Editorial

European private law

On the development of a European private law in the 1990's

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1. Introduction

While most of the business world is buzzing with excitement over '1992' and 'Maastricht', this does not seem to be the case in the world of law. For many a Dutch lawyer, '1992' does ring a bell, but as far as private law is concerned, the entry into force of a new Dutch Civil Code in that year seems of far greater importance to him. It may be assumed that interest among the rank and file of attorneys in other European countries in the Single Market is not much larger.

Yet, important changes are on hand. The directive on product liability[1] has been the first of a number of EC measures which go to the heart of the civil law. An earlier directive dealt with misleading advertising.[2] Later subjects include door-to-door sale,[3] consumer credit,[4] package travel[5] and unfair contract terms.[6] Other areas of civil law, such as comparative advertising,[7] liability for services,[8] waste disposal[9] and distance selling,[10] may soon follow suit. The impact of EC Antitrust Law and the importance of EC directives for the banking and the insurance industry[11] is already obvious. In order to keep up with developments, German lawyers can no longer confine their research to German case law, Spanish attorneys to Spanish case law. Cross border research will become more and more important. Not only new directives, but also the economic consequences of the Single Market's coming of age and the ensuing commerce necessitate this.

1. Dir. 85/374, *Official Journal* 1985, L210/29.
2. Dir. 84/450, *Official Journal* 1984, L250/17.
3. Dir. 85/577, *Official Journal* 1985, L 372/31.
4. Dir. 87/102, *Official Journal* 1987, L 42/48.
5. Dir. 90/314, *Official Journal* 1989, L 158/59.
6. Proposal, *Official Journal* 1989, C 193/1. In June 1992, a political compromise was arrived at in the Council of Ministers. The compromise substantially differs from the original and the amended proposals.
7. Proposal, *Official Journal* 1991, C 180/14.
8. Proposal, *Official Journal* 1991, C 12/8.
9. Proposal, *Official Journal* 1989, C 251, amended Official Journal 1991, C 192.
10. Proposal, *Official Journal* 1992, C 156/14.
11. See F. Reichert-Facilides, 'Versicherungsvertragsrecht in Europa am Vorabend des Binnenmarktes', *Versicherungswirtschaft*, 1991, p. 805–807.

An interesting illustration of the fact that this necessity has not remained unobserved is the recent wave of mergers and other forms of co-operation between attorneys' offices throughout Europe. Another example of a new interest in cross-border developments is the current enthusiasm of law students for exchange agreements and of law faculties to develop new integrated law courses on European private law.[12]

2. Legal writing is still mainly domestic

It is submitted that this cross–border interest is not facilitated by legal writing, which in the main remains focussed on national/domestic developments. A new law review devoted to European developments in a broad sense, including domestic developments in other European countries, may help to change this attitude. As a German author observes:

> Heute wird man der zivilrechtlichen Komparistik sicher zumuten dürfen, die innergemeinschaftliche Privatrechtsvergleichung zu verstärken und anstelle isolierter und manchmal auch zufälliger Einzelstudien stets auch einen gemeinsamen systematischen Rahmen für eine Bestandsaufnahme ins Auge zu fassen, dadurch auch möglichen partiellen Fragebogenaktionen der Kommission eine Orientierungshilfe zu geben, vielleicht auch den gemeinsamen Kern als Restatement festzuhalten, im übrigen den Marktbezug der Regeln sowie Vorteile und Nachteile im Verhältnis von Vielfalt und Angleichung zu analysieren und, gegebenenfalls, auch einheitliche Regeln vorzuschlagen.[13]

A new law review would also contribute towards providing materials for the newly developed university courses on European private law, which often struggle with a dearth of sources. Publications in the own language are ususally available in abundance, but foreign language publications seem to be scarce for most jurisdictions.

Perhaps even more important is the contribution which a new law review may make towards elaborating a new international framework of concepts

12. See for instance F. Ost & M. Van Hoecke, 'Pour une formation juridique européenne', (1990) *Journal des Tribunaux* pp. 105–106; H.G. Schermers, 'Jurist voor morgen', *Nederlands Juristenblad*, 1991, pp. 521–522; R. Verstegen, 'Naar een Europese rechtsopleiding', *Rechtskundig Weekblad*, 1990–1991, pp. 657–660; G.R. de Groot, 'European Legal Education in the 21st Century', in Bruno de Witte and Caroline Forder, *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.

13. P.C. Müller- Graf, *Privatrecht und Europäisches Gemeinschaftsrecht/Gemeinschaftsprivatrecht* (2nd ed.), Baden- Baden, 1991, pp. 41.

and norms of civil law. The necessity of this has been underlined by several authors.[14] 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 internationale 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.[15]

P. Ulmer recently 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 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.[16]

Yet another purpose, on a more political level, is to provide a platform for discussing the possibility and desirability – or absence thereof – of developing a truly European private law. In some areas, such as those of contracts (the European Commission on Contract Law presided by O. Lando,[17] as well as the

14. 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*, vol. 32, Berlin 1990, p. 124, at 131: 'europäische Rechtswissenschaft sollte nicht blosze Folge europäischer Rechtsangleichung sein, sondern ist im Grunde ihre Voraussetzung'.

15. 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, *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, p. 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'.

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

17. See the article by Lando in this issue of the *European Review of Private Law.*

Unidroit Project on Principles for International Commercial contracts), and procedural law presided by the second author, M. Storme, these developments are already taking place. These codification efforts raise interesting questions as to the difficulties of overcoming the differences between common law and civil law, between various legal cultures, and between countries of varying economic wealth. They raise political problems, such as the question whether or not private law harmonisation is at variance with the basic principle of subsidiarity, which, in the European context, means that only those functions which cannot be performed more effectively by local, regional or national authorities should be transferred to the Community.[18]

They also raise more theoretical problems of codifying the law along social economic lines, after the civil code concept or according to yet different criteria. An interesting question on the agenda is whether a codification should take the form of one of Napoleon's classic codes, whether or not the time for such codification on a European level has already arrived,[19] whether this should be a civil or rather a commercial code[20] and what should be its subject-matter.[21]

Apart from the positive aspects of harmonisation, the negative aspects of disintegration of domestic law through partial harmonisation[22] should also be a subject for further research.[23]

It seems appropriate not to make a distinction any longer between the development of Community law and domestic law. As Koopmans has observed, 'It is more rewarding, intellectually, and also more interesting, to look at it as one global process: that of the progressive construction of one many- sided legal edifice'.[24]

18. F.H.J.J. Andriessen, The Integration of Europe/Now or never!?, Inaugural address on the occasion of acceptance of the European Integration Chair, Utrecht University 1991, p. 15.

19. W. Rolland, 'The Role of the Law of Obligations in the Legal System of a Free Industrial Society', in: A. Harmathy, A. Németh (eds.), *Questions of Civil Law Codification*, Budapest 1990, p. 142, at 153 expresses doubts as to this question.

20. In the latter sense W. Tillmann, *Wirtschaftrecht*, Berlin/Heidelberg/New York/Tokyo, 1986.

21. See O. Remien, 'Möglichkeiten und Grenzen eines europäisches Privatsrechts', in: *Jahrbuch Junger Zivilrechtswissenschaftler* 1991, pp. 11–42.

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

23. On this issue see also G. Brüggemeier, Chr. Joerges, Europäisierung des Vertrags- und Haftungsrechts, Beitrag zur Tagung 'Gemeinsames Privatrecht in der Europäischen Gemeinschaft', Trier 2–4 April 1992.

24. T. Koopmans, 'The Birth Of European Law. At the CrossRoads of Legal Traditions', 39 *American Journal of Comparative Law* 493, 506 (1991).

3. Subject areas

The developments mentioned above may be observed in many areas of the law, administrative law and criminal law not excluded. Yet it would make little sense to start a law review devoted to all of these. A choice appears to be indicated, even within the area of private law. One option would be to limit coverage to civil law in the continental European sense (family law, contract law, tort, property law and some other areas of the law). Another would be to extend coverage to the whole of private law, including commercial law and civil procedure. The latter approach appears to us the best, but for various reasons it has seemed appropriate to privilege at first 'partrimonial law', including the law of obligations (contract, tort, unjust enrichment) and property law, as well as procedural law. Family law and commercial law are not excluded, but rather receive only limited treatment in the Review, at least in the beginning.

Private international law is also included. 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 forces.[25] The unification of European private international law, as for instance in the Rome Treaty, 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 Union.[26] For these reasons, private international law should not be excluded from this Review, although this is an area where owing to the activities of existing law reviews a circulation of ideas is already taking place.

4. Jurisdictions to be covered

From the above, it will be clear that developments at a Community level are not the only subjects to be treated in this Review. Developments in domestic private law will also be covered. This raises the question which jurisdictions are to be covered. It will be obvious that these jurisdictions should include

25. 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, p. 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.

26. J.H.A. Lokin, W.J. Zwalve, *Hoofdstukken uit de Europese Codificatiegeschiedenis*, Groningen 1986, p. 363.

not only the Member States of the EC, but also the EFTA Member States which are indeed on the verge of accepting the 'acquis communautaire' to be introduced in their law.

Because of a possible future extension of the EC towards East and Central Europe, an extension which has already taken place within the Council of Europe, it will occasionally also be of interest to look east and devote attention to developments in countries such as the Czech Republic, Hungary, Poland and Russia. At the present time of recodification of East European law, there may also be something to learn from East European experiences when work on a future European Civil Code is to start in earnest.[27]

Comparison of legal developments in Europe is often facilitated by a common heritage of Roman and canonical law.[28] This common heritage will also be a subject-matter for this Review. The common heritage does sometimes extend to America, witness the influence of American developments on European law.[29] It therefore seems appropriate occasionally at least to allude to – some – American developments in the Review. Nor should the European offspring be forgotten; a recent example is the adoption of Product liability legislation[30] after the model of the EC directive.

The ideas as to the jurisdictions to be covered in this Review are mirrored in the composition of the Advisory Board.

5. Essays, Chronicles, Case notes, Book Reviews, Practice Notes

The authors of this introductory article both have experience with setting up new law reviews. The first author is Editor- in-Chief of a quarterly review which – under the title Kwartaalbericht Nieuw BW[31] – was set up nine years ago to make Dutch practising attorneys familiar with the New Dutch Civil Code (which entered into force on 1 January 1992). The formula used was to have four distinct parts, devoted to (a) essays, (b) chronicles, (c) case notes and (d) book reviews. The second author is Editor- in-Chief of the Tijdschrift voor Privaatrecht, which ever since its start in 1964 carries four parts, devoted to (1) doctrine, (2) case-law by way of chronicles summarising and

27. See A. Harmathy and A. Németh (eds.), *Questions of civil law codification*, Budapest 1990.

28. See the publications of H. Coing.

29. 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, thesis Utrecht, Deventer 1991.

30. Trade Practices Amendment Act 1992 – see Jocelyn Kellam, Australian Product Liability Reform, *Product Liability International* 1992, p.p. 18–21, 25.

31. The present title is *Nederlands Tijdschrift voor Burgerlijk Recht* and the journal is no longer a quarterly but published 10 times a year.

critically analysing the main decisions of the courts, (3) current developments in legislation, and (4) book reviews.

In line with these two examples, the European Review of Private Law is to consist of at least four parts. There will be essays on interesting developments on the Community level and in the various jurisdictions covered by the Review (but always from a comparative point of view). Occasionally, the Review will devote special attention to specific issues, but it is not now envisaged to do so at the expense of other contributions.

The Chronicles are to provide a vehicle for transmitting in condensed form important developments in national legal systems. In the Tijdschrift voor Privaatrecht, these chronicles occupy a major part.

Every case reported will be annotated and each case note will place the case in a comparative perspective. The use which case law may be made of in a comparative way has been stressed by B. Markesinis in a lecture delivered at the London School of Economics[32] and in Ghent on the occasion of the XXVth anniversary of the *Tijdschrift voor Privaatrecht.*[33]

Book reviews also will form a valuable part of a new journal.

A fifth part in the Review will deal with practice (new contracts, exchange experiences, etc.).

6. Language(s)

The ideal of a European Review of Private Law would be to be available in all European languages. Since this ideal is unattainable, the question rises: should the journal be edited in English, German or French (and perhaps Italian or Spanish), or in a combination of languages. Bi- and tri-lingual journals do not seem to prosper. For commercial reasons, a single language would be the best option. The most likely choice of a single language would then be English, Europe's new *lingua franca.*

Yet such a choice would also have its drawbacks. Not all European lawyers read English. Some civil law problems are difficult to convert into English. Also, at the Community level French is the predominant language. With the German unification, it is not inconceivable that in a future Europe the German language will also assume a larger role which is more in accordance with Germany's important legal tradition.

It has therefore been decided to use three languages in this Review: French,

32. B. Markesinis, Comparative Law – A Subject in Search of an Audience, 53 *Modern Law Review* 1–21 (1990).

33. B. Markesinis, Rechtsvergelijking – een onderwerp op zoek naar een gehoor, *Tijdschrift voor Privaatrecht* 1989, pp. 1615–1656.

English and German. Since it seems probable that the single language read by a majority of potential readers is English, at least in the beginning emphasis will be on the use of the English language.

An unsolved question is whether or not, after the example of the European Review of Public Law, Italian – or in order to provide a bridge to the large Spanish speaking world: Spanish – should be adopted as a fourth language. For the time being, it has been decided to leave it at English, French and German, three languages being difficult enough to handle.

In order to accommodate other language readers, summaries in the two other languages of the Review will be provided.

Although for practical purposes, the number of languages used in Europe presents some obvious problems, we 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 flavour. On a more abstract level, a case may well be made that the co- existence of several languages may contribute towards a higher quality of legal texts.[34] Using more than one language, this Review is in line with this view.

The composition of the Editorial Board should guarantee the feasibility of the Review's linguistic policy.

7. Conclusion

The impact of European law on the development of private law will become more and more important in the imminent future. A new law review may contribute towards the circulation of ideas with regard to this development. 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.

To achieve this, both legal writing and the comparison of legislation and case law may play an important role.[35] A special role will be there to play for judges and academics.[36] Nothing new, of course. As Portalis, one of the most famous draftspersons of the French Civil Code, already observed in his Discours préliminaire:

34. See Olivier Remien, Rechtseinheit ohne Einheitsgesetze? – Zum Symposium 'Alternativen zur legislatorischen Rechtsvereinheitlichung', *Rabels Zeitschrift* 1992, 300, 307.

35. See M. Storme, Lord Mansfield, Portalis of von Savigny?, *Tijdschrift voor Privaatrecht* 1991, 849 ff.

36. 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, p. 339, 348.

> Un code, quelque complet qu'il puisse paraître, n'est pas putôt achevé, que mille questions inattendues viennent s'offrir au magistrat. Car les lois, une fois rédigées, demeurent telles qu'elles ont été écrites. Les Hommes, au contraire, ne se reposent jamais; ils agissent joujours: et ce mouvement, qui ne s'arrête pas, et dont les effets sont diversement modifiés par les circonstances, produit, à chaque instant, quelque combinaison nouvelle, quelque nouveau fait, quelque résultat nouveau.
>
> Une foule de choses sont donc nécessairement abandonnées à l'empire de l'usage, à la discussion des hommes instruits, à l'arbitrage des juges.
>
> L'office de la loi est de fixer, par de grandes vues, les maximes générales du droit, d'établir des principes féconds en conséquences, et non de descendre dans le détail des questions qui peuvent naître sur chaque matière.
>
> C'est au magistrat et au jurisconsulte, pénétrés de l'esprit général des lois, à en diriger l'application.
>
> De là, chez toutes les nations policées, on voit toujours se former, à côté du sanctuaire des lois, et sous la surveillance du législateur, un dépôt de maximes, de décisions et de doctrine qui s'épure journellement par la pratique et par le choc des débats judiciaires, qui s'accroît sans cesse de toutes les connaissances acquises, et qui a constamment été regardé comme le vrai supplément de la législation.[37]

A better introduction to the European Review of Private Law could not be imagined.

Presidents of the board

37. J. Portalis, 'Discours préliminaire', in: P.A. Fenet, *Recueil complet des travaux préparatoires du code civil*, vol. I, Paris 1827, pp. 463, 469–470.