.

How to proceed, once regulation —be it in the form of codification, restatement or otherwise— has been opted for? Some advocate the use of a single text as a point of departure. Several authors, all Italians, have argued that the Italian Civil Code is best equipped to serve as a model for a European Code on Contract Law. For what reason?

«Pour deux raisons fondamentales: tout d'abord pour la position intermédiaire qu'il revêt par rapport non seulement aux deux principaux courants juridique français et allemand (...) mais par rapport aussi au droit anglais; ensuite pour sa modernité intrinsèque, une modernité—dirais-je—raisonnablement prononcée, exempte des excès qui ont amené certains pays à faire en toute hâte marche arrière»³².

In the practice of the Commission on European Contract Law (the «Lando Commission»), the text of the new Dutch and Québec Civil Codes are often consulted. There is a growing literature of those engaged in the various harmonisation commissions as to their experiences³³, which may well serve to indicate how future codificatory or regulatory work can be organised.

V. IS IT FEASIBLE?

«let contract flowers bloom rather than allow the tort elephant to trample them down»³⁴.

Having seen that a European Civil Code, although raising serious constitutional issues, is not constitutionally impossible, I now turn to the main question raised in this paper. Is a European Civil Code, more in particular a Book on Contract Law feasible? Having looked at this question, I shall then briefly turn to some other areas of Private Law: Family and Succession, Company, Restitution, Extra-contractual liability, Property, and Trust. I shall base my findings on the second edition of *Towards a European Civil Code*.

³² Giuseppe Gandolfi, Pour un code européen des contrats, *Revue trimestrielle de droit civil* 1992, 707, 726.

³³ See the recent *Festschriften* for Drobnig, Lando, Ramberg and Tallon as well as the other publications listed in the Bibliography.

³⁴ H. Kötz, 10 *Tel Aviv University Studies in Law* 195, 212 (1990).

With regard to the *Law of Contract*, Sacco in Chapter 13 provides us with some practical ideas as to harmonisation of the rules on formation of contracts, after pointing out the difficulties of finding a common definition of what contract is. In Chapter 14 on the Pre-contractual stage, Van Erp sees problems in bridging the gap between English law and the other European legal systems, but he is sympathetic to the idea of harmonisation and also seems less sceptical than in the first edition of this book. In that edition, Van Erp had discerned a growing divergence between English and continental law, as was demonstrated by the case of *Walford v Miles*³⁵ - see No. 8 below. In this case, the House of Lords considered; «A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party». A European Code, which would point to a different direction, would be totally unacceptable to the United Kingdom according to the author.

In Chapter 15, Fabre-Magnan concludes that achieving unification as to the defects of consent in contract law is not easy, but it is not impossible either. In Chapter 16, Storme Jr. starts with the assumption that if there is any aspect of contract law which is resistant to harmonisation, it probably is the validity of contracts. His conclusion is that indeed there are many opposing views, albeit of a mainly technical character. One of the few authors in the book who already takes account of Central and East European Law is Kötz, who in Chapter 17 tries to rid the subject of Interpretation of traditional theories which have lost their relevance for present-day law.

Unfair contract terms, at least in consumer contracts, is one of the areas where an EC directive has brought about some harmonisation (some, because the directive allows Member States to provide consumers with more protection). Not only should it be possible to expand this harmonisation to commercial contracts, but filling the gaps is also feasible, as is suggested by Wilhelmsson in Chapter 18.

One of the battle grounds between common and civil law sometimes appears to be that of good faith. The introduction of this notion in England has met with some fierce resistance³⁶. Quite unnecessarily so,

³⁵ [1992] 2 *WLR* 174.

³⁶ See Chris Willett (Ed.), *Aspects of Fairness in Contract*, London 1996; Gunther Teubner, Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences, 61 *Modern Law Review* 11-32 (1998).

is the contention of Hesselink in Chapter 19. The author is doubtful, however, if a good faith clause should be inserted in a code or restatement of European private law. Hardship is a typical daughter of good faith, according to Chapter 20 by Tallon. The question whether or not it is an acceptable defence once again divides Europe's jurisdictions, but this time the Channel is not the dividing line. The author enters a plea for the solution adopted by both the Unidroit and the Lando Principles. From the scarcity of case law he also deducts that whenever the law gives the court large powers, it uses these with moderation. In Chapter 21, on the basis of his practical experience, Lando concludes that it is possible to establish a system for non-performance and a terminology accompanying this system. The price to be paid is that it has not been possible to provide general rules on performance and remedies which have any great precision.

In his Chapter 22 on termination, Beale demonstrates that subjects should be studied in their context. English law on termination is quite different from that in continental systems. The explanation, according to Beale, lies in the absence of specific performance as a regular remedy in English law. This is compensated by allowing the aggrieved party more coercive powers to try to make the defaulting party perform. Like Beale, Du Perron in his Chapter 23 on Contract and Third Parties also places his subject in a context. The prospect of codifying the law on this subject seems daunting to him, but he shows himself undaunted and concludes that it may be less difficult after all. But the difficulties relate to the general part of the law: to the status of relative rights and the relationship between contract and tort.

Towards a European Civil Code II contains two chapters on specific contracts. In his Chapter 24 on Sale of Goods, Ferrari explores the possibility to simply adopt the Convention on the International Sale of Goods (CISG; Vienna Sales Convention) as the common law for Europe. He does find some drawbacks, but for the viewpoint of the feasibility of harmonisation on a European level, the message is clear: it is feasible, as is demonstrated by CISG. What about codification of «modern» contracts, such as factoring, leasing, technology contracts? In Chapter 25, Fontaine warns us that more traditional contracts should come first.

Now turning to *Family Law*, Martiny begins Chapter 10 with explaining why in the current debate about unification of European civil law, Family Law has only played a marginal role. The same holds true for the law of succession, but here a uniform act, according to Verbeke

(Chapter 11), is not only feasible, but has already been proposed³⁷. *Company law* has long been considered the motor of European private law, but—as Hommelhoff shows in Chapter 12—the motor has slowed down and it may be doubted whether the more recent initiatives have been well-chosen.

With regard to *non-contractual obligations*, Clive in Chapter 26 not only sees possibilities for a European Code, he already submits to us a set of draft provisions. We then find that Howarth in Chapter 27 argues not for uniform law, but rather for some degree of approximation, with room for experimentation and diversity. The Code should also encourage debate by not purporting to solve every problem in advance and by acknowledging the role of the courts. Chapter 28, written by Von Bar, mentions quite a number of divergences in the law on vicarious liability, but in the end he arrives at a proposal for a European code.

In Chapter 29, Howells is in the enviable position that Product liability has already been harmonised to some extent by the EC Directive of 1985. The lessons to be drawn from the ensuing implementation process are that national legal traditions are difficult to overcome, that formally harmonised laws may yet differ in their application and that harmonisation is of limited utility if not all aspects are harmonised.

As for traffic liability, A. Tunc in Chapter 30 states the case for a traffic accident compensation, which as far as he is concerned, may find a place in a European Civil Code, although the author does see potential adversaries among insurers and practicing attorneys. He argues for a division of the traditional domain of tort law into tort law and accident law, the latter including labour, medical and traffic accidents. In Chapter 31 on Environmental liability, Betlem shows himself to be an ardent supporter of an Environmental Liability Regulation, which in his view could easily be inserted into a European Civil Code. This author also writes about two aspects which are not taken up by most other authors. First, he sets out the constitutional basis for the Regulation advocated by him. Second, he puts Europe itself in perspective, seeing it not so much as something far larger than what we usually deal with, but rather as part of the world.

³⁷ Y. H. Leleu, *Nécessité et moyens d'une harmonisation des règles de transmission successorale en Europe*, *European Review of Private Law* 1998, 159-194.

Now turning to *Property law*, Drobnig in his Chapter 32 on transfer of property in corporeal movables sets out the profound differences between the various European countries. For once the English Channel does not seem to be the major divide, but rather an Anglo-French conglomerate versus Germany, Greece and the Netherlands. Yet this author does see a possibility of drafting a European Civil Code, provided this will take into account two basic rules. An important point which the author makes, is that the rules on obligations and property are interdependent to such a degree that an isolated unification of rules of central importance is not advisable. As we have seen earlier, some authors on Contract Law, such as Du Perron, arrive at the same conclusion. In Chapter 33, Drobnig analyses the difficult area of security rights in movables. He comes to the conclusion that a harmonisation is possible. A code should integrate the two heterogeneous regimes which have developed in most countries into a modernised pledge law. The author warns us against a general system of registration for non-possessory securities.

Dalhuisen in Chapter 34 gives an account of the everlasting struggle of modern business needs for security interests which are compatible with the legal traditions of the various countries of the world. The author does see a possibility for civil law and common law to arrive at a common position through the elaboration of the ownership context. This common position should be arrived at through case-law, which has been the conduit for the development of all modern security rights, and not through legislation.

Then, in Chapter 35 Wehrens strongly argues for the development of a *Euro-hypothèque* (mortgage), to be used in case of transfrontier credit transactions as an alternative to domestic mortgage. The author raises two issues which are also discussed in some other Chapters. First, does private international law provide a solution for transfrontier credit transactions under mortgage. He answers the question in the negative. A second issue is whether a European regulation should only deal with transfrontier mortgage transaction or should cover all such transactions, even the domestic ones. The major differences between the various mortgage institutions of European countries turn the latter solution into a somewhat unrealistic and perhaps also undesirable one.

Finally, Chapter 36 is devoted to the *trust*, a common law institution which seems on its way to plant itself in civil law countries. Grimaldi and Barrière argue that it is desirable that the trust, or its civil law equivalent *fiducie*, expands throughout Europe. Duality of ownership and unity of patrimonium are no valid obstacle.

VI. HOW TO PROCEED

From the preceding part of this paper the conclusion may be drawn that a European Civil Code may still be a long way ahead, but that it is not to be excluded altogether. It therefore seems appropriate to contemplate the elaboration of a code or restatement, which may at least provide a framework. Such «pre-code» may for instance serve to make directives compatible with one another.

Perhaps even more important is the contribution which an exchange of ideas may make towards elaborating a new international framework of concepts and norms of civil law. The necessity of this has been underlined by several authors³⁸. It is well stated by H. Kötz, who suggests that

«auch die Grundlagen des Zivilrechts in den Prozess der Rechtsvergleichung einzubeziehen, also einen Bestand allgemeiner Regeln des Vertrags- und Deliktsrechts herauszuarbeiten, der auf einen internationalen Konsens rechnen und dazu beitragen kann, der Rechtsprechung die Anwendung des geltenden Einheitsrechts zu erleichtern, die geschilderten Auslegungsdivergenzen zu vermeiden und den Boden für künftige Vorhaben der Rechtsvereinheitlichung vorzubereiten»³⁹.

P. Ulmer has further developed this idea as follows:

«Geeignete Gegenstände dafür bilden Werk-, Dienstleistungs- und Geschäftsbesorgungsverträge, aber auch Darlehens- und Bankgeschäfte, Versicherungs-, Miet- und Leasingverträge, um nur die wichtigsten heute

³⁸ In this sense for instance O. Remien, *Europäische Rechtswissenschaft - Voraussetzung oder Folge europäischer Rechtsangleichung*, in: K. J. Hopt (ed.), *Europäische Integration als Herausforderung des Rechts: Mehr Marktrecht - weniger Einzelgesetze, Veröffentlichungen der Hanns Martin Schleyer-Stiftung* 12, vol. 32, Berlin 1990, p. 124, at 131: «europäische Rechtswissenschaft sollte nicht bloße Folge europäischer Rechtsangleichung sein, sondern ist im Grunde ihre Voraussetzung».

³⁹ Neue Aufgaben der Rechtsvergleichung, *Juristische Blätter* 1982, pp. 355, 361. In his paper on «Legal education in the future: Towards a European Law School?», in: Bruno de Witte and Caroline Forder (eds.), *The common law of Europe and the future of legal education/Le droit commun de l'Europe et l'avenir de l'enseignement juridique*, Deventer 1992, pp. 31, 41, Kötz argues that «[t]he aim of finding a European common core of legal principles (...) is simply to mark out areas of agreement and disagreement, to construct a European legal *lingua franca* that has concepts large enough to embrace legal institutions which are functionally comparable, to develop a truly common European legal literature and the beginnings of a European law school curriculum, and thus to lay the basis for a free and unrestricted flow of ideas among European lawyers that is perhaps more central to the idea of a common law than that of identity on points of substance».

gebräuchlichen Vertragstypen zu nennen. Ziel dieser Arbeiten kann es nicht sein, alsbald Kodifikationsvorschläge zu erstellen. Schon viel ist gewonnen, wenn man auf diesem Wege zur Entwicklung gemeinsamer Grundsätze kommt, die ihrerseits durch Erläuterungen über die jeweilige Rechtslage in den Mitgliedstaaten und über die maßgebenden Erwägungen für die erarbeiteten Vorschläge zu ergänzen sind»⁴⁰.

All of this requires what Sacco has called the circulation of legal ideas. I warmly support this idea⁴¹. Domestic law should be given a much wider audience than only the citizens of the state concerned. Smaller nations, especially, should make an effort to «export» their law. Most Nordic countries already have a tradition of providing government reports with English language summaries. Countries such as Greece, the Netherlands and Portugal would be well advised to take over this tradition. The Netherlands do have a long standing tradition of supplementing doctoral theses with foreign language summaries. Likewise, some countries publish annual translations or adaptations of major law review articles in English⁴². New law reviews such as *Europa e diritto privato*, the *European Review of Private Law* and the *Zeitschrift für Europäisches Recht* also help in disseminating legal ideas.

Although for practical purposes, the number of languages used in Europe presents some obvious problems, I do not support the idea that in the future there should be a single European language. Rather the diversity of languages, like that of cultures, seems to give Europe its distinct flavour⁴³. On a more abstract level, a case may well be made that

⁴⁰ P. Ulmer, *Vom deutschen zum europäischen Privatrecht?*, *Juristen Zeitung* 1992, p. 1, at 7.

⁴¹ See for a similar call Anthony Ferner and Richard Hyman, in: *Industrial Relations in the New Europe*, Oxford 1992, pp. xvi-xvii: «Whether «harmonisation» of national industrial relations systems is a realistic possibility must therefore be left to subsequent analysis. However, such policy discussion certainly needs to be informed by an understanding of the similarities and differences between national systems, the evidence of convergence and divergence in recent years, and possible explanations for these trends and characteristics».

⁴² The *Scandinavian Studies in Law* are an example, but this is not confined to smaller states. Of the larger European countries, Italy has also adopted this system —see *Italian Studies in Law* (Ed. A. Pizzorusso), Dordrecht 1992; and *Italian Yearbook of Civil Procedure* (Ed. Elio Fazzalari), Milano 1992—.

⁴³ Because of fear for annihilation of the cultural variance, Pierre Legrand, in: *Against a European Civil Code*, 60 *Modern Law Review* 44-63 (1997) and in other publications argues what the title of his essay suggests.

the co-existence of several languages may contribute towards a higher quality of legal texts⁴⁴.

VII. NEW PROBLEMS: FINDING THE LAW

The conclusion from the preceding analysis appears to be that harmonisation of private law at a European level raises some major difficulties, but is not inconceivable. However, a word of caution is now appropriate. Even when private law in the various Member States were to be completely unified, this would not necessarily mean that its application and interpretation would be the same all over the Union. There are some big hurdles to overcome, especially when one looks at the way judges find the law in these jurisdictions.

Before embarking upon this exercise, I have to restrict the importance of my own argument. Practice is often closer than theory suggests. This idea is indeed at the basis of the *Common Core of European Private Law* project. An amusing example may be taken from the debate as to the introduction of open or vague norms into the common law. This introduction, forced by European Union directives, has been described as a legal irritant by one author, and is indeed viewed as such by most English lawyers. And yet, at the very same time, there is a British government agency, which is introducing such open or vague norms into British self-regulation.

This is the *Office of Fair Trading*, which over the past years has taken action against unfair contract terms in trades and industries such as advertising, the air industry, beauty therapy, *bungee jumping*, computers, *credit cards*, double glazing, driving lessons, gambling halls, gas, hair dressers, mobile telephones, mortgages, parking lots, postal services, recreation, safety systems, soccer clubs, swimming pool subscriptions and travel⁴⁵. Often the *Office of Fair Trading* succeeds in simplifying clauses by introducing open norms. A computer contract contained the following clause:

⁴⁴ See Olivier Remien, *Rechtseinheit ohne Einheitsgesetze? - Zum Symposium «Alternativen zur legislatorischen Rechtsvereinheitlichung»*, *RabelsZ* 1992, 300, 307.

⁴⁵ Bulletin «Unfair Contract Terms» 1997/4, pp. 27-57, to be ordered free of charge from the *Office of Fair Trading*, P O Box 172, East Molesey KT8 0XW, England.

«Force Majeure. Time shall not be the essence of the Contract and the Company shall not be liable for any delay in installation in the event of any strike, lock out, trade dispute, accident, fire, flood or any natural disaster or act of God or any contingency whatsoever beyond the reasonable control of the Company affecting the supply or installation of the Contract overleaf. Such suspension or cancellation shall not constitute a breach of Contract by the Company, nor will the purchaser be liable to claim for any loss or damage howsoever arising as a result of these circumstances».

After negotiations with the Office, the clause was changed into: «*The Company will manufacture and install the items within a reasonable time*». And the clause «All claims for non delivery shall be deemed waived unless presented to the Seller within 7 days of delivery of each shipment. Modification to delivery schedules by the Purchaser must be received by the Seller 21 days prior to the requested shipping date» was turned into: «*All delivery dates are quoted in good faith*». Which demonstrates that the presumed British fear of open norms is not as widespread as we are made to believe.

However, in the following, I shall not discuss the many similarities, but rather the dissimilarities, not on the level of substantive law, but on the higher level of finding the law. Such dissimilarities may exist even as between close neighbours.

VIII. THE NETHERLANDS, BELGIUM AND GERMANY

At first sight, Belgium, Germany and the Netherlands appear to be very close where finding the law is concerned. Belgium, Luxembourg and the Netherlands constituted the Benelux, which after World War II served as a model for the later European Union. Private law in Belgium and especially the Netherlands has always been influenced by German doctrine.

But there is a major difference between the Netherlands on the one hand, and Belgium and Germany on the other. The latter two countries are very familiar with judicial review of the Civil Code. It is true that in the Netherlands the constitutional question in finding the law is not unknown⁴⁶. But in case-law, the development is not very pronounced, as

⁴⁶ T. Koopmans, De constitutionele kant van de rechtsvinding, in: E. S. G. N. A. I. van de Griend and B. W. N. de Waard (Eds), *Rechtsvinding/Gedachtenwisseling over het*

opposed to that in the other two countries, which both have a Constitutional Court.

In this regard, there is a similarity between the Netherlands and the United Kingdom, where constitutional arguments also are of little importance. Is finding the law in the Netherlands therefore comparable to that in the United Kingdom? Everyone, perhaps with the exception of Zimmermann, is convinced that there is a world of difference between these two legal systems⁴⁷. This may be illustrated by the case of *Walford v. Miles*, quoted above.

IX. COMMON LAW AND CIVIL LAW

The case of *Walford v Miles*⁴⁸ concerned the question whether or not a person who engages in negotiations may be held liable for calling off the negotiations. Most, if not all continental European countries answer this question in the affirmative. Not so England, where Lord Ackner, speaking in the House of Lords, uttered the sentence quoted above. These words are often quoted to demonstrate the big difference between *common law* and *civil law*. Correctly so, but for a wrong reason. What we may not deduce from Lord Ackner's words, is that under no circumstances shall English courts allow pre-contractual liability. Everything is dependent upon the facts of the case. The precedent setting value of *Walford v. Miles* is restricted to the facts of this particular case. In other cases, although it may at present seem unlikely, English courts may adopt other rules under other circumstances.

But in the very fact that the difference between the two jurisdictions may be smaller than one expected at first sight, lies a difference on the level of finding the law which may be of even bigger importance. A restriction of a court's holding to the facts of the case is particular for the *common law* system; on the continent, there is no such restriction - and therefore the inclination to do the same with *common law* cases. So paradoxically, a court decision has more value on the continent, to the

nieuwe Algemeen Deel** van de Asser-serie (Asser-Vranken), Deventer: W. E. J. Tjeenk Willink, 1996, pp. 1-8.

⁴⁷ See the special issue *Anglo-Amerikaans recht*, *Ars Aequi* 1998, 353-535.

⁴⁸ [1992] 2 *WLR* 174.

extent that it is considered to be binding in any case, no matter what the facts are.

So we find that there is, after all, a fundamental difference between *common* and *civil* law, not on the substantive level, but on that of the importance of precedent. Basically, when we speak of civil law, we have in mind the European continent. But now the question should be raised: does Russia, do the other former Soviet republics, does the East share this interest in case-law of the supreme courts?

X. EAST AND WEST

Finally, I would like to mention the big difference between Western Europe on the one hand and Central and Eastern Europe, the former socialist republics, on the other. In my own university, we nowadays receive many students from Albania, the Czech Republic, Hungary, Kosovo, Poland, Slovakia and Ukraine for a six to twelve month period. When these students have to hand in papers, they often do not mention any case-law. Why not? Because under their system they have been taught that case-law only illustrates how legislation functions. This in fact is a correct interpretation of how judges saw their own function under socialist rule. They would closely follow the Party and as *bouche de la loi (rouge)* should not show too much initiative. In the present time of recodification of Central and East European Law, this places us for some problems. Western codes nowadays often contain open, or vague norms, which are in need of being filled in by the courts. And the ways in which courts do so, should be reported in law reports, in order for other courts as well as litigants to know what is happening. Such a tradition is absent at present, and there we have a weakness in the export of West European law to Central and Eastern Europe.

Having discussed some of the dissimilarities as to finding the law in Europe, we now arrive at a moment to discuss some methods in finding the law, which at present are not converging, but could be developed on short notice to do so. These are: European community law (No. 11), the constitutional argument (No. 12), and the comparative argument (No. 13).

XI. EUROPEAN COMMUNITY LAW

In 1960, some 300,000 Dutch citizens suffered from an itching disease. After some time, it became highly likely that the disease was caused by a new margarine, which the large Anglo-British concern Unilever had brought on the market under the brand name of *Planta*. Maybe typically for the Netherlands, no judicial decision was ever arrived at in this case. Rather, the manufacturer set up a three-men commission of wise old men who were given the power to adjudicate claims. Most claims did not involve high sums of money. Now let us assume, for the sake of argument, that the claims would be brought under the present EC-directive based Product Liability legislation. Just imagine that someone has suffered damages to the amount of Hfl. 2,000. According to Article 6:190 paragraph 1 sub b Burgerlijk Wetboek he may claim these damages «with a franchise of Hfl. 1,263,85». Two questions will immediately arise. First, how did the legislator arrive at such a strange amount: why did he not opt for either Hfl. 1,000 or Hfl. 1,500. And secondly, what is a «franchise»? The answer to the first question is simple: it is the value of 500 Ecu (the predecessor of the Euro). The second question is more difficult: what is a «franchise»? Does it mean that once the sum of Hfl. 1,263.85 is surpassed, the victim will receive the full amount of his damages, or should the Hfl. 1,263.85 be deducted from the Hfl. 2,000. leaving him Hfl. 736.15? The Dutch language is not unequivocal on this point, nor is the English text. The French text: «sous déduction de», and the German text: «unter Selbstbeteiligung von» are perfectly clear, however, and there is much reason, taking into account the provision's legislative history, to award the consumer the lower amount. What has been the case? The civil servant with the Commission who drafted the provision was a German citizen, who wrote his texts — as was usual at that time — in French. The Dutch and English texts were made by the EU's translation office in Luxembourg. So why not place more weight on the French and German texts? Well, it is not that simple. In the first place, legislative history as an argument does not carry the same weight in all member states⁴⁹. In the second place, all European

⁴⁹ See the «Practice direction» of the Supreme Court: 3. *Documents to be served*. Any party intending to refer to any extract from Hansard in support of any such argument as is permitted by the decisions in *Pepper v. Hart* [1993] A. C. 593 and *Pickstone v. Freemans Plc.* [1989] A. C. 66 or otherwise must, unless the judge otherwise directs, serve upon all parties and the court copies of any such extract together with a brief summary of the argument intended to be based upon such

languages are equal, according to EU law⁵⁰. And in the third place, teleological interpretation has great importance on the European level⁵¹. And it is especially the teleological interpretation —looking for the purpose of the directive— which may lead to a more consumer friendly result. In Dutch legal writing, my conclusion is supported by Dommering-van Rongen⁵², but not by Snijders⁵³ and Van Wassenaer⁵⁴. Verkade c. s. consider both positions tenable and therefore —*testimonium modestatis*— do not give an opinion⁵⁵.

In countries outside the Netherlands this question is usually ignored because the language does not give rise to any doubts. France and Germany have such unequivocal texts, that the idea to consult the Dutch or English texts will simply not cross a lawyer's mind. And the United Kingdom, in transposing the directive, has opted for a consumer friendly text, and few British writers will find that this text is different from that of the directive.

What does this teach us with regard to finding the law? That distinctions on this point between the various jurisdictions are not very large, but also that small differences may lead to opposing results.

It also learns us that with regard to interpretation, authentic national law and Europe-influenced national law should now be distinguished. Whenever a legislature opts for incorporation of a directive in a national Code, it would therefore be wise to begin with a warning: YOU ARE NOW ENTERING A ZONE OF EUROPEAN LAW⁵⁶.

extract' (Supreme Court, Practice Direction (Hansard: Citation), [1995] 1 *Weekly Law Reports* 192-193).

⁵⁰ EC Court 6 October 1982 in the case CILFIT/Ministerio della Sanità.

⁵¹ See Hans Kutscher, as quoted by Stephen Weatherill, Paul Beaumont, *EC Law*, second ed., London 1995, p. 172: «The literal and historic methods of interpretation recede into the background. Schematic and teleological interpretation... is of primary importance».

⁵² Dommering-van Rongen, *o. c.*, p. 262. She mentions the auxiliary argument that the British solution is the more practical one; under the French/German solution, the buyer/victim may have to address both the seller and the producer.

⁵³ Snijders, *o. c.*, p. 84.

⁵⁴ Van Wassenaer, *o. c.*, p. 60, invoking the French and German text.

⁵⁵ Verkade c. s., p. 94.

⁵⁶ The advantage of separate legislation is that from the outset it will be clear that interpretation methods may have to be different—see Marek Schmidt, *EU-Richtlinien und nationale Auslegungsmethoden*, *RechtsZ* 1995, p. 569, 572: «Angeglichenes Recht ist seinem Ursprung nach nationales Recht. Daher liegt es nahe, daß bei

XII. THE CONSTITUTIONAL ARGUMENT

The case, unfortunately, is well known in Western Europe. A man is in need of a loan. A bank is only willing to give the man a loan, when his wife, daughter, or other relative is willing to sign a contract of guarantee. The man then fails to pay back his loan and the bank enforces the obligation to secure the debt owed by the husband or father. In several jurisdictions, the courts have tried to curtail such *sexually transmitted debts*. What is interesting is that in Germany, the incentive to do so has come from the Constitutional Court⁵⁷. The civil law courts were in general reluctant to encroach upon freedom of contract, but not so the *Bundesverfassungsgericht*. This is an example of how constitutional arguments may play a bigger role in finding the law in Europe.

XIII. THE USE OF COMPARATIVE BY COURTS

An Englishman, following a family quarrel, had a will drawn up by his family solicitor, excluding his two daughters from his inheritance. When later the family relations were restored, the testator asked his solicitor to prepare a new will ensuring that his two daughters should receive L 9,000 each. Although he had invoked the solicitor's help around mid-June, it was not until September 17, that an interview could be arranged, notwithstanding repeated attempt to arrange an earlier meeting. On September 13, the testator had a heart attack and he died without having altered his will. The frustrated daughters sued him for their lost legacies. After a lengthy and costly battle, they won their case: in the landmark case *White v. Jones*, the House of Lords ruled in favour of accepting the solicitor's liability⁵⁸. What interests us in this regard, is that the House gave much consideration to arguments coming from German precedents. The British court did not follow the German precedents where the grounds for liability are concerned: instead of the

seiner Auslegung mit noch größerer Unbefangenheit national tradierte Methoden zugrunde gelegt werden».

⁵⁷ See *Barclays Bank plc v O'Brien* and another [1993] 4 All ER 417, BVerfG, 19.10.1993, *European Review of Private Law* 1996, 263-286.

⁵⁸ *White v Jones*, [1995] 2 *Weekly Law Reports* 187, HL, *European Review of Private Law* 351-379 (1996).

German contractual basis (*culpa in contrahendo*), Lord Goff thought a delictual regime conformed better with the English legal system.

White v. Jones is an example of what Drobniig has called *voluntary recourse to foreign law*⁵⁹. This may be distinguished from *necessary comparison* in the case of General principles of law, conflict of laws, uniform legislation, European Union law, rules shared with other countries, maritime and air law, and extradition. Drobniig sadly concludes that voluntary recourse to comparative law in cases of a purely domestic character is very rare. But *White v. Jones* may be the beginning of a new era. Here also lies a task for academics, who by making foreign legal systems accessible to their own courts greatly advance the practice of using comparative arguments. In that particular case, the seminal book by Markesinis on German tort law has no doubt been of major importance. A new project like the Van Gerven *ius commune* books may pave the way for ever more comparative arguments.

XIV. CONCLUSION

The impact of European law on the development of private law will become more and more important in the imminent future. A number of directives does already force Member States to harmonise part of their contract and tort law. Other areas of private law will soon also be the object of harmonising efforts. Not always will the European Community use directives as its sole instrument. Other instruments propagated include treaties and regulations. Private self-regulation is another source.

What is needed at present is a framework in which all these efforts can be placed. Such a framework could be established by a European Civil Code. As yet it is too early to even consider adopting such a Code. The notions and the practical solutions found within Europe are still very much apart and in some areas, such as formation of contract, appear to be diverging rather than converging.

⁵⁹ Ulrich Drobniig, The use of comparative law by courts, in: K. D. Kerameus (Ed.), XIV Congrès international du droit comparé Athènes 1994/Rapports généraux, Athens/The Hague 1996, pp. 65, 68.

Finding the law is also differently thought of. However, if a Code is brought about which only aspires to serve as a set of Principles of Civil Law, some practical difficulties seem to diminish. Such set of Principles may also serve as a source of inspiration to both judges and academics⁶⁰. Judges should play an important role, since it is only through case-law that major areas of the civil law, such as that of corporeal securities, are formed. Academics are important, since they will have to contribute towards the circulation of ideas with regard to this development⁶¹. A similar conclusion is reached by Manfred Wolf with regard to the necessity of unification of civil procedure⁶². The new European challenge to lawyers in Europe seems to be taken up with enthusiasm in a number of countries.

Finding the law is sometimes called the core of legal education. Although this is perhaps slightly exaggerated, there is no doubt that it is an important subject. In my country, three authors have in the past set out to write a scholarly introduction to the subject. All three are at present in the course of being updated. One of the new elements, in my mind, should be that more and more legal education should focus on Europe rather than on national states.

Is there such a thing as a common European way of finding the law? No, this is not the case. Even when judging only from the Netherlands,

⁶⁰ W. van Gerven, «Court decisions, general principles and legal concepts: ingredients of a common law of Europe, in: Bruno de Witte and Caroline Forder (eds.), *The common law of Europe and the future of legal education/Le droit commun de l'Europe et l'avenir de l'enseignement juridique*, Deventer 1992, pp. 339, 348.

⁶¹ Such circulation of ideas should in itself, apart from developments at a Community level, make a contribution towards the development of domestic private law. This has always been one of the main functions of comparative law.

⁶² «Eine Bestandsaufnahme der Prozessordnungen der europäischen Mitgliedstaaten lässt erkennen, dass sie auf einer gemeinsamen rechtsstaatlichen Grundlage beruhen, (...). Trotz rechtsstaatlich gemeinsamer Grundlagen bestehen bei der Ausgestaltung im einzelnen manche Unterschiede. Diese Unterschiede, die zum Teil Ausdruck besonderer kultureller Anschauungen, Erfahrungen und sozialer Gepflogenheiten sind, müssen auch in der Europäischen Gemeinschaft nicht vollkommen nivelliert werden. (...) Den prozessualen Verschiedenheiten sind in der Europäischen Gemeinschaft aber Grenzen gesetzt, soweit die Handelsbeschränkungen und Wettbewerbsverzerrungen zur Folge haben. (...) Insoweit ist eine Anpassung an die Erfordernisse des Binnenmarkts geboten»: Manfred Wolf, *Abbau prozessualer Schranken im europäischen Binnenmarkt*, in: *Wege zu einem europäischen Zivilrecht/Tübinger Symposium zum 80. Geburtstag von Fritz Baur*, Tübingen 1992, pp. 35, 67.

it is clear that there are differences with finding the law with the neighbouring Belgium and Germany, which both have installed constitutional review, as opposed to the Netherlands. The differences with the common law countries are even more conspicuous. At first sight, Holland and England are close in that neither of them has constitutional review. But then, a case such as *Walford v. Miles* discloses a channel of difference with regard to pre-contractual liability. A difference which upon closer inspection is smaller than expected. But as we have seen, the very fact that the substantive differences are smaller leads us to see that finding the law in the common and the civil law is much further apart than we may at first have imagined. May we speak of «the» civil law? Major differences between East and West Europe demonstrate that here also lies a problem.

Still, it appears worthwhile to start thinking of new Euro-wide ways of finding the law. Using arguments gained from community law, broadening constitutional arguments and finally promoting comparative law may contribute to this new area of research.

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