

REALISM AND IDEALISM IN THE HARMONIZATION OF  
CONTRACT LAW IN THE EUROPEAN UNION

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## Table of Contents

Introduction and Outline of Subject	1
Chapter 1	6
The PECL and the Draft Common frame of Reference	
From Principles to ‘toolbox’	17
Draft Common Frame of Reference and codification	22
The Advent of European legal concepts	26
Chapter 2	27
Novum Ius Commune Europaeum	
12 <sup>th</sup> Century renaissance	29
Fragmentation and defragmentation	31
Impact of Protestant Reformation	35
The role and influence of Helmut Coing	37
The case of Sweden	40
Coing and Savigny	41
Legal and jurisprudential affinities	45
Chapter 3	53
Professor Legrand’s Seminal Paper	
Values, presuppositions and outlook	55
Codification and pragmatism	58
Enlightenment Era of Codification	59
Developments in Germany in 19 <sup>th</sup> Century	64
Legrand’s inferences regarding Convergence	65

Coke, the English <i>mentalité</i> :and Legrand’s use of Culture	68
Oblique criticism	73
Chapter 4	
Good Faith and Jurisprudence	75
Lord Mansfield’s treatment of Good Faith	77
Fourteenth century developments	80
Unreasonable and unconscionable	81
19 <sup>th</sup> Century perspectives	83
Voluntarism and Utilitarianism	84
Contemporary influence of Civil Law	87
The moral context of freedom of contract	89
Good Faith as a catalyst for harmonization	92
Reticence and fraud	95
Reaching a consensus	96
Chapter 5	98
The Evolution of Thought Within the Commission	
International conventions	101
Political considerations of the Commission	103
The New Poverty	104
Consumer Protection today	105
Consumer Protection and the Draft Common frame of Reference	106
The legal position under the treaties	108

The Court of Justice's role	108
Impact of <i>Tobacco Advertising</i> case judgments	109
Conventions on contractual and Non-contractual Obligations	109
Supplanting the Draft Common frame of Reference	112
The Common European Sales Law	114
The duty of disclosure to the Consumer	117
Concluding Remarks	121
Risk of legal nationalism	124
Conflict Resolution through Education	127
References	131

## **Abstract**

The advantages of enhanced cross-border trade among the member states are emphasized by advocates of the harmonization of law in the European Union, a principle which has been included in each of the treaties of accession. Following political events in 1989, the concept of a Europe-wide law of obligations received renewed impetus. The leading advocates, who comprised a Study Group under the chairmanship of Professor Christian von Bar, were academic lawyers supported by the European Commission and by journals devoted to legal integration. The impact of decisions of the Court of Justice of the European Union in 2000 and 2006, however, ensured that only a modest proposal, as distinct from a European Civil Code, would be put forward.

The Common European Sales Law, an optional instrument, is assessed both in terms of how it is expected to work and in the light of benefits arising from the existence of standard European terms. Also in this thesis historical-legal arguments in favour of ‘Europeanized’ contract law are evaluated and found to be not wholly convincing. The counter-argument, put forward by the Canadian Professor Pierre Legrand, maintains that the principal European legal traditions are epistemologically distinct, rendering convergence impossible. Legrand’s contribution to the debate is possibly overstated but has never been shown to be misconceived. However, this thesis draws attention to the degree of affinity – greater than is generally recognized – which always existed between the Common and Civil Law traditions. It is argued that this underlying affinity is more likely to lead to durable results by European lawyers seeking solutions to shared problems than by the artificial process of codification.

## INTRODUCTION AND OUTLINE OF THE SUBJECT

A persuasive argument can be made that in countries of the Western legal tradition there is a tendency for law and legal standards to converge “as the problems faced by courts and legislators acquire a common and international flavour” (Markesinis 1994, p.30). In point of fact the trend was recognised by Holdsworth (1935, p.vi) who remarked that through the impact of modern science the world had been diminished in size, civilization had become standardized and the social and economic problems faced by modern states had become increasingly similar. The consequence was that “a consideration of the different legal solutions which each nation has made of these problems is more necessary than it was in the past”. In addition to the impact of global trends there is another argument, perhaps complementary, to the effect that law should be harmonized as a matter of policy and not left to chance. The economic dividend from the increased volumes of trade that would result is the most commonly urged justification for such a policy today. In the aftermath of the First World War, however, the principal motivation was to render the prospect of another European conflict less likely.

The Unidroit movement established in the 1920s was the progenitor of the two Hague Conventions which in turn became the basis for the Convention on the International Sale of Goods (CISG). This last took effect among signatory states in 1988. Although the CISG is regarded as a success, its terms are regarded as prone to interpretation according to the different national law background of legal practitioners (McKendrick 2006, p.7). Since 1988 much work has been done on the preparation of a number of

legal instruments in the service of the harmonization of Contract Law. *The Principles of European Contract Law* (1995 et seq.) achieved much by way of restoring the reputation of Comparative Law following its eclipse during the Cold War, before themselves being superseded by the *Draft Frame of Common Reference* and in October 2011 by the Proposal for a *Common European Sales Law*. The history of these changes, which also addresses some of the policy considerations that had a bearing on why the progress of harmonization has been only gradual, forms the substance of the first chapter.

During the long gestation period of the Hague Conventions the Treaty of Rome was drafted. Article 2 - since replaced by Art 114 of the Lisbon Treaty (TFEU) - provided for the ‘approximation’ of national laws among the Member States of the European Communities. The revolutionary nature and purpose of what was proposed - ‘a united European state’ - was succinctly summarized by Cornwell (1969, p.91). The immediate aims were to prevent the occurrence of wars by ending national sovereignty and to bring about reconciliation between France and Germany. In these aims conspicuous success may be claimed but the “creation of a third force in the world [which] would counter balance the strength of the United States and Russia” and the “full use” that could be made of “the economic and military resources of Europe by organizing them on a continental rather than a national scale” (ibid.) have proved difficult to realize. Except for a period in the 1950s (Eden 1960, p.30ff.) the United States has not since 1945 been willing to countenance the growth of Europe as a front rank military power. This notwithstanding, the goals set by the Treaty of Accession could only be achieved if the European entity reached the status

of an economic superpower. Since one of the reasons for the wealth creating capacity of the United States is the size and sophistication of its internal market, it was urged that everything had to be done to encourage a similar degree of economic activity across national borders within Europe. The inclusion of the principle of the approximation of law in the second article of the Treaty of Rome is best understood in this context. There may have been a number of factors, including the existence of a protective tariff wall, behind the statistics that show that from 1958-63 the total value of trade within the original six Member States increased by 130% (Cornwell op. cit., p.96).

The recognition that legal systems are of the essence of nationhood may have been a secondary consideration on the part of those who prioritized the approximation of laws when the treaties establishing the communities were being drafted. As mentioned, except for the notable work of a small number of academic writers, principally in West Germany, the policy of encouraging approximation remained practically dormant from the 1950s-1980s. As late as 1990 Markesinis added the phrase ‘a subject in search of an audience’ as a subtitle to a paper on Comparative Law<sup>1</sup>. The policy of leaving the constituent nations with their respective legal systems, which had been adopted in 1707 by Great Britain when it became the first modern federal state in Western Europe, was not followed because it conflicted with the economic and political aims of Europe’s founders as adumbrated above. Instead there was a quest to establish a basis for the harmonization of law which was based on something more edifying than simple economic or geo-political considerations. It is undeniable that the ancient *Ius*

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<sup>1</sup> ‘Comparative Law - A Subject in Search of an Audience’ *Modern Law Review* 53 (1) pp.1-21



*commune* has been idealized as a species of Roman Law which remained in force over most of Continental Europe until the dawning of national particularism in the revolutionary era of the late 18<sup>th</sup> Century. If this seems a simplistic reading of an historical phenomenon of some complexity, it is nevertheless characteristic of the treatment accorded to the concept of the *Ius commune* in the context of German *Rechtswissenschaft* (literally ‘legal scholarship’), particularly by those influenced by Helmut Coing (1912 – 2000) and his sympathisers. Whether the use to which the *Ius commune* has been put by a succession of academic writers should be described as historical or propagandistic is a question which is treated in depth in Chapter 2 of this thesis, since whether the *Ius commune* can bear the interpretation often placed upon it is a matter which has not received due consideration. Moreover, the note of historical determinism that is evident whenever there is discussion of a *novum Ius commune Europaeum* will be shown to be questionable.

A related purpose of this thesis is to address the manner in which history has been used by European legal scholars to serve the contemporary goal of achieving a ‘re-Europeanized’ legal *Weltanschauung*. The prevailing assumptions regarding the basis for any such ‘outlook’ or *mentalité*, together with widely held belief in the convergence of the national law of European states, were questioned by Legrand (1996) in a paper which challenged the complacency of those who imagined that a codified European Law of Obligations would become a reality by 2010. In Chapter 3 an assessment is made of Legrand’s contribution - undoubtedly erudite - to the debate since he is widely regarded by legal integrationists as having overstated his case. The grounds for Legrand’s controversial claim

that differing legal systems, and the habits of thought that they reflect, are inherently centrifugal - thus tending to diverge rather than converge - are questioned since they appear founded on assumptions quite as much as the arguments of his detractors. Even if it is true, as Legrand asserts, that the different traditions are separated by 'an epistemological chasm', clearly European legal systems are "sufficiently cognate to one another to make comparison profitable" (Holdsworth op. cit., p.v). No-one can be in any doubt where Legrand stands in the debate over whether convergence is desirable. He argues that attempts to distil Comparative Law into a science detached from any historical and even political context run the risk of ignoring the fact that *mentalité* varies significantly from jurisdiction to jurisdiction. Whether 'the chasm' is as profound, or so wide as to be unbridgeable, is perhaps open to question. Moreover, since the term *mentalité* has different shades of meaning, the establishment of a European 'outlook' might be achievable in one area of law, for instance Consumer Protection, but not in another.

Because of the priority given to Consumer Protection by the Commission, the 'legal irritant' represented by the principle of 'good faith and fair dealing' was first intruded into the English legal system by means of the Unfair Terms in Consumer Contracts regulations in 1993. Whether this principle will enhance the approximation of law and legal thought in Europe or whether it will simply undermine well established judicial precedent in England is discussed in Chapter 4. At the same time a critique is made of claims that have been made for this principle regarding its

suitability as a catalyst for bringing about the harmonization of contract law<sup>2</sup>.

Three factors are considered in the final chapter: the evolution of the policy of the European Commission over the years, the impact of a series of judgments by the Court of Justice on the Commission's thinking, and, lastly, whether the Common European Sales Law can be seen as an optional instrument capable of realizing the original aims of the European Union's founders. Accordingly the discussion of certain legal instruments in Chapter 1 is complemented by the discussion of the Common European Sales Law in Chapter 5. The intervening chapters should shed light on those matters of policy that are occasionally alluded to obliquely, but seldom enunciated succinctly, either by the European Commission or by its servants who are responsible for them.

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<sup>2</sup> See Zimmermann, R. and Whittaker, S. J. (2000) *Good Faith in European Contract Law* Cambridge: CUP

## Chapter One

### The PECL and the Draft Common Frame of Reference

The economic and political factors that have been the principal drivers of European integration since the inception of the European Communities were given renewed impetus by the historic changes in Europe in 1989 which heralded the rapid expansion of the European Union. The functioning of the internal market, as prescribed by Article 26 of the Treaty for the Functioning of the European Union (TFEU), forms the context, in this the most recent consolidation of the treaty of accession, for a fully harmonized law of obligations including the development of a European law of contract. The arguments consistently advocated by the European Commission for the harmonization of the private law of the Member States are primarily concerned with augmenting the volume of cross-border commerce and, increasingly, with strengthening and deepening the benefits that thereby accrue to the consumer (Reding 2012, para.15). Advocates of closer European integration characterize differences in contract law as one of the most significant ‘non-tariff barriers’ to greater economic activity.

The creation of a fully functioning internal European market was one of the economic and political considerations that led to the adoption within Europe of a robust policy on integration in the late 1980s. As discussed below such considerations were not new and had been at the forefront of the minds of those who laid the foundations of the European Communities. Integrationists have always argued that a uniform private law is an essential precondition to an internal market and that, even if not specifically alluded to in the Single European Act 1986, its development was logically implied

by that measure, and by corresponding legislation and regulations subsequently. Continental jurists who favour greater integration, notably those from the Low Countries and Germany, see nothing new in such a departure. At times this leads to an over-simplification of the arguments. For instance, in Belgium the propositions of those in favour of faster progress to closer integration - the so-called *Européénistes* - have been ranged against those of their counterparts, the *Euroskeptiques* (a term with a different connotation to that in a British context), by van Hoecke (2004, p.1). Ironically such a division serves to give credence to those who interpret the advocacy of the harmonization of contract law in the European Union as an aspect of an essentially political - in the sense of politically driven - agenda. Employing an historical analogy, Smits (1998, p.328) claimed that the purely economic motive for the unification of private law is

usually exemplified by the situations in Italy and Germany in 1866 and 1900 respectively; in these countries, unification of the law came about after political and economic integration.

### *Legal Scholarship*

To these economic and political considerations Smits added a third: “It is also challenging academically to achieve a uniform private law which is capable of removing the alleged contradistinctions between Civil law and Common Law” (ibid, p.328). If, as seems to be implied here by Smits, European comparative lawyers habitually view all “European” questions through the prism of national experience and history, it is important for legal scholars to have broad horizons and more than a superficial knowledge of legal history. It is regrettable that for most European students, as well as for many teachers and practitioners of law there exists

little more than a vague awareness of the precepts of European legal systems other than their own. This is notwithstanding the existence of notable figures in the field of comparative law such as Helmut Coing, 1912-2000, who encouraged a European legal scholarship ‘oriented round legal problems rather than national rules’<sup>3</sup>.

The establishment of a European ‘legal scholarship’, an expression which is apt to vary in meaning according to the prevailing legal culture, contains an implicit recognition of the general truth that different political entities receive their distinctive characteristics, at least in part, by virtue of the nature of their legal systems. Well before the controversy initiated by Legrand (1996), discussed in Chapter 3 below, the point was made by Fletcher (1982, p.10). He advocated closer harmonization within the context of ‘legal scholarship’ but was wary of those whose motivation was primarily political. A perceptive writer, Fletcher accurately predicted the rise of regional legal nationalism as a response to the dominant legal culture in Europe. The first Treaties, according to Fletcher, provide for the “progressive unification” of the laws of member states “in accordance with the integrationist philosophy with which they are imbued”, a process which “may be seen as an instrument whereby the larger, ultimate objective of European Union is to be achieved” (ibid., p.10). Fletcher concluded, “When eventually the community reaches a stage where it functions as a single legal unit, or at least as a federalized legal system, the psychological and material foundations for political unity will be well and truly laid”

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<sup>3</sup> Coing, H. (1990) ‘Europäisierung der Rechtswissenschaft’ 43 *Neue Juristische Wochenschrift* 937, 940 cited in Gordley, J. (2000-01) ‘Comparative Law and Legal Education’ 75 (4) *Tulane Law Review* 1003-1014, 1005

(ibid., p.11). A blueprint for such unity had been drawn up by an important ally of Konrad Adenauer, Walter Hallstein (1962, p.24), who ultimately served as President of the Commission:

The chief motive for what we have called economic integration was always political. It was given expression at Paris and Messina and is voiced in the preambles to the treaties establishing the Communities; the subject matter of these too, and of the Community's action, is political ... For this reason its organization is also political, and modeled on the federal tradition of recent history.

### *Principles of European Contract Law*

In the early years the attitude of the Commission was influenced by the language of Article 2 of the Treaty of Rome which was redolent with the economic optimism of the post-war era of cheap oil. The Community was tasked with 'progressively approximating the economic policies of member states' leading to 'an increase in stability, an accelerated raising of the standard of living, and closer relations between the states belonging to [the Community].' While the language of Article 3 of the Treaty of European Union (TEU) and the corresponding Article 114 of the Treaty for the Functioning of the European Union (TFEU) strike a less certain note regarding standards of living, it is likely that contemporary Commission policy is a continuation of that of those who drafted the early treaties pertaining to the European Communities. Article 115 TFEU, ex Article 95 of the Treaty establishing the European Community (TEC), provides:

[T]he Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.

The negative consequences for trade of continuing legal uncertainty in cross-border transactions evidently prompted the inclusion of this provision for harmonization of laws in the treaty of accession.

Among European policy makers it has long been assumed that more cross border commerce would both result from closer approximation of private law and lead to an acceleration of the harmonization process. Funding was provided by the European Commission in the early 1980s for the twenty two members of the Commission on European Contract Law under the chairmanship of Professor Lando. Accordingly the Lando commission undertook the establishment of principles understood as constituting ‘soft law’, the Principles of European Contract Law, often characterized as a new *Lex mercatoria*. In Smits’s opinion (op. cit., p.330), however -

The precise nature of the Lando principles is not very clear. According to the Preamble their purpose is rather modest, but in the majority of the now ample literature the Principles are treated as if they were a legal system on an equal level with national law developed over centuries which is capable by itself of resolving disputes ... although any applicable case law, based on the Principles, is still lacking.

Either the Principles were found to be insufficiently robust to bear the interpretation thus placed upon them, or it was decided that only a species of hard law would lead to the desired level of integration. Arguably the Principles were simply overtaken by events, and in the post-1989 world they were found to be too narrow in scope, conception and application, particularly with regard to the consumer. Smits’s paper, published before enthusiasm on the part of the Commission for a European Civil Code had begun to decline, included an oblique reference to the possibility of a less consensual approach: “I do not shy away from defending the position that



in the past few years, perhaps unconsciously, ideas on a European codification have taken a u-turn". By this he meant a deliberate turning from 'soft' to 'hard' law which would take the form of "a binding instrument imposed by the competent institutes of the Union." (op. cit., p.330).

The PECLs' authors themselves had stated their belief that

general principles applicable across the Union as a whole must be established by a more creative process whose purpose is to identify, so far as possible, the common core of the contract law of all the Member States (Lando and Beale, 2000 Intro xxvi; cf. *ibid.* XXIV footnotes 3 and 6).

The authors' stated aim of establishing the 'common core' of the European legal systems suggests that there are principles that all European legal systems hold in common, and that any legal principles that are not held in common are not part of the PECL. In reality the position is not so simple. Without doubt the principle of good faith and fair dealing, well-developed in Civil Law jurisdictions, was eventually included because it would have seemed incongruous to omit it from the PECL even though it is not a principle that can be said to have been held in common by all the member states - if one excludes the workings of the Unfair Terms in Consumer Contract Regulations 1993, 1999 in the interests of the European consumer. It seems implicit in the reference to a 'common core' that a harmonized European contract law would be divested of legal traditions not shared by all the member states. However, the claim that "[o]ne of the major benefits offered by the Principles is to provide a bridge between the civil law and the common law by providing rules designed to reconcile their differing legal philosophies." (*ibid.*, Intro p. xxiii) is consistent with the opinion of Smits cited above. The authors also stated, somewhat laconically, that one

objective of the PECL “is to serve as a basis for any future European code of contracts” (ibid., Intro p. xxiii).

A “set of neutral rules” was advocated which was “not based on any one national legal system but drawing on the best solutions offered by the laws of jurisdictions within (and sometimes outside) Europe” (ibid., Intro p. xxiii). As a basis solely for resolving disputes by arbitration after the manner described in paragraph 4.a of the Preamble to *The Unidroit Principles of International Contracts* (1994) this selective approach seems uncontroversial. However, the authors of the PECL wished to see them “applied equally to purely domestic contracts.”(p. xxv) One might almost believe that the PECL was an academic exercise intended to have an entirely beneficent impact on commercial relationships within the European ‘family’ of legal systems if so desired. The reasoning behind the European Parliament’s resolution, however, is more overtly political, and the tone is one of which Hallstein and successive Presidents of the European Commission would have approved: “[U]nification can be carried out in branches of private law which are highly important for the development of a Single Market, such as contract law.” (European Parliament, 1989). In the aftermath of the Single European Act 1986 the stress was on ‘unification’ rather than ‘approximation.’ This marked the beginning of a decade which augured well for the promulgation of a codified system for use throughout the European Union. The reasons for a subsequent shift in emphasis away from formal codification early in the new century and the consequent modification of the proposals will be considered in Chapter 5 below. It is arguable that any discussion of matters prior to 2001 is merely historical. However, a close examination of the

reasoning and motivation which then pertained is considered important for two reasons. Firstly, over the years there has been a notable lack of frankness on the part of the Commission regarding its long term plans for the future so these have to be inferred from its actions and public statements (McKendrick 2006, p.13, cf Vogenauer and Weatherill 2006, p.141 et seq. and Ashton 2006, p. 246); secondly, the shift in emphasis towards an optional instrument as distinct from an obligatory code was not accompanied by widespread resignation on the part of those who had been the keenest advocates of the former policy. Accordingly the policy espoused a generation or more ago during the formative period of those who still wield influence in the European Union, whether as academic writers or in a formal capacity, may yet determine the evolution of European Private Law for the foreseeable future.

### *Philosophical background*

Although the words unification and harmonization are sometimes used interchangeably, a policy of unification of law in fact may be contrasted with the kind of harmonization that might emerge if left to evolve naturally through legal education (Lando, 2003, p.123). In the case of European law, like national law before it, development would take place in a manner consistent with the evolutionary principles espoused by the Historical School of the 18<sup>th</sup> – 19th Centuries. Those who would unify the law of obligations in the European Union sometimes refer to the trend towards progressive harmonization instituted by the Commission as the ‘Europeanisation’ of such law (Beale, 1996, p.23). However, as Whittaker (2009,p.624) has noted, their antecedents may be found in the

‘Enlightenment rationalism applied to the science of law-making’ characteristic of the 18<sup>th</sup> Century. The unifiers are apt to -

see the piecemeal nature of EC directives as clashing with their own legal traditions and creating both formal and substantive difficulties for their national laws. The national codifications of civil law swept away the patchwork of enactments and accumulated customary laws and replaced them with coherent and internally consistent principles and rules. ... In common with national constitutions the civil codes were political acts: many reinforced national unification and they reflected societal values, even where these values were clothed in concepts inherited from the Roman legal tradition.

While few would contradict this analysis it is doubtful whether the process Whittaker describes could have been brought to a successful conclusion in either France or Germany in the 19<sup>th</sup> Century in the absence of the exercise of imperial authority. It seems at least questionable whether anything analogous can be achieved by this means when popular assent, expressed through appropriate constitutional mechanisms, is obligatory. Had the Commission proceeded on the basis of Qualified Majority Voting to impose a European Civil Code the consequences must have been an increase in legal nationalism. Having been educated in a society in which Hegelian principles are still paramount, German comparative lawyers who espoused the cause of a European Civil Code were in a position to conduct an analysis of various propositions which have been put forward concerning the closer approximation of European contract law in accordance with Hegel’s principle of a propounded thesis being countered by its antithesis before ultimately being resolved in a synthesis. Support for this contention may be found in the fact that something approaching a sublation, in the Hegelian sense, is discernible in the thought of an earlier generation advocates of a standardized ‘Obligationsrecht’: the title - *Vom*

*deutschen zur europäischen Recht* - of a collection of papers dedicated to Hans Dölle in 1963, is clear evidence of the thought processes at work (Zweigert,1963; Zimmermann 2006, p.547 footnote 24).

Central to the agenda of the integrationists in the last quarter of the 20<sup>th</sup> Century was a desire to continue a process, which in the 19<sup>th</sup> Century successfully unified German law by means of a legal scholarship (or legal 'science' - both are acceptable translations of the expression *Rechtswissenschaft*) - which in its original conception was unashamedly derived from the ancient Roman commentators. The concept has no direct equivalent in conventional English legal scholarship. Behind it lies a weight of classical learning so great as to be characterized by Lord Goff (1997, p.748) as an 'incubus', particularly for students. One consequence is that academic opinion in Germany since the 19<sup>th</sup> Century has been held in such high esteem that German professors of civil law can expect to their conclusions not only to inform judicial thinking but also to be taken into account by those charged with the formulation of public policy.

By means of 'legal science' all of Europe, both Civil Law and Common Law jurisdictions, might eventually be brought into conformity. In order to understand how this might be so, it will be necessary to examine certain presuppositions of modern legal thought from which it may be possible to perceive how great a degree of proximity exists between academic writers who advocate greater 'coherence' in European contract law and those who are entrusted with directing the European 'way forward' at the political level. However, it is submitted that the fostering of a European identity among the jurists of Europe should not require the creation of a dichotomy

between European and national legal systems in order to bring about the ‘Reception’ of the one at the expense of the other in a manner analogous to what happened at an earlier stage in German history. In 1997 Lord Goff extolled the virtues of “the first volume of Professor Christian von Bar’s great enterprise to produce a European law of torts ... This remarkable work, inspired by a romantic reminiscence of the reception (sic) into Germany of Roman law, ... should educate us all about the possible shape which our law of obligations may adopt in the years to come.” (op. cit., p.748) The evidence suggests that beyond the initial creation of a ‘European legal scholarship’ is the aim of achieving the inception of a European legal ‘*mentalité*’ or, to use Fletcher’s term ‘psychology’(1982, p.11), as a precursor to the establishment of a Europe-wide law of obligations.

#### *From Principles to ‘toolbox’*

One of the virtues of the *Principles of European Contract Law* lies in the accessible language, devoid of abstract concepts, in which they are couched (Schulze and Wilhelmsson (2008, p. 157). It was hoped that the Principles might have served as a basis for a set of non-mandatory ‘European’ contract terms, possibly attaining a degree of authority comparable to that of the American Restatement of Contract Law. In the event, the PECL came to be treated as a storehouse of ideas by those scholars, under the chairmanship of von Bar, who were appointed to the Study Group on a European Civil Code which succeeded the Lando commission in 1998. In a working paper produced for the European Parliament, von Bar (1999, p.137) set out the principal reasons why it would be unsatisfactory for the projected European code to apply to cross-border disputes alone “out of

respect for national sensitivities”. In his opinion “what we still tend to refer to rather inadvertently as an international case today has long since become an inter-regional case in the EU context” and “the artificial territorialization of private law within the European Union has to be overcome.” A European Code whose operation was restricted to cross border trade, von Bar argued, would create “demarcation problems” because any distinction between “domestic” and “external” was no longer “logical”. He continued:

Another aim of a European Civil Code, moreover, must be to grasp the opportunity, which is veritably unparalleled in history, to improve and modernize private law in the areas that it covers. (ibid. p. 137)

It is evident that two years previously Lord Goff had not envisaged anything quite so far-reaching, concluding instead (ibid., p.748) that we were “ perhaps more likely to see further international developments on the lines of the Vienna Sales Convention or the ‘UNCITRAL’ Model of Arbitration Law.” In view of the promulgation of the Common European Sales Law in 2011 these words seem prescient; arguably, however, they represented no more than wishful thinking.

The Study Group was initially charged by the European Commission with the drafting of a civil code. Subsequently this was modified in the light of clarification by the Court of Justice of the Commission’s competence in this particular field<sup>4</sup>. The consequence was the drawing up the ‘draft’ version of a *sui generis* species of law, a Common Frame of Reference. In passing it can be mentioned that French scholars, whose co-operation is ultimately essential to the realization of a Europe-wide law of obligations,

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<sup>4</sup> The impact of the *Tobacco Advertising* cases are discussed further in Chapter 5 below. At a BIICL conference on 7<sup>th</sup> February 2011, Ms Diana Wallis, at that time still the European Parliament’s *rapporteur* on the harmonization of Contract Law, stated in answer to a question on whether or not a European Civil Code was “now a dead letter”, that such a code ‘never was a live letter’. She went on to say that Europe would not be ready for a Civil Code for at least a generation.

have evinced little enthusiasm for a proposed body of law that would supersede the *Code Civil*. This may be cited as one reason for a more cautious approach. In England, while the then Lord Justice Bingham felt it necessary to challenge Common Law practitioners on their tendency to have an insular outlook (Bingham 1992, p.1) the members of the House of Lords with the relevant expertise subsequently entered a period of constructive engagement with interested parties.

The *Draft Common Frame of Reference* (DCFR) on publication in 2008, with a revision appearing in 2009, was hailed by Hesselink (2009, p.923), one of the co-ordinators of the Study Group for a European Civil Code, as representing such a code “in all but name”. For others, however, publication actually seemed evidence that the Commission lacked the courage of its convictions and had allowed the professed aim of many of the European Union’s foremost legal scholars, particularly those in Holland and Germany, to fall into desuetude in consequence of taking a decision which, in essence, was political rather than juridical. Conceding that the American Restatement had always been intended to be an authoritative instrument, Jansen and Zimmerman (2009, p.99) expressed surprise that Schulte-Nölke (2008, p.47f.) had cited “leading members of the Study Group” in support of his comparison of the DCFR to the Restatement. According to Jansen and Zimmermann, the lack of unanimity within Europe rendered it inappropriate for the DCFR to be equated with the Restatement (op.cit., p.103f.) There are a number of reasons why direct comparison with the United States of America is inappropriate, not least that the expression ‘Europe’ is used politically to denote the 27 states of the European Union and geographically to include former Eastern bloc



countries with scarcely embedded modern commercial laws and customs. The status of the DCFR in relation to the Principles was described pejoratively by Jansen and Zimmermann as an “eminently political” document, in which the DCFR, they claimed, had been “strategically abused” (op. cit., p.104) by being implicitly compared to the American Restatement. Likewise they regarded as inappropriate any comparison by Schulte-Nölke of either the PECL or the DCFR to a “map” of the relevant legal landscape within Europe (ibid., p.105). Arguably reference to maps of any kind is apt to mislead unless it is certain that all the interested parties have a common ‘destination’ in mind. Nevertheless, previously Zimmermann had written approvingly of the manner in which Kötz (1981, p. 481ff; Zimmermann 2006, p.547 footnote 25) “had mapped the various ways in which comparative legal scholarship might attain a common private law in Europe.” Evidently Jansen’s and Zimmermann’s reservations about the ‘map’ metaphor employed by Schulte-Nölke reflect their disapproval of the legal ‘landscape’ that he envisaged.

Unless the eventual Common Frame of Reference itself were to become “an optional instrument”, that is that it had the capacity to become “a closed and comprehensive system as it is known in the form of the *Bürgerliches Gesetzbuch* (BGB) in Germany” (Jansen and Zimmermann, op. cit., p.109) all talk of maps seems at best wishful thinking. The prioritizing of an ‘optional instrument’, together with the increased usage of this expression, ensured that at least some progress was made even if this fell far short of the aspirations of those who had hoped for a more substantial legal document. An optional instrument is intended to offer a distinctly European legal framework which the parties partaking in cross-

border transactions within or beyond the European Union, provided one is either a consumer or falls within the definition of a small to medium-sized enterprise (SME), may agree to use in preference to the national law of the party in whose home state the agreement was made. As mentioned above, the mooted “optional instrument” has since been realized and the extent to which the Common European Sales Law offers real choice to the economically weaker party will also be discussed in Chapter 5 below.

Doubt was expressed by Jansen and Zimmermann (op. cit., p.109) concerning whether the DCFR would be effective as a “toolbox” because the definitions and rules cannot be referred to “in isolation” as they should be and could have been if the DCFR had indeed been a code in all but name. Whittaker (2009, p. 621) emphasized the point that the Common Frame of Reference that might follow the DCFR would be more than merely soft law –

[T]he CFR could be used as an “optional instrument”, meaning a body of rules to be adopted by contracting parties ... not ... merely as *terms* (which is uncontroversial) but that they would be enabled to choose the CFR as *applicable law*. [author’s emphasis].

Believing that the DCFR “aspires to be a codificatory system”, Jansen and Zimmerman evidently hoped that their analysis and conclusions would be accepted by those who had produced the DCFR, and that a unified contract law analogous to a civil code would yet emerge. However, their sense that “the scholarly and political agendas” were “strictly separated” (op.cit., p.111) indicates that a degree of pessimism existed about the prospect of this goal being realized. They did not refer to the embryonic plan for a “Blue Button” in terms of standard European contract terms (Schulte-

Nölke, 2007, p.349). It was this concept, rather than a European civil code as once envisaged, that formed the ‘landscape’ to which the “map” of relevant European law, as represented by the Draft CFR, was the key. The promulgation of the Common European Sales Law in October 2011, anticipated by Whittaker, followed a gestation longer than would have been the case had the energies of the Study Group on the European Civil Code not been diverted to the division of the Draft Common Frame of Reference, in code-like manner, into seven books. Such an arrangement could indicate one of two things. Conceivably the Study Group, having once been intent on drafting a European Civil Code, simply found difficulty in drafting a document of an entirely different character. With almost Delphic opacity, Schulze and Wilhelmsson argued (op. cit. p. 158): “[T]he structure of the DCFR can be a stimulating challenge - from a certain perspective - in order to promote the long-term exchange of ideas with regards to European private law.”

#### *Draft Common Frame of Reference and Codification*

Owing to the influence of the PECL, concepts such as freedom of contract and the binding effect of contracts within the DCFR are strongly coloured by civil law assumptions rather than being based on concepts shared by legal scholars in all jurisdictions. The principal merits of the DCFR that were extolled when scholars were eventually able to consider the entire text were its wider purview than the PECL and its capacity to serve as a ‘toolbox’ in order to achieve greater coherence in the *acquis communautaire* of the future by means of optional provisions and mechanisms which could be employed by the Member States and interpreted by the Court of Justice. The code-like structure of the DCFR is

perhaps the most striking of its numerous ambiguities. Whittaker (2009, p.621) argued that the Draft Common Frame of Reference included indications that it might yet serve as a stepping stone to a European Civil Code. The manner in which the DCFR's own 'Principles' would work in practice is unclear, adding to an impression of excessive generalization, and, as Whittaker has pointed out, their very presence raises questions in view of the supposed function of any Common Frame of Reference as simply a 'toolbox' (ibid., p.638).

Such apprehension as exists among English practitioners regarding the Commission's policy on codification, both in the 1990s and subsequently, is based on concerns described by McKendrick as 'fundamentally pragmatic' (2006, p.19). Undoubtedly the ingrained habit of analogical reasoning that is characteristic of the Common Lawyer's mode of argumentation would be threatened by the imposition of a codified system. Moreover, few would disagree that there is a natural aversion among Common Law practitioners to substitute something that might have unforeseen consequences for a system which, in spite of its idiosyncrasies, is regarded as offering a high degree of legal certainty for contracting parties, and whose advocates evince, in the barbed words of Lord Goff, a "readiness to face up to difficulties rather than pretend that they do not exist" (1997, p.747). Quite apart from the ostensibly academic but arguably political project of engrafting of Civil Law principles on to the Common Law tradition, there are certain matters the neglect of which suggests that certain protagonists were naïve regarding the time span necessary for the realization of a European Civil Code.

United Kingdom government representatives have stressed the importance of invisible earnings derived from clients who prefer to use English contract law. Clients would almost certainly turn to other Common Law jurisdictions if a European contract law based on Civil Law principles and practice became mandatory in England and Wales (Ashton 2006, p.246). The European Commission would be hardly less sanguine than the British government itself about the prospect of a vast annual loss of tax receipts to a Member State. Possibly it is because this objection to the harmonization of European contract law is based on financial rather than jurisprudential considerations it is less often advanced, yet it must be a vital consideration for policy makers. Possibly alone among commentators, Baroness Ashton (ibid., p.246) argued that the “best solution” was the “application of the principle of subsidiarity - in using existing national legal systems to deliver real benefits to [EU] citizens in cross-border cases.”

In spite of the negative assumptions of many Civil Law practitioners (McKendrick op. cit., p.19), for many years there has been less hostility in the legal profession to the principle of codification than many are apt to believe. The Sale of Goods Act 1893 and the Marine Insurance Act 1906 were widely seen as examples of the successful codification of key aspects of English commercial law. In the 19<sup>th</sup> Century a proposal for the codification of the rules of Evidence drafted by Sir James Stephen had even been announced at the beginning of a Parliamentary session (Stephen 1895, p.377f.). Paradoxically it is the attenuated nature of the political process rather than lack of enthusiasm on the part of jurists that have caused plans for codification to be stillborn. Any such proposal would have to spend so long being scrutinised in committee that the progress of legislation to

which higher priority was attached would be jeopardized. This was as true in the 19<sup>th</sup> Century as it would be today: in the words of Stephen's biographer, "The measure vanished in the general vortex which swallows up such things" (ibid., p.381). Under the Westminster system there would have to be cross-party support for any bill that sought to introduce the changes necessary to bring to fruition the degree of harmonization of contract law that has long been regarded as unexceptionable among many European comparative lawyers. A proposal for codification could hardly survive Parliamentary scrutiny if what was proposed was a step from relative legal certainty to a situation in which the outcome of a case became significantly less predictable. However, given sufficient incentive, it is submitted that common lawyers could make the transition to a system under which the settled case law formed the basis of a codified system. Indeed, the increased importance of case law in civil law systems (Whittaker 2009, p.625) in recent decades might be congenial to the common lawyer trained to argue by analogy irrespective of the absence in Europe of a doctrine of binding precedent (ibid. ftnt.71<sup>5</sup>).

Within the English legal tradition codification is associated primarily with the name of Bentham (1748-1832) who is ranked among the late 18<sup>th</sup> Century rationalists whose thought has come to define 'Modernism'. A generation after Bentham, Austin laboured to establish English jurisprudence on criteria consistent with strict rationalism. These two important contributors to English legal history represent but one school of thought, however. Bentham was opposed by the statesman Burke (1729-97), who is remembered today for his polemics against the excesses of

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<sup>5</sup> MacCormick, D.N. and Summers, R.S., eds. (1997) *Interpreting Precedents: a Comparative Study* Chapter 18.

‘Reason’ under the French Republic. Burke is credited with founding the influential Historical School of jurisprudence mentioned above (p.5). If the disagreement between Bentham and Burke represents a fault line in English juridical thought, it nevertheless remains true that if presented as a ‘tidying up exercise’ codification accords well with English pragmatism.

*The advent of European legal concepts*

The apparently haphazard manner in which the harmonization of European contract law has proceeded indicates how difficult it is to achieve in practice if consent must first be sought. Since it is easier to harmonize those legal systems that have most in common, the danger exists that the policy of establishing a ‘Common Core’ will ultimately yield a ‘Europeanized’ set of principles founded very largely on Civil Law notions. If this were to occur, non-Civil Law jurisdictions might be obliged over time to adapt themselves to what had been proposed. While the foregoing is not to say that there is no merit either in establishing standard European contract terms as advocated by Schulte-Nölke, it is clear that the note of uncertainty in European affairs has not been quelled either by the commission or by any of the academic consultants whose services it retains.

## Chapter Two

### Novum ius commune Europaeum

Publishers' imprints and websites employing the expression "Ius commune" became commonplace in the 1990s, especially in Holland and Germany where enthusiasm has been strongest for what von Bar described to an English audience as "a continental type comprehensive civil law" (2000, p.78). The notion of a revived "common" law implied by this expression has been treated by proponents as a template for the 21<sup>st</sup> Century. For many the concept of the mediaeval *Ius commune* lends credibility to the vision of a single European 'legal scholarship', or 'legal science' in the modern age (p.35, below). However, the term *Ius commune* is seldom defined clearly, or analysed critically, by those who most frequently allude to it. The version of the 'common past' commonly presented by comparative lawyers is frequently over-simplified. This suggests that the *Ius commune* is employed principally as a useful tool in support Zimmermann describes a "re-Europeanised" law of obligations (1994, p.68). Since the 19<sup>th</sup> Century the tradition of "legal scholarship" in Germany has served as midwife to the assumed priorities of the present, rather than existing as disinterested scholarship for its own sake.

Evidence for the potentially misleading nature of imprecise treatment of the *Ius commune* by numerous European legal scholars is provided by Robinson *et al* (1994). The authors, who readily admit their difficulty in giving a sophisticated definition of the *Ius commune*, and also their inability to express the full meaning of the term succinctly, describe it as –



the complex result of the coming together - in varying proportions from place to place and from time to time - of local custom with feudal law, Roman Law in modified and elaborated form, canon law and law merchant. (Robinson *et al.* 1994, p.106)

To this should be added the essential function of the *Ius commune* which was to serve neither as a ‘corpus’ of law nor a legal system, but rather as a means of reaching a definitive position on some point of interpretation. According to Robinson *et al.* (*ibid.*, p.106) its counterpart, the *Ius proprium*, comprised “the local law of territories and cities” being “dominated by custom and feudal usages”. The expression *Ius commune* actually originated in ecclesiastical law signifying the general law of the Church as distinct from custom of only local applicability (Holland, 1924 p.59, footnote 3), and was only subsequently employed by analogy in the secular law.

The era when Western European scholars needed no passport other than proficiency in Latin had far-reaching implications for the resurgence of Roman civilization modified by Christian principles. In time the teaching at European universities of the *Ius utrumque*, both the canon and secular laws, became an integral part of this influence. The historian Knowles referred to a shared intellectual legacy from the eleventh to the fourteenth centuries when educated Europe formed “a single undifferentiated cultural unit” (1962, p.80). However, in considering how the *Ius commune* has been treated by modern jurists, we have to bear in mind that, initially, legal studies at the highest level were not included in this ‘shared stock’. Knowles’s definition of Europe was not confined to the near Continent so that even if it could later be said that certain developments in England caused her legal practitioners gradually to diverge, nevertheless Latin

remained the *lingua franca* of scholars despite the vicissitudes of succeeding centuries. Moreover, as Kunkel observed, the characteristic features of Anglo-Saxon law “for all their individual nature still often remind one surprisingly of the structure of classical Roman law” (1973, p.185).

### *12<sup>th</sup> Century renaissance*

For more than a hundred years after its rediscovery in the sixth century, the Justinian *Corpus iuris civilis* was not widely studied and even in the 11<sup>th</sup> Century it was taught exclusively in Italy, notably at Bologna. Those who date the *Ius commune* to the era of the so-called ‘recovery’ of the *Corpus iuris* at this time do so in order to broaden the definition of the *Ius commune* from its original, quite narrow usage in order to include the secular law. For instance Bellomo (1995, p.xiii) argues that ever since the recovery there can be said to have existed “a common legal past” embracing all western Europeans:

The legal norms of the *Ius proprium* found in the *Ius commune* principles, rules and technical terminology ... This was true when the *Ius proprium* reacted against or diverged from the *Ius commune*; when this occurred, by choice or out of ignorance, it created a problem of comparison with, hence of relation to, the *Ius commune*. Thus for the keenest intellects and greatest jurists of Europe in the Middle Ages the *Ius commune* turned out to be a formidable unifying force. It lay at the centre of the law and was the symbol of its unity.

Here the lines of what must in reality have been a complex process taking place across a variety of different cultures, and not always contemporaneously, are greatly simplified.

For the proponents of the unification of European private law, the value of the *Ius commune* consists in its being a model for what Zimmermann (2006 [2], p.1), echoing Bellomo, terms the “contemporary renewal of an old idea”. The inception of the *Ius commune* is dated by Zimmermann instead to what he terms the ‘so-called 12<sup>th</sup> Century renaissance’ (1994, p.82) i.e. a century and a half later than that suggested by Bellomo. Zimmermann’s point of reference is the publication in 1141 by Gratianus (F. Graziano, 1090-1159), of the *Decretum Gratiani*, marking the beginning of an epoch during which it can accurately be said that ideas radiated from the law faculties of northern Italy. In the ensuing two centuries numerous other universities were founded, including Toulouse in 1229 and Cologne in 1338. Gratian’s achievement had been to systematize the Canon Law in the same manner as the secular Civil Law, thereby facilitating the study of the *Ius utrumque*. Since Canon Law was taught as a branch of theology, the mediaeval jurists, at Oxford and Cambridge as well as on the Continent, were almost exclusively ‘clerks in holy orders’. Indeed Baker (1990, p.178) questions whether it is appropriate to regard jurists of that era as constituting a legal profession.

While it is true that both canon and civil law were taught “in every sizeable principality” after the manner of the Bologna law faculty (Zimmermann 1994, p.83), this is chiefly true of those principalities that lie to the West of the Rhine and Danube. Although particular examples are not cited, Zimmermann avers that the law that the medieval jurists studied “seemed to be infinitely richer in detail, as well as in principle, than any local law or custom” (ibid., p.83) and the tradition thus founded was “truly European” in character. That he refers in this context to Justinian’s code rather than

purely to Canon Law is made clear when he describes the *Corpus iuris* as the “basis of our European common law”(ibid., p.85). Although during the early Middle Ages the interpretations of the commentators and glossators came to be regarded as authoritative (Robinson *et al. op. cit.*, p.59) any analogy with the Common Law followed in England would almost certainly be misleading. Significantly Robinson *et al. (op. cit.)* do not directly equate the *Ius commune* with the *Corpus iuris civilis*, merely observing that in Germany as a result of the attempt to establish a “common law of the Reich” Roman law had “received recognition as, at the very least, a general subsidiary source of law.” (*op. cit.*, p.190)

### *Fragmentation and defragmentation*

The perception, widely shared by writers on Comparative Law since being espoused by the late Helmut Coing (1912-2000), is that since the 18<sup>th</sup> Century the law on the European Continent has “been split up into a series of national systems” to the detriment of the *Ius commune* Coing 1973, p.515. The advocates of rapid approximation of private law regard a process of ‘ever closer union’, as included in the Preamble to the original EC treaty and thus in the Preamble to the TFEU, as a means to arrest - and subsequently reverse - the disintegration of the former *Ius commune* that Coing described. Coing influenced a considerable number of comparative lawyers who were writing in the late 20<sup>th</sup> Century. It is noticeable that in the second half of a paper published in 1994, Zimmermann not only chooses identical topics to those elaborated by Coing in his seminal paper two decades earlier but also discusses them in the same order. It is submitted, however, that in view of the differences in

outlook between medieval and modern jurists it is difficult to see how the *Ius commune* can serve as a template for the present.

The term ‘defragmentation’, employed as a synonym for the closer approximation of private law, implies the former existence of a mass, or edifice, of law and legal scholarship which became subjected, in the words of Zimmermann, to ‘two hundred years of legal nationalization’ (2006 [1], p.570). Elsewhere he describes codification in the late 18<sup>th</sup> Century as symptomatic of the ill-effects of what he terms the ‘national particularization’ of law

up to and including the time of the so-called *usus modernus pandectarum* in the 17th and 18th centuries, the whole of educated Europe formed a single and undifferentiated cultural unit. Lawyers who had received their education in one country could occupy a chair in a university in another. (1994, p. 83)

The Latin phrase *usus modernus pandectarum* implies that the use made of Roman law by von Savigny (1779-1861) and other 19<sup>th</sup> century German jurists of the Historical School of jurisprudence proved an effective check to the accelerating trend towards ‘national particularism’. The expression “a single and undifferentiated cultural unit” is evidently derived from Knowles (op. cit., 1962) but it is to be noted that Zimmermann, like Bellomo subsequently, extends the relevant era from three centuries to eight. In view of the great emphasis placed on the world of the *Ius commune* by modern jurists it is worth quoting more fully from the passage to which Coing (1973, p.507) was among the first to allude. According to Knowles (1962) the “great European revival”

was in every sense of the word a supra-national movement, forming a republic of teachers, thinkers and writers. It had the characteristic peculiar to itself in the

history of Western Europe of becoming in its final development a supra-racial, yet wholly homogeneous culture. For three hundred years, from 1050 to 1350, and above all in the century between 1070 and 1170, the whole of educated Western Europe formed an undifferentiated cultural unit. (p.80)

Significantly, perhaps, Knowles goes on to point out that “we are speaking only of a small educated minority to which the land owning aristocracy in general, many monarchs, and even some bishops, did not belong.” Thus in reality the idealized culture without borders, which certain modern jurists regard as a template for the 21<sup>st</sup> Century, existed exclusively on “the level of literature and thought” (ibid., p.81).

It is important to be precise about “the whole of educated Europe”. The twelfth and thirteenth centuries, the era of Vacarius and Bracton in England, constituted an era when the ideal of scholars such as Bellomo, Coing and Zimmermann was indeed realized, although whether it may be equated with the *Ius commune* is open to doubt. It is important to appreciate that the so-called ‘Reception’ of Roman Law by the German Empire in the late mediaeval era was not a single, transforming event. Beyond the old frontier of the Roman Empire, except in the environs of Cologne, Mainz and Munich, there existed the traditional Teutonic customary law. Accordingly, we should regard the Reception as the initiation of a process which continued for many decades and was not complete even as late as 1800. Indeed it may be plausibly argued that Savigny’s work during a critical period in the development of modern Germany represented a second ‘Reception’ of Roman law in that country. Only a generation before the Protestant Reformation, therefore, it would not have been possible to refer to the *Ius commune*

as existing in Germany in the sense as that used by Robinson et al (op. cit., p.106) but only as indicating that the Roman and Canon law formed “a common background knowledge of all educated lawyers in Europe” (ibid., p.107). Evidence was adduced by Kantorowicz (1937, pp.326f.) that the pretensions of the classically educated legal scholars in the German Empire caused widespread and persistent resentment when customary ways of settling disputes under the *Landrecht* were displaced by a foreign legal system. The same point is made by Paton and Derham (1972, p.548), in discussing the displacement of ultimogeniture as a principle of inheritance of property in favour of primogeniture.

#### *Impact of Protestant Reformation*

The impact of the Protestant Reformation on the *Ius commune*, in terms of both legal theory and practice, is seldom if ever discussed by contemporary comparative lawyers writing on the subject of harmonizing the law of obligations. This is a significant omission. To portray Europe as being an undifferentiated cultural unit until the French Revolution is controversial; likewise to present the so-called ‘national particularism’ in matters of law as simply a by-product of Enlightenment rationalism has the potential to be misleading. The origins of the so-called ‘nationalization’ of law can be traced at least to the aftermath of the Reformation, in particular to the development of Natural Law which is associated principally with the Dutch jurist Grotius (Hugo de Groot, 1583-1645). The Natural Law of the 18<sup>th</sup> Century has been pejoratively described by Paton and Derham (1972, p.20), in reference to the ambitions of J.-E. Portalis, 1746-1807, and his co-authors on the *Code Civil*, as “the shibboleth of immutable rules of law discovered by abstract reason.” However, inasmuch as Grotius had sought

to establish law on a foundation of humanity's desire for self preservation and a conflict-free existence but without reference to the Unwritten Law (Walker 1980, p. 541), the existence of which for the mediaeval scholastics was axiomatic, the Natural Law school of the early 17<sup>th</sup> Century should be regarded as the harbinger of Modernism. The cursory treatment of the post-Reformation era by many contemporary legal scholars, together with their presentation of it as an extension of the *Ius commune*, confirms the impression that their interpretation and treatment of history is selective.

### *Mapping a path to a common future*

Referring to his collaborators in this field of scholarship, Zimmermann asserts strongly held opinion in the manner and tone in which a scientist states propositions that have been proved by empirical means. "They have demonstrated," he writes, "that awareness of the common past can facilitate the path towards the common future" (2006 [1], p.572). In reality it would be more accurate to state simply that much has been argued on the basis of a supposed 'common past'. The latter is no more than a past during which certain common features were shared, and, as has been stated, not by all simultaneously

In a basic sense Roman and canon law developed by the medieval jurists as the learned law were common to the habits of thought and background knowledge of all educated lawyers in Europe (with the partial exception of England) from the thirteenth century onwards ... It was only in this sense that there was a *ius commune* in Germany between the collapse of imperial authority in the early thirteenth century and the deliberate and general adoption of Romano-canonical procedure in the higher courts in the late fifteenth century. (Robinson *et al.*, 1994 p.107)



It may additionally be observed that Zimmermann employs language of a strongly deterministic nature. His use, for example, of the definite article in the quotation cited above, implies that ‘the path’ to which he refers already exists and that it merely remains for an enlightened guide to show the fore-ordained route to legal unification. Zimmermann employs verbs such as ‘point out’ and ‘demonstrate’ in preference to ‘advocate’ and ‘suggest’ respectively.

To be German and in favour of the extension of Savigny’s *Rechtswissenschaft* beyond national borders is, paradoxically, to be an internationalist. By careful selection of historical references Zimmermann is able to reach some bold conclusions. Legal historians, he claims

have been among the first to point out that the national particularization of private law and private law scholarship in Europe is both unnatural and anachronistic (2006 [1], p. 572).

In other words not only should comparative law be taught in order to realize the longer term - many would say laudable - goal of a European legal scholarship, but national legal systems should be regarded as outmoded. Zimmermann goes further arguing

“[I]t is open to doubt whether, apart from political considerations (a European civil code is a symbol of European unity), economic arguments can be advanced in favour of legal unification” (ibid., p.574).

That Zimmermann’s writing style is persuasive is demonstrated by the unqualified acceptance of his contentions on the part of those academic commentators, such as Twigg-Flesner (2008, p. 2-4), who are broadly in favour of closer approximation of European legal systems. More surprisingly such a detached observer as Lord Mance (2006, p.17-18), a

Lord of Appeal in Ordinary, uncritically accepts the historical accuracy of the portrayal of the *Ius commune* as a unifying system. For those who remain to be persuaded of the validity of the author's conclusions, as well as of his use of history in support of the arguments he adduces, academic writing of this kind, notwithstanding the author's evidently wide knowledge of the subject, lacks sufficient precision to be convincing and leaves important questions unanswered.

### *The role and influence of Helmut Coing*

Anyone wishing to reserve Comparative Law in Europe purely to the academic realm will find that hardly any project or study in the field of comparative Private Law in Europe today is launched without regard to what Zimmermann terms "the process of Europeanization" (2006 [1], p. 570). The process ante-dates the work of Lando and Beale by some years and can be traced back to the generation that first advocated a socially, politically and economically cohesive Europe. During this era the late Helmut Coing was highly regarded for his scholarship and breadth of vision. In view of this comparative lawyer's influence, particularly on the succeeding generation of German jurists, it is at once necessary and instructive to establish the extent to which he shared the premises on which the arguments presented by advocates of closer integration in the 21<sup>st</sup> Century are based.

In 1973, the year of the United Kingdom's accession to the European Communities, the *Ius commune* was portrayed by Coing as having the potential to serve as a 'common law' for a United Europe in a paper entitled 'The Roman Law as the *Ius commune* on the Continent'. Since this

paper encapsulates an approach to legal history which has been highly influential in Germany in the last four decades it is important to assess the assumptions on which its principal contentions rest. A number of instances are given by Coing of how he understood the *Ius commune* to have operated. For instance, in the late 17<sup>th</sup> Century a Common Law judge, in determining a dispute concerning a merchant ship and its cargo captured in time of war, concluded that since there was no international agreement with France on which to settle the matter, the case, in Coing's words "had to be decided on the rules of the *Ius commune*" and that "under the rules of that law, the French court was wrong" (1973, p. 505). Coing went on to describe the *Ius commune* a "...a body of law developed out of the Roman law of Antiquity" (ibid., p. 505). The natural inference of the non-specialist British reader in the 1970s would have been that the *Ius commune* was systematized law comparable to the *Ius civile* or the *Ius gentium* of Ancient Rome, capable under certain circumstances of superseding national law. Whether or not the importance of the *Ius commune* has been exaggerated in the Civilian Law, tradition - particularly among those favouring the 're-Europeanisation' of law - it has not been held to be historically significant in the development of English law. Coing described as follows the traditional manner - developed by Italian legal scholars during the Middle Ages - in which a decision was reached in the Civil Law jurisdictions -

a judge must first apply local customs and statutes but wherever he could not find an appropriate rule ... he could turn to Roman Canon Law and fill in the gaps found in territorial or local law by the rules of Roman Law. (ibid., p. 513)

Coing's reference to Canon Law in this example indicates that he occasionally employed the term *Ius commune* in the narrow, traditional sense. As implied by the word "*commune*", the *Ius commune* stood in

contrast to those ecclesiastical conventions that were merely local in application. As originally conceived, therefore, it can hardly be construed as having any significance for the secular law or civil society. However, inasmuch as the Church was the only institution in the Middle Ages to have an unbroken tradition reaching back to the time prior to the fall of the Roman Empire, it followed that ‘the general law of Christendom’, or Canon Law, was itself partially based on precepts derived from the jurisprudence of the later Roman Empire, as Coing himself implied (op. cit. p.514). Nevertheless, the phrase ‘under the rules of that law’ used by Coing in discussing the English maritime case is striking, since the Admiralty court in England applied the traditional conventions of western Europe which were in fact derived from the *Consolato del Mare* from the Mediterranean and, from the Baltic, the *Laws of Visby*. Accordingly, what Coing referred to as the *Ius commune* in this instance in fact had the characteristics of customary law (*Ius proprium*). As such it was the very antithesis of what he advocated. The nature of maritime law had long been recognized in England. Holland (1924, p.133, footnote 3) cited the 16<sup>th</sup> Century theologian Hooker whom Montesquieu followed. Hooker stated that, besides mankind’s social and constitutional relationships being regulated by ethical and municipal law –

there is a third kind of law which touches all such several bodies politic, so far as one of them hath public commerce with another, and this third is the law of Nations.<sup>6</sup>

Although Coing employs the term *Ius commune* in a more restricted sense than does Zimmermann and other contemporary writers on the perceived benefits of a ‘re-Europeanised’ civil law, he nevertheless idealizes the *Ius*

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<sup>6</sup> Ecclesiastical Polity i. c. x. s.12 ; cf Montesquieu ‘Droit de gens’ in *Esprit de Lois* i. c. 3

*commune* in such a manner that it is not always possible to gain a clear perception of the original historical context in which the *Ius commune* operated. Moreover, the manner in which the legal history of Sweden is treated by both Coing and Zimmermann betrays a desire on the part of both authors to see the acceptance of the *Ius commune* as to some degree as normative.

### *The case of Sweden*

Both Coing and Zimmermann espouse a distinctive theory of history according to which the influence of the mediaeval jurists is equated with progress: “On the whole,” wrote Coing -

the development [of the *Ius commune*] was complete by the beginning of the sixteenth century, some countries like Sweden still being behind. At this time the *juristae*, the university trained lawyers, dominated the civil service in the courts of the continental states. (1973, p. 512)

While Coing seems to have tolerated the occasional ‘exception that proves the rule’ of his over-arching theory of the former existence a shared European *mentalité* in matters of law, Zimmermann and Whittaker (2000) are at pains to demonstrate that Sweden was not immune to the *Ius commune*. Accordingly we read that “since the 17<sup>th</sup> century Swedish-Finnish law was (*sic*) deeply influenced by the European *Ius commune*” (pp.55-6). The grounds for making this claim are, firstly, that from the 17<sup>th</sup> Century all contracts made under the mediaeval law codes were construed as being contracts made in accordance with the principle of good faith, and, secondly, the passing into law of the Nordic Contracts Act, an early example of harmonized legislation agreed by non-belligerent nations during the opening years of the First World War. In reality traditional

Swedish customary law already recognized a duty consistent with ‘good faith and fair dealing’. If Sweden did become ‘deeply influenced’ by Roman law concepts it was primarily by means of codification in the 19<sup>th</sup> Century, and not as claimed by Zimmermann and Whittaker. In 1811 a commission was established to replace the *Rikes Lag* of 1734, itself a codification of traditional custom law precepts (Robinson *et al* 1994, p. 248). Since the new code was inspired by the principles of the French *Code Civil*, it appears - paradoxically, and in contrast to what is often alleged about the ‘fragmentation’ of European law - that Swedish legal history tends to show that what is attributed to the spirit of the *Ius commune* in that country came about by the adoption of the legal standards of the Enlightenment shared elsewhere in Western Europe. Accordingly, the case of Sweden presents a challenge to the contention that the process of codification in the 18<sup>th</sup> and 19<sup>th</sup> Centuries, because it is alleged to have led to ‘national particularization’, was detrimental to legal ‘coherence’ in Europe. It is submitted that, far from being an illustrative example of Coing’s and Zimmermann’s thesis, the unique evolution of Sweden’s legal system in fact brings into question the entire historiographical theory by which Zimmermann, following Coing, seeks to validate the goal of so-called ‘defragmentation’ of legal traditions in the European Union.

### *Coing and Savigny*

It is likely that Helmut Coing was the first German jurist to idealise the *Ius commune*. Although evidence that this had happened as early as the 18<sup>th</sup> Century is adduced by Coing himself (1973, p.506) in an example from European history which was related in order to convince English readers of the potential of a revived *Ius Commune* as a unifying factor, it is highly

likely that the expression *Ius commune* in this context is Coing's own. The example related to the establishment of a new university at Berlin in the early 19<sup>th</sup> Century. The advice given by Savigny to the Prussian government was that the new curriculum for the Faculty of Law, in order to have broad appeal, should not be based on Prussia's law code of 1794 but instead "mainly on Roman Law as the *Ius commune* of Germany" .

Savigny, who acted as Minister of Justice until the tumultuous events of 1848, was convinced that the Justinian *Corpus iuris* contained a deposit of wisdom spanning several centuries, and that it, more than any modern code, had the capacity to yield answers to contemporary problems as they arose. When in 1814 he coined the term *Rechtswissenschaft* he meant intensive studies in the field of Roman law for the purpose of providing solutions to legal problems in modern society. His achievement, broadly speaking political in conception, was to bring academic and political opinion in Germany round to the idea that only Roman law could provide the terminology for the development of a common national law and jurisprudence of sufficient coherence for an era of rapid industrialization and social change. He considered the German language at that time as insufficiently developed for modern legal requirements. (Walker, 1980 p.1103)

Despite Savigny's unequivocal championship of Roman law, it is insufficiently stressed by modern advocates of a 'Europeanised legal scholarship' that throughout his life he opposed the codification of law. His opposition to the proposal of Anton F.J. Thibaut (1772-1840) in 1814 for a national code tends to be presented as the intellectual triumph of the

Historical School over the adherents of the Natural Law school comprising the followers of Portalis and his co-authors of the *Code Civil*. Zimmermann (1994, p.81) quotes Savigny from the latter's dialogue with Thibaut: "As to what we aim at we are in agreement", but this should not be taken to mean that they agreed that codification was desirable. What separates Savigny from Gustav von Hugo (1764 – 1844) and the other founders of the Historical School of jurisprudence, and in part what led him to oppose not only Thibaut but also any who would codify the law, was his insistence on the development of an objective legal science (Ryan 1962, p.30). 'Legal science' is an alternative translation of *Rechtswissenschaft* reflecting the strongly analytical nature of the academic tradition in Germany. While it is true that the German legal code which was published in 1900 "owed its maturity to the conceptual foundations laid down by the historical school of jurisprudence" (Zimmermann 1994, p.91), it is evident that this result owes more to accident than to design since the delay was caused partly by lack of political unity in the country, and partly by disputes between Savigny's followers and opponents`. Because Savigny believed in the superior 'coherence' of Roman law over the non-systematized regional law that would have been the raw material for a codified law on Teutonic principles, his influence and that of his supporters ensured that the introduction of a legal code in Germany was deferred for at least a generation. Accordingly it is difficult to agree with Zimmermann's characterization of the situation that has arisen in Europe since the inception of the European Union as "Savigny versus Thibaut all over again". Claiming, by implication, to be preserving Savigny's legacy, Zimmermann incessantly advocates the adoption of a uniform 'coherent' legal culture across the European Union.



He avers that the establishment of a European legal scholarship (*Rechtswissenschaft*)

may, eventually, pave the way towards a codification as widely accepted in Europe as the *Code Civil* is in France or the *Bürgerliches Gesetzbuch* ... in Germany. (2006 [1], p.573)

It is submitted that this aspiration is founded on a flawed representation of the dynamics of modern German legal history. For German scholars who eschew legal nationalism the process of the harmonization of law in the member states of the European Union is one by which Savigny's vision of a *lex Romanus redivivus* for a unified Germany in the 19<sup>th</sup> Century can be externalized and thereby consolidated, with modifications, at home. No doubt the tradition of legal scholarship, which has been such a notable feature of German juridical thought since Savigny's day, accounts in part for the vigour with which German jurists have in recent decades led the drive for what von Bar described as "a new *Ius commune Europaeum*" (Bar 2000, p.1). No doubt, too, contemporary German *Rechtswissenschaft* is derived from Savigny's perception, as a classicist turned lawyer, of Roman law as a perfected legal system. With the passage of time this, the characteristic view of Savigny and Mommsen (1818-1892), has become outmoded, and since it no longer serves as a viable basis for a European 'legal science' it follows that nothing of substance has been proposed. Zimmermann (1994, p.81), argues for the 'depositivising' of national legal systems, adding that what is needed is a renewed historical school of jurisprudence which can "build on common, systematic, conceptual, doctrinal and ideological foundations which are hidden beneath the debris piled up during two hundred years of legal particularisation" (ibid., p.82). In view of Savigny's resolute opposition to codification throughout his

career it cannot be assumed that he would have approved of a European civil code, a goal which was regarded as attainable until quite recently (Zimmermann 2008, pp.573, 577)

*Legal and jurisprudential affinities*

When Smits (1998, p.328) outlined the goal of achieving a uniform private law he included among his aims the removal of “the alleged contradistinctions between Civil law and Common Law”. During the 16<sup>th</sup> Century the *Landrecht* took precedence over the Roman law that was gradually being imposed throughout Germany by means of the institution known as the *Reichskammergericht* (Robinson *et al.* 1994, p.190f.). Regional variation in Law remained in Germany as late as the early 19<sup>th</sup> Century. As intimated above, despite the ‘Reception’ of Roman Law in the late Middle Ages, and the consequent establishment of the *Reichskammergericht*, adherence to local customary law remained strong. Many European jurists tend to see the English Common Law as an isolated manifestation of the *Ius proprium* or Customary Law which was widespread in different forms and in different places throughout Western Europe at that time. Thus it is an unintended consequence of the work of Savigny, and the codification of German law more than a century ago, that the continuation of the Common Law in England for so many centuries seems now to be no more than an historical anomaly. In Zimmermann’s opinion “the English common law remains embedded in a tradition which is bound to appear quaint and bizarre to the modern civil law observer” (1994, p.87).

Zimmermann elaborated his perception of the Common Law in an address given in Cardiff in 1996. In order to lend colour to his argument he cited Thomas Hogg, a 19<sup>th</sup> Century barrister, author and rationalist who was offered the chair of Civil Law at University College London. Hogg contrasted the early 17<sup>th</sup> century English judge Sir Edward Coke with the French jurist Cuiacius (Jacques Cujas, 1522-90), caricaturing Coke as, by comparison, no more advanced than a denizen of “the trackless jungle”. Zimmermann added:

this is how many continental lawyers essentially still think today when confronted by the casuistic nature of English law with its bizarre traditionality (*sic*) or with its peculiar interlocking of common law and equity.(1996, p.587)

The irreverent text from which Zimmermann quoted had been prepared as an inaugural address. Although it was never delivered due to lack of funds for the chair, it did eventually appear in print in 1831<sup>7</sup>. Hogg’s audience would have consisted chiefly of liberals for whom Coke would have had iconic status for his early espousal of what we now refer to as ‘the rule of law’ for which he incurred the displeasure the king. The importance of this for subsequent developments is discussed in Chapter 3, below. For the Benthamites among Hogg’s listeners rationalization and codification of the Common Law was a priority. However, the words already quoted, and others comparing Coke to a ‘tattooed savage’, should have been understood as no more than self-deprecation indulged in for the purpose of reminding Hogg’s listeners, in an amusing manner, of the greatness of some of the Continental jurists: after all, until the publication of Blackstone’s *Commentaries on the Laws of England*, Coke’s *Reports* were regarded as

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<sup>7</sup> Hoeflich, M. ed. (1988) *The Gladsome Light of Jurisprudence: learning the law in England and the United States in 18<sup>th</sup> to 19<sup>th</sup> centuries* London: Greenwood

the most authoritative exposition of the leading cases in England, for generations being referred to simply as ‘The Reports’ (Denning 1982, p.222).

Apparently failing to appreciate the humorous aspect of Hogg’s iconoclasm, Zimmerman continued (1996, p.587), “Indeed, the English themselves like to cultivate the notion of their law as flourishing in noble isolation from Europe.” The original context from which this observation is taken indicates that the “noble isolation” that Zimmermann implicitly deprecates as ‘legal nationalism’ was not intended by the phrase’s author, Baker, to mean that there was any lack of affinity between the principles of justice enshrined in the Common Law and those in the Civil Law. According to Professor Baker (1990, p.35), the difficulty for mediaeval practitioners of the Common Law was that

even its more abstract doctrines were not easily transportable to countries which had different systems of courts and knew nothing of writs and juries. And so English law flourished in noble isolation from Europe, and even ... from parts of Britain.

Accordingly, it was the distinctive features of the English legal system, rather than lack of affinity with the essentially Roman concepts of the *Ius commune*, that primarily accounts for the separate evolution. Subsequently the Common Law judges found they had enough resources of their own on which to draw in cases of difficulty. Holland (op. cit., p.69) cited a 17<sup>th</sup> Century Master in Chancery who stated that English judges ‘do not refer to

Roman civil law or to that of other European nations but rely on their own judgement and conscience’<sup>8</sup>.

At times, like Coing before him, Zimmermann draws attention to the underlying affinity between England’s legal norms and those of her near neighbours. A generation previously Coing had stated that “the English Common Law has never been completely separated from legal developments on the Continent” (1973, p.516). However, while Zimmermann concedes that it is not difficult to understand “the English common law as a specific emanation of a European, or Western, legal tradition” (1996, p.589) he appears to draw no more conclusions from this than did Coing for disinterested legal scholarship. Zimmermann (ibid., p.590) added that the late Lord Bingham had referred to the possibility of England “rejoining” the European mainstream and that Lord Goff of Chieveley had found “hardly any difference between English and German law as far as application and development of the law by the judiciary are concerned.” Because Zimmermann considers the separate identity of the Common Law a major “objection” to “creating a common European legal science” (ibid., p.587) the inference that the reader is invited to draw from both remarks is that the assimilation of the English legal system into that of the Continental Civil Law systems is overdue.

Previously Zimmermann had argued that in order to secure an appropriate point of departure for “the restoration of a common European jurisprudence,” two inter-linked propositions had to be “addressed” (1994,

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<sup>8</sup> ‘... non recurrunt ad ius civile Romanorum, ut apud alias gentes Europeas, sed suo arbitrio et conscientiae reliquuntur.’ Duck, A. [1653] *Usu. et Auct.* ii. c. 8. 6, 8

p.87). The first of these propositions is that England is a legal 'island' as well as a geographical one, and the second that her legal profession obstinately adheres to her 'bizarre' legal system. In order to dispose of the first of the two propositions, Zimmermann states that he had tried

to show that the notion of the English common law as constituting an entirely autochthonous achievement is a myth. For in reality, England was never entirely isolated from continental legal culture. (ibid. p.87)

In view of the considerable range of external influences on legal and political developments in the British Isles over the centuries it is doubtful that a British or Irish legal historian would ever describe legal development in any corner of them as "autochthonous". Moreover, that adjective is inappropriate for describing a development resulting from a substantial degree of geographical and political isolation. The use of the word 'autochthonous' by Zimmermann indicates that he interprets the English Common Law as a surviving example of Teutonic customary law, albeit modified by Civil Law principles. While the term 'autochthonous' would not be an appropriate adjective in the context of English legal history, it would be entirely apposite with reference to ancient laws or customs that were not derived from another culture. Evidently Zimmermann has interpreted the essential nature of the Common Law in such a way as to accord it the same standing in English life as the *Landrecht* used to have in some German principalities prior to the Reception of Roman Law when in "consequence of the political fragmentation of Germany, German law of the Middle Ages was fissured into innumerable local legal systems." (Kunkel 1973, p.186)

Coing had hardly been controversial when he averred that it would be inaccurate to regard England as never having been affected by the Roman Canon Law; it was –

also clear that the mediaeval law schools in Oxford and Cambridge taught Canon and Roman Law. What is more, in the 12<sup>th</sup> and 13<sup>th</sup> centuries there were English judges having a broad background of knowledge of the Roman Canon Law.” (1973, p.515)

In this context Coing cited the Dutch legal historian R. C. van Caenegem to the effect that Roman law came to England ‘too late’ to impress English law with the characteristic features of the Civil Law jurisdictions<sup>9</sup>. The necessary inference is that Professor van Caenegem had a low estimation of the importance of Bracton (d. 1268), author of *Concerning the Laws and Customs of the English*, as displaying the erudition of one trained in the Bologna tradition. Nor does he accurately reflect the degree to which European jurists in the 11<sup>th</sup> to 13<sup>th</sup> centuries formed an international clerisy. Kunkel (1973, p.185) assessed this critical period in English history differently:

The Anglo-Saxon area remained excluded from this great legal family because England, which in the twelfth century - the time of the early flowering of the Glossator-school - had come under the first influences of Roman law, later consciously closed itself to these influences.

To a degree Coing’s opinions concurred with those of Ryan (1962), but the latter (op.cit., p.23) also reached a different conclusion:

The history of English law has been marked not by the reception of a foreign system and its infusion with native institutions, but instead by the growth of a body of rules newly fashioned by the king’s justices and developed by their

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<sup>9</sup> *Royal Writs in England from the Conquest to Glanville* London: Selden Society LXXVII, 1959

successors in which neither Roman law nor the customary law was a decisive, or even a considerable, influence.

It is to be noted that, in advocating the establishment of a new *Ius commune*, Coing attaches insufficient weight to the fact that the formal Reception of Roman Law in those parts of Germany beyond Cologne and Munich, where Roman influence had always been strongest, occurred some two centuries later than the era that he, in common with later writers, regards as the golden age of the *Ius commune*. Arguably, were it not for the immense influence of the classicists Savigny and Mommsen in the 19<sup>th</sup> Century, the importance of which was stressed by Kunkel (1973, p.191), the Reception of Roman Law four centuries earlier might have come to be regarded today as no more than a half-hearted attempt to impose uniformity on Germany.

The most significant single factor in legal history is the influence of individual jurists. These may be famous names such as Bracton and Lord Mansfield in England, Portalis in France and von Savigny in Germany. No doubt every legal system owes a debt to one or more jurists of comparable stature. The decline in the influence of the Roman Law in England during the 14<sup>th</sup> Century can be ascribed to the introduction late in the previous century by an energetic king, Edward I, advised by the Italian Franciscus Accursius, of the policy of appointing laymen to the judiciary (Baker op. cit., p.179f). From this time too, as Coing (op. cit. 1973, p.516) readily concedes, English lawyers received their training at the Inns of Court in London and by exposure to the court system. In consequence of English lawyers no longer studying with the *juristae* of the universities, the nature of their knowledge became less abstract and more attuned to the



practicalities of the administration of justice. Had it not been for such reforms, it is likely that the English legal system to day would share the essential characteristics of a Civil Law jurisdiction.

It is difficult to avoid the conclusion that Coing and Zimmermann were united in attempting to subordinate both historical *actualité* and legal scholarship to an essentially political programme intended to create a supra-national legal culture in Europe. The era that followed the rediscovery of the Justinian *Corpus* was summarized, together with the impact that this discovery had on subsequent developments in Europe, by Professor Kunkel (1973). He stated that the legal science that rapidly became “the basis of a common European legal culture”, lasting until the present era, only blossomed in the schools of the mediaeval universities from the 15<sup>th</sup> Century onwards. In comparison with the legal systems in England and France which had been established previously under royal authority, Germany’s “innumerable local legal systems” found resistance to the imposition of Roman Law by the Reich difficult. An English translation of the sixth edition of Kunkel’s *Römische Rechtsgeschichte*, originally published in 1966, appeared in 1973. Its publication coincided with that of Coing’s paper in the *Law Quarterly Review*, the title of which - ‘The Roman Law as the *Ius commune* on the Continent’ - was evidently phrased so as to appeal to the English legal profession and to hint at the possibility of establishing a reinvigorated *Ius commune* in a manner analogous to the Common Law. However, it is not without significance that the expression ‘*Ius commune*’ was not included by Professor Kunkel in his work. The current widespread usage of the expression can, without

difficulty, be traced directly to the period in which Coing was writing and teaching, but not before.

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### Chapter Three

#### Professor Legrand's Seminal Paper

During the decade following the passing of the Single European act 1986 it was frequently asserted that there was already at work a process of convergence of law among the Member States. The increased economic activity among European consumers gave rise to what Markesinis (1994, p.1) termed 'the gradual convergence' of European contract law, the phrase being incorporated into a book title. Lest the 1990s should come to be characterized by a sense of an onward march to the foreordained goal of a European Civil Code early in the new century, Legrand's paper 'European Legal Systems Are Not Converging' (Legrand, 1996) directly contradicted Markesinis and like-minded comparative law scholars (ibid., p.54). Legrand intended to refute what he regarded as a widespread fallacy and to constitute a challenge to rethink from first principles. His paper appears to have been successful in giving enthusiastic supporters of rapid progress towards a Europe-wide Law of Obligations pause for thought.

Arguing that the Common Law and the Civil Law were on diverging ‘trajectories’ Legrand invited academic legal writers in Europe to reconsider the *grande idée* of a European legal unity enforced in the name of humanist rationality and grounded in the premise that legal homogeneity is the optimal basis for the European Community to prosper (Legrand 1996, p.80). The reader senses here profound opposition not only to any European Union-sponsored drive towards the ‘Europeanisation’ of law, but also to the entire process that began with the publication of the first volume of Lando and Beale’s ‘Principles of European Contract Law’ (1995). This antagonism constitutes in effect an invitation either to accept unreservedly or to reject utterly one of Legrand’s principal propositions, namely that the systematization of law that is characteristic of the Civil Law regimes is repugnant to anyone trained in the Common Law tradition. As mentioned in Chapter 1, occasional attempts have been made to secure Parliamentary time in order to codify by statute aspects of the Common Law, so it would be misleading to insist that such repugnance as does exist is either innate or universal.

In furthering his professed aim of “contribut[ing] to a better understanding of the culture of English Common Law” (ibid., p.74). Legrand postulates the existence of a profound dichotomy between the prevailing culture of Civil Law countries and the English legal tradition. The significance in this context of the early 17<sup>th</sup> Century English jurist Coke is discussed below. Continental lawyers without personal experience of the operation of the Common Law may have been impressed by Legrand’s forceful argument that the legal system that was developed by Common Law judges is not only epistemologically distinct from the Civil Law system but also

intimately connected to habit and custom. Legrand is at pains to stress that the ‘otherness’, as he terms it, of the Common Law does not mean anything more than that lawyers with different ‘acculturation’ (ibid., p.78) can only understand each other by an effort of the imagination, but not in the manner of lawyers from the same tradition who naturally understand each other’s terms of reference.

This chapter represents a critique of the arguments adduced by Legrand in favour of the proposition that the characteristic differences between the Civil Law and Common Law systems denote incompatible processes of legal reasoning arising from widely differing historical experience in terms of both the genesis and evolution of institutions. Legrand does not deny “the existence of a long-standing and important influence of the Civil Law tradition on English law” but such recognition, instead of being discussed fully is consigned to a footnote (ibid., p.62, n.41). Throughout his paper Legrand exclusively adduces arguments that support his contentions, but he chooses not to address or attempt to refute any conceivable objections to his thesis. One consequence of this is that there is no analysis of whether his principal contentions might be true of one area of law but not of another. Moreover, it is at least conceivable that the divergent ‘trajectories’ to which he refers may ultimately be turned and that the closer approximation of English and Continental law with regard to contracts that existed as a result of Lord Mansfield’s judicial activism during the 18<sup>th</sup> Century may one day return. To state this, however, is not necessarily to contradict Legrand’s contention that the “analysis of European legal integration at the level of posited law suggesting a convergence of legal systems is misleading” (ibid., p.61).

*Values, presuppositions and outlook*

Lying behind the articles of differing law codes in the Civil Law tradition, and the authoritative decisions under the Common Law, are the values and presuppositions of the cultures that produce them. According to Legrand, a 'rule' contained within a law code inevitably comes about as a result of negotiation between interested parties. It thus connotes 'a socio-cultural dimension which ... remains inherent' (ibid., p.57). This naturally results in what he terms "nationalistic legal positivism". The expression 'legal positivism' is frequently referred to by Legrand, but not elaborated upon. Accordingly we should give this expression its conventional meaning so that the 'centrifugal' effect of the 'nationalism' to which he alludes is in fact asserting no more than that each polity prefers the positive law that it has grown accustomed to. If the implication of this is that different legal systems will not naturally converge without a centripetal force to offset the natural tendency he describes, Legrand's observation can hardly be termed controversial. Indeed, despite using the word 'nationalistic', a word which is usually understood pejoratively, Legrand does not base his argument merely on the observation that legal systems tend not to converge naturally. Instead he evinces an antagonism to rules *qua* rules. The essence of Legrand's contention is that the concept of Law encompasses the entire wealth of moral, social and psychological antecedents that lies behind the private law in any given society. He sees a danger in regarding the 'rules' as equating with 'law' in the fullest sense. The consequence of adhering to a "law-as-rules" interpretation, much comparative law work has, paradoxically, become an epistemological barrier to more profound legal knowledge. (ibid., p.60; and n.38)

Whereas a community, or polity, can be formed on a variety of bases - ethnic, linguistic, religious or even on the basis of a legal system or tradition - culture is the coming to fruition of a series of 'collective mental programmes' (ibid., p.56). The last term is rendered by Legrand as '*Weltanschauungen*' - the plural of a word invariably employed by German writers in the singular. Usually the term *Weltanschauung* is rendered into English as 'world-view' or simply as 'outlook on life'. Indeed towards the end of his paper Legrand himself (op. cit., p.79) cites Munday (1983) to the same effect: 'a lawyer brought up within a system of judge-made law has a legal outlook utterly different from one who has grown up within a codified system'<sup>10</sup>. The term 'outlook' also serves as an adequate rendering of what commentators mean by *mentalité*. However, it is arguable that what is significant is not so much the 'outlook' of the jurist as the methodology of the practising lawyer. The latter encompasses the way things are done in a practical sense - including how Law is learnt - and, importantly, the process by which judicial decisions are reached. In terms of the debate about the convergence of European private law, such methodological differences are arguably more significant than the apparently divergent legal doctrines.

By employing four epistemological categories - descriptive, inductive, deductive and axiomatic - Legrand plausibly contrasts the 'inductive' reasoning practised under the Common Law with the 'axiomatic' nature of Civil Law argumentation<sup>11</sup>. He contends (op. cit., pp.64-65) that the Common Law

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<sup>10</sup> Munday, R. (1983) 'The Common Lawyer's Philosophy of Legislation' 14 *Rechtstheorie* p.191

<sup>11</sup> Blanché R., (1983) *L'épistémologie* (3<sup>rd</sup> edn), p. 65

has not left the inductive stage of methodological development. ... One cannot axiomatise English legal thought, for Common Law lawyers use discrete inductive ideas capable of functioning only within limited factual spheres.

If this analysis is correct it follows that analogical reasoning remains indispensable to the Common Law judge or jurist. Legrand's wariness of any systematization rendering legal categories axiomatic arises because in his view under the Civil Law systems the facts of a particular case 'are immediately inscribed within a pre-existing theoretical order where they soon vanish'. For Legrand one of the virtues of the Common Law is that the factual basis of authoritative case law is never lost sight of. However, to assert as Legrand does, that the axioms of Common Law could never be successfully distilled from the factual matrix out of which justice in each English case is wrought, is to overlook the fact, mentioned above, that on a number of occasions in the last century and a half key aspects of English law, such as Marine Insurance, have been brought together in what for all practical purposes are tantamount to codes.

### *Codification and pragmatism*

Not long after Legrand's seminal paper was published, von Bar (1999, p.137) acknowledged that Legrand's thesis did not lack substance. He stated that the European Commission's objective in the first instance

can only be the creation of a sort of basic law of property upon which the Member States of the European Union can agree without forfeiting their evolved national legal cultures (their legal identities as some will say) at a single stroke. Unity can therefore grow from a kernel without any overambitious attempts to uproot the rich diversity of legal traditions.

These significant words foreshadowed the Commission's change of policy which first manifested itself subsequently when the policy of achieving a hard law instrument by 2010 was abandoned in favour of improving the

Consumer *Acquis*. In the same context the Common Law tradition was referred to specifically by von Bar –

Nor would any harm be done to the legal systems of the British Isles. They themselves, after all, already possess partially ‘codified’ structures, the law on the sale of goods being one example. (ibid., p.137)

The implication of these words seems to be that if one area of contract law has been consolidated by Parliamentary statute, then adaptation to an overarching European civil code could be achieved leaving the Common Law tradition intact for other aspects of domestic law such as Tort. It is not as though what von Bar construes as partial codification has only occurred in relation to contract law, since aspects of the criminal law, in addition to the law governing marine insurance, have likewise been consolidated. A partial or quasi- codification by means of an Act of Parliament requires little no change in the analogical reasoning and reference to binding case law which characterize the methodology of the Common Law system. Legrand (op. cit., p.65) stresses English pragmatism in legal matters and quotes with approval Weir who avers that this tradition “is more concerned with result than method, function than shape, effectiveness than style”<sup>12</sup>.

### *Enlightenment Era of Codification*

A key aspect of the rationale of Enlightenment era codification was the perceived need to set the application of law on principles which did not need to be underpinned by reference to an unwritten moral law. Accordingly the principles needed to be rigorously logical and the constituent parts consistent with one another. Part of this process was political, broadly speaking, in that the act of removing legal anomalies has

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<sup>12</sup> Weir, T. ‘The Common Law System’ in David, R. ed. (n.d.) *International Encyclopaedia of Comparative Law* vol. 2



the effect of bringing greater cohesion to the nation state. This is important in terms of what Legrand has to say about legal culture. From the late 18<sup>th</sup> Century onwards jurists in Continental Europe applied Modernist principles to the administration of justice with the result that a citizen's position in relation to his family, his society and the State reflected the prevailing intellectual climate. Nevertheless its authors were content to adopt certain reforms of commercial law instituted by Colbert in the era of the Absolute Monarchy as well as the traditional *coutumes de Paris*. That there were bound to be imperfections in any codified system was recognized by those who oversaw the promulgation of the *Code Civil*:

A code, however complete it may seem, is no sooner finished than a thousand questions present themselves to the magistrate. For these laws once drafted remain as written. Men on the other hand never rest. They are always moving; and this movement, which never ceases and whose effects are variously modified by circumstances, continually produces some new fact, some new outcome. Many things are therefore necessarily left to the authority of custom, to the discussion of learned men, to the arbitration of the judges. (Portalis *et al.* 1801, para.32)

In the France that had survived until the Age of Reason there had been two distinct juridical areas - that part of the country south of Bordeaux in which 'le droit écrit', in other words Justinian law, had been accepted for centuries, and secondly 'les pays de droit coutumier', that is customary law of Germanic origin dating back to the collapse of the Roman Empire in the West. During the high Middle Ages, conformably with Helmut Coing's depiction of the workings of the *Ius commune*, the Roman law of the Justinian *Pandectae* was influential in the universities. However, it was never esteemed for practical purposes by the French kings who associated it with the Holy Roman Empire whose political ambitions they had resisted

for many years. According to Ryan (1962, p.16) in those areas of France where the Roman law was introduced, as in Germany for years after its 'Reception', it was used solely as an "infiller" where the *droit coutumier* was silent. Over time the customary law was collated and published, for example under the *Ordnance de Montils-les-Tours* of 1453 which marked the end of the protracted struggle with England known as the Hundred Years War. Thus in France, as among the German principalities, and indeed as in England, the 'interface' between customary law and written law played a more significant part in national life than is generally recognized. Portalis and his colleagues in 1800 succeeded in removing the grounds for Voltaire's jibe that in France a traveller changed law as often as he changed horses. In Ryan's words (1962, p.29) they did so

in a manner which has evoked so strongly the enthusiasm and national pride of the French people that any large measure of reform is extremely difficult to carry through.

Notwithstanding the well-known reticence of French jurists towards the concept of a Civil Code for Europe it would be an exaggeration to characterize every academic writer on Law in France either as a legal nationalist or a supporter of the use of Reason for ideological reasons. In spite of its imperfections the *Code Civil* has been influential in Europe, North and South America and, suitably adapted, in Egypt and other parts of the Muslim world. It is of interest to note that the essentially Germanic *droit coutumier* survived the process of codification by incorporation into the *Code Civil* and thus were not obliterated. This kind of customary law is significant in that its existence hitherto in France serves as an example of the cultural dimension of the questions surrounding codification so central to Legrand's contentions. If we follow the necessary inference from

Zimmermann (1994, p.87) and regard the Common Law in England as essentially a species of the *consuetudo* once existing in France and Germany, no doubt its axioms could be incorporated within an English civil code. It might be argued that such a code is a necessary precursor to the promulgation of a European Civil Code since one would expect to meet a degree of resistance from the legal profession to any proposition that entailed a change in methodology and reasoning so profound as to constitute a revolution. The evidence suggests that the Common Law - or perhaps one should say English law taking into account elements of both the Common Law and the Civil Law - is less rigid and more readily adaptable, by a process of addition and accretion, than any codified system. Codification of European contract law would not require merely the adaptation of English law but its transformation - not an evolution but a revolution.

Legrand's eclecticism leads him to employ the categories of the French anthropologist Claude Levi-Strauss. "When you submit habits and thoughts to the grindstone of reason, you pulverize ways of life based on long-standing traditions" - a process that is said to have a dehumanizing effect<sup>13</sup>. Moreover, Legrand argues that we should "reverse the process of aestheticisation of the legal." The term "aestheticisation", signifying 'formal arrangement' is derived from the German philosopher Baumgarten (1714-62). Instead of 'aestheticising', jurists, according to Legrand, should learn to "embrace habits and customs" rather than "rules and concepts" such as those found in the Justinian *Pandectae* (Legrand op. cit., p.60). As such his argument is no more than a resurfacing of the traditional

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<sup>13</sup>Levi-Strauss, C. and Eriobon, D. (1988) *De près et de loin* p. 165

antagonism between the Historical and Natural Law schools of jurisprudence.

Not surprisingly, in Legrand's opinion the pragmatic approach taken by English judges is to be preferred to the inexorable application of 'legal science'. Although the dangers of the merely mechanical application of legal principles were criticized in the 1920s by the Benjamin Cardozo, the American was not the first jurist to see them. In 1886 von Jhering collated a series of his own satirical articles published anonymously, in which he lampooned the tendency to apply the regional Civil Codes that existed prior to the promulgation of the BGB to the extent of reaching ludicrous conclusions<sup>14</sup>. Legrand quotes approvingly the more recent words of Griffiths LJ in *Ex parte King* [1984] -

[T]he Common law of England has not always developed on strictly logical lines, and where logic leads down a path that is beset with practical difficulties the courts have not been frightened to turn aside and seek the pragmatic solution that will best serve the needs of society<sup>15</sup>.

It is arguable, however, that this is simply an application, perhaps unconscious, of the principle "the greatest happiness for the greatest number" derived from the utilitarianism of Bentham and Mill. Atiyah (1979, p.372) states that there was "a considerable degree of personal contact between lawyers on the one hand, and the political economists and the Benthamite utilitarians on the other" in the 1830s and 1840s and that exposure to this doctrine influenced the jurisprudence of John Austin (ibid.). This rationalist and Natural Law theorist of the 19th Century was in regular contact with jurists on the Continent, including Savigny. The

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<sup>14</sup> Jhering, R. von (1886) *Scherz und Ernst in der Jurisprudenz* ("Jest and Seriousness in Jurisprudence")

<sup>15</sup> [1984] 3 All ER 897, 903 CA -

importance of the affinities between Common and Civil Law categories of thought in the 19<sup>th</sup> Century is discussed in Chapter 4.

### *Developments in Germany in 19<sup>th</sup> Century*

The century preceding the publication of the BGB is a crucial period in the historical process by which codified law came to dominate European legal thought. In the aftermath of the Napoleonic wars, the reaction of Thibaut and others against the reception of foreign legal ideas was understandable and many enthusiasts of the historical school, rather than adapting existing laws for a society undergoing an Industrial Revolution - with its concomitant alteration in human relationships that Marx was among the first to identify - devoted their research into the customary law of the German people that existed prior to the 'Reception' of Roman law in the late 15<sup>th</sup> Century. The inevitable 'Kulturkampf' implicit in this activity was deprecated by Savigny whose ideal for the German legal system, should it achieve unity, could be described as perfected Justinianism without recourse to codification.

Legrand's rejection of the principle of the codification of law, as much in the 6<sup>th</sup> Century as in the 19<sup>th</sup>, places him in sympathy the Hegelian doctrine of the *Volksgeist*, the 'spirit' - or 'innate consciousness' - of the people. While Legrand does not fall into the error of mystifying the *Volksgeist* of the English-speaking peoples - supposing that there is in fact a single such 'geist' - his previously mentioned remarks about the 'aestheticisation' of law nevertheless constitute a body blow directed at the era of codification during the 18th -19th Centuries, and, by extension, to any plans for the codification of the law of obligations in the European Union.

### *Legrand's inferences regarding Convergence*

Legrand argues that in both of the two legal traditions represented within the European Community there exists “an irreducible element of autochthony constraining the epistemological receptivity to globalization” (op. cit., p.79). Since the history of the ‘droit écrit’ in Languedoc demonstrates that in fact the legal precepts derived from the Justinian Corpus can over time become part of regional cultural patrimony it must be inferred that ‘autochthony’ is being used loosely: if the term were used narrowly only the traditional, customary law of the Scandinavian nations and Germany would satisfy the definition. It would seem to be implicit in Legrand’s use of this term that the modern law codes developed by jurists in France and Germany, in particular, were, in a material sense, artificial and must, to a lesser or greater degree, have run contrary to the habits, customs and societal norms that had hitherto existed within their respective jurisdictions. However, one simplifies in order to clarify: despite Savigny’s conviction of the supposed superiority of the jurists of the later Roman Empire, and to the idealized *Ius commune* that existed subsequently, there is no doubt that the *Bürgerliches Gesetzbuch* is profoundly influenced by the philosophical tradition of Leibniz and Hegel. Moreover, behind that tradition it is possible to detect the genuinely ‘autochthonous’ principle of ‘bounden duty’ (*Pflicht*) in Teutonic thought. If ‘autochthony’ is construed in terms consistent with ‘innate consciousness’ - and hence with Hegel’s *Volksgeist* - Legrand’s observation seems to be saying little more than that legal systems, codified or not, reflect the *genius* of the respective peoples from whom they emerge. Legrand was among the first to observe that “the European Community has dramatized [the] *cognitive disconnections*” that

exist among, or between, the two principal types of law to be found in the European Union, and has made possible a new awareness of the difference regarding underlying assumptions that exists.

Only with reference to cultures whose peoples feel that their civil law was imposed rather than freely adopted, would it be possible to argue that popular culture had not assimilated the rationalist principles of early jurists. In the case of France, as well as that of Germany, it has been shown that national culture, in the sense that Legrand employs the term, has been strongly influenced by the historical processes that led to codification and by the daily application of the respective codes over many years. Whether the consequences have been wholly benign, and preferable to the 'customs and habits of the people', Legrand, with his aversion to systematization and codification, would doubt.

#### *Conflict resolution and methodology in legal and political culture*

From what we know of the practices of three related peoples of Northern Europe - the English before the Norman conquest, the parts of France that retained *le droit coutumier* under the *Ancien Regime*, and the German people before and after the Reception of Roman Law by the lower courts in the late Middle Ages - we can deduce that in each society there was a contest, of greater or lesser intensity, between local custom law and Royal or Imperial authority. If, following Hegel, we accept that each polity has established institutions which reflect the manner in which the *Volksgeist* of each society has been historically conditioned, we can say that the characteristic differences lie not in the nature of the contest itself but in the manner in which each society resolved, or attempted to resolve, such

conflict. As discussed below with reference to what Legrand has to say about the form taken by such resolution in England, it is artificial to separate the juridical activity from its political and constitutional context.

If there are, as Legrand maintains, “irreducible” differences between the Common Law system and Civil Law Systems, these may be more to do with methodology than fundamental concepts of justice. Consistent with what Legrand maintains in regard to the different cultures, we would expect the manner in which law is conceived and applied to correspond, to a large degree, with those political norms, including juridical structures, which evolve over time. This is illustrated by the principle of the superiority of local law over Imperial law in late mediaeval Germany as encapsulated by the aphorism ‘Landrecht bricht Reichsrecht’. Doubtless the exponents of Imperial law believed it to be more progressive by the standards of the day. That they wished to bring about legal convergence is emphasized by Ryan (1962, p.22) who stated that the existence of a custom under the *Landrecht* had to be established beyond reasonable doubt, otherwise Imperial law automatically took precedence in the Imperial courts. We can be sure that during the era prior to the ‘Reception’ of Roman law in the German principalities, and prior to codification in France which followed the Revolution, the proposition that customary law - which had constituted the *Ius proprium* in ancient Rome - was something to be swept away on the grounds of inconsistency would have been vigorously resisted.



*Coke and contemporary English mentalité: Legrand's use of Culture*

Under the Civil Law jurisdictions, in contrast to the characteristically English constitutional principle that “the executive cannot justify any course of action unless it can rely on the conferment of a power by the legislature”, there is to be found, Legrand argues (op.cit., p.74), “the notion that the government has the inherent power to govern”. In other words the *dirigisme* that characterized the monarchical system of government in many parts of Europe until the popular revolutions of 1848 was not dissipated by the advent of democratic constitutions. It becomes immediately apparent, therefore, that the prevailing culture to which Legrand refers is, at least in part, the prevailing *political* culture. It may be remarked that it would be strange indeed if the executive under a constitutional monarchy considered it lacked an inherent right to govern by decree in the event of national emergency. It is sometimes forgotten in the case of the United Kingdom that there is no legal obligation - as distinct from political imperative - on the government of the day to have treaty obligations ratified by the elected chamber once they have been agreed by the states concerned. Accordingly we observe that Legrand appears to overstate his case in this instance, even to the point of ascribing to the British constitution attributes more truly characteristic of the American. Nevertheless, the broader point made about legal positivism and culture is worth exploring more deeply. In jurisdictions in which the codification of law has come to be regarded as normative “everything turns on the authority of texts, themselves seen as depending on reason” (ibid., p.74). One objection to this state of affairs, as Dicey observed with regard to Constitutional Law, is that “rigidity ... tends to check gradual innovation”

(1939, p.131). However, Legrand's purpose is to highlight the "unexpressed presuppositions which the [Common Law] judge is competent to discover" (op. cit., p.72) and to contrast this feature with codified texts which embody rules. His point is that such rules, however well drafted, cannot be framed to cover every factual situation that might arise. Since, as indicated above, this point was made by Portalis himself, it appears that Legrand to a certain degree overstates his case. One might add that he does not give due weight to the significance of case law in Civilian Jurisdictions. However, by drawing attention to this divergence of approach, Legrand's intention is to extrapolate what this connotes with reference to political and juridical culture. He quotes (op. cit., p. 80) the 17<sup>th</sup> Century jurist Sir Edward Coke in support of his contention regarding systemization: "For bringing the common laws into a better method, I doubt very much of the fruit of that labour"<sup>16</sup>. Nevertheless, the fact that Coke set down his opinion for posterity suggests that even four centuries ago a contrary opinion was expressed from time to time.

Since the early 12<sup>th</sup> Century it has made sense in reference to England to speak of a Common Law interpreted by the judiciary, although for several centuries this was exclusively concerned with public law, not private. It is in this context that Legrand cites Coke, who became justly famous in Constitutional Law - and in English history - for articulating the principle of 'the rule of law' in a manner that set a limit to the royal pretensions of that era. We are not concerned here with the political aspects of the protracted struggle between Crown and Parliament that commenced four centuries ago except to note that the adversarial nature of the contest

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<sup>16</sup> 4 Co. Rep. II at x, 'To the Reader', Legrand op.cit. p.80, n.144

reflected the manner of trying cases much as politics in modern Britain still does. The consequent change in the traditional perception concerning the immutability of the Common Law, and the manner in which the subsequent practice of the law was affected by the conflict, however, are taken by Legrand to be highly relevant to his thesis. He cites (*ibid.*, p.71) Coke's preface to a collection of early 17<sup>th</sup> Century legal judgments "[T]he grounds of our common laws at this day," he wrote, "were beyond the memory or register of any beginning" (*ibid.*, *fn*.99). That these apparently innocuous words are redolent with political significance can be seen in how Coke expanded on this theme in a subsequent volume: "the common law of England had been time out of mind before the conquest, and was not altered or changed by the Conqueror"<sup>17</sup>. The phrase 'time out of mind before the conquest' suggests not an assertion of fact so much as the reiteration of what was becoming a national 'myth'. While it is true that the Norman kings, as we have seen, effectively restated Anglo-Saxon laws and customs in laying the basis of the Common Law, Coke's statement is consistent with the widely held belief in the 17<sup>th</sup> Century that the Anglo-Saxons had enjoyed numerous freedoms that had been curtailed or extinguished by the Norman kings. In the political struggle to retrieve these freedoms, whether real or imagined, we see the seeds of the rise of the kind of Liberalism which came to dominate British politics. It is no surprise to learn that Coke, and certain other judges who agreed with him, lent their support to those in Parliament who sought to prevent the Crown governing by Prerogative powers without reference to legislative powers of Parliament which had been accorded recognition. In the words of Wade (1939, p.lxix):

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<sup>17</sup> 3 Co. Rep. II at xii, Legrand *op.cit.* p.72, n. 100

The recognition of the legislative powers of Parliament precluded insistence on the part of the lawyers that in the Common Law there existed a system of fundamental laws which Parliament could not alter but only the judges could interpret. The price paid by Coke and his followers ... was that the Common Law could be changed by Parliament, but by Parliament alone.

It is for this reason that the principle exists under the rules of Statutory Interpretation that there can be no merely implied alteration to the Common Law: any alteration must be express and the defect in the Common Law that needs emendation should consequently be stated clearly in the Preamble. Likewise, there remains to this day a tendency on the part of the judiciary to regard an Act of Parliament as what Latham (1937, pp.510-11, cited by Wade *op. cit.*, p.lxix) termed “an interloper on the rounded majesty of the Common Law”. The same author concluded:

[T]he courts show a ripe appreciation of institutions of long standing, whether founded by statute or in the common law, but they inhibit themselves from seizing the spirit of institutions and situations which are in substance the creation of modern legislation. (*ibid.*)

Since Common Law judges today may be more open to ‘the spirit of institutions’ such as the European Convention on Human Rights, it is difficult to assess the contemporary relevance of Latham’s observation, but the prevalence of a conservative outlook in the judiciary is not unexpected.

For Legrand, the example of Sir Edward Coke is authority not only for the proposition that the English judges have for centuries been doing things differently in the courts of law from their Civil Law counterparts, but also for the proposition that the *mentalité* thus engendered has the capacity to persist despite a hostile environment. It is submitted that the true picture is considerably more subtle than Legrand allows, both in terms of political development under the Norman and Plantagenet kings - when ancient

English usages were formally recognized by the Crown as part of a wider political settlement - and also in the evolution of English legal practice. Canon Law had an umbilical link to Continental jurisprudence by which is meant Roman law mitigated by the application of the principles of the New Testament. If “the majesty” of the Common Law is indeed “rounded”, as Latham averred, there can be little doubt that mediaeval jurists trained in Canon Law played their part in the evolution of the Common Law. Moreover, although the point was famously made by Lord Eldon in the early 19<sup>th</sup> Century that the Court of Chancery was a court of Law, not of Conscience, it remains true that many of the early decisions taken nominally by the King in Council were in practice taken by the Lord Chancellor a senior churchman who as often as not applied moral rather than legal principles to the cases delegated to him (Baker and Langan, 1982, p.10).

The doctrine of Obligations in Civilian Law is more developed because Continental jurists have sought to systematize the law in such a way that legal liability follows from an infraction of one of a generic type of duty whether in Delict Law or in the Law of Contract. If systematization and codification run the risk over time of rendering the law insufficiently flexible, it is not as though the Common Law is entirely immune to the dangers of mere formalism, as every student of the Common Law soon learns. Ever since the confluence of the Common Law and Equity, created by the Judicature Act 1873, English judges have been permitted to consider equitable remedies in circumstances where the traditional Common Law remedy of damages does not suffice. Thus the Constructive Trust could be used where one party’s behaviour had been unconscionable, to defeat the

injustice wrought by the absence of third party rights under a contract. Accordingly we can see that if not the Common Law itself then at least the *mentalité* of its judges has been shaped to a greater or lesser extent by doctrines that form part of a common European patrimony. Legrand is silent on these questions as he is on the significance or otherwise of the mediaeval *Ius commune*.

While few would deny that there is force in his arguments, Legrand himself does not relate them to the question of whether or not the differing European perceptions of contractual obligations can be harmonized sufficiently so as to give the consumer or business customer greater confidence in his or her dealings abroad. Instead we are simply informed that the chasm is unbridgeable, the differences irreducible and, in consequence, that meaningful convergence not possible. On the narrow question of whether rapid progress towards a 'hard-law' code is achievable within a decade he is right. On the broader question of whether convergence is possible at all his case is at best 'Not Proven'.

### *Oblique criticism*

Whatever might ultimately prove to be the nature of the proposed 'optional or binding instrument', Zimmermann (2006 [1], p.574) affirmed his belief that the process of the 'Europeanisation' of law would continue apace and that comparative law would continue to be 'crucially important' in this process. That Zimmermann's attitude to historical legal scholarship is markedly different to that of Legrand can be inferred from what he says of the latter's attitude to the process just described:

This is contested only by those who, oddly, equate legal culture essentially with national legal culture and who, equally oddly, wish to focus scholarship in

comparative law on the investigation (or as it is sometimes put: the celebration) of differences in mentality, style or approach. (ibid.)

For Zimmermann, as for Coing and Savigny before him, the purpose of legal scholarship is to fashion means by which to efface differences and discrepancies between competing law systems. According to Zimmermann the function of historical scholarship is to identify ‘the common ground which still exists ... as a result of a common tradition, of independent but parallel developments, and instances of intellectual stimulation or the reception of legal rules or concepts’ (ibid., p.575). Paradoxically these words, so heavily redolent of five centuries of legal development in Germany, tend not so much to undermine Legrand’s thesis as to confirm the essential validity of some of its key propositions.

## Chapter Four      Good Faith and Jurisprudence

Two developments, one in English law, the other in German appear to lend weight to Legrand's thesis that the Common Law and Civil Law are on diverging "trajectories". Under the former the doctrine of *stare decisis* is considered essential to the maintenance of legal certainty, while under the latter, even though von Savigny rejected codification on principle, the eventual drafting of the *Bürgerliches Gesetzbuch* (BGB) in the final decade of the 19<sup>th</sup> Century is widely regarded as the crowning achievement of more than half a century of 'legal science' (*Rechtswissenschaft*). The degree to which the inclusion of good faith and fair dealing within the BGB represented a departure from the rigorously Romanizing tendency of Savigny and Mommsen will be considered in this chapter. On account of its separate development, English law never adopted or developed a principle of such general application. In fact there was closer affinity between English and German jurists in the mid-19<sup>th</sup> Century than is generally appreciated. This is particularly true with regard to voluntarism and the moral responsibility of the individual for contracts freely entered into. The desire to see English law founded on principles amenable to rationalism, rather than on arcane notions respecting "the breasts of her Majesty's judges", led first Bentham, and subsequently Austin, to conclusions much closer to those of Portalis and his associates in France. Thus the era just prior to codification, first in France and a century later in Germany, arguably had the greatest potential for finding common positions among English and Continental jurists. However, German and English scholars approached such problems from different philosophical



backgrounds. This chapter will assess whether the background of Hegelian positivism and English logical positivism respectively account for the differences of approach that remained. It will also endeavour to assess whether the intrusion into English law of the principle of good faith and fair dealing was necessary in order to achieve the requisite degree of harmonization of contract law. Also considered is whether or not good faith's inclusion in the Unfair Terms in Consumer Contracts regulations (UTCCRs) 1993, 1999 will have a benign effect on judicial decision making. While the flexible nature of English law may enable it to accommodate itself to this principle, as suggested by Lord Bingham in the House of Lords' decision in *Director General of Fair Trading v First National Bank* [2002] - the first case in which the UTCCRs were referred to - it is possible that Civil law jurisdictions will interpret the principle more narrowly in future, in a manner consistent with traditional notions of 'freedom of contract'<sup>18</sup>. In such a case the case law authorities on which much of English contract law rests would not be fatally undermined by the advent of a new doctrine.

In the past good faith has been held up as a principle with potential for integrating European legal systems (Zimmermann and Whittaker, 2000). The reason why English academic lawyers often maintain a defensive attitude is that, unless confined to precisely drafted rules, the doctrine had the capacity, in the words of Whittaker (2008, p.24), to trespass on 'the legislative domain'. Whittaker has also characterized as potentially "insidious", particularly for the common lawyer, the manner in which the doctrine would be likely to be interpreted under a Draft Common Frame of

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<sup>18</sup> [2002] 1 AC 481, 1 All ER 97

Reference (2009, p.642). That no common standard has yet been attained is largely because of the manner in which the doctrine was included within the Unfair Terms in Consumer Contracts Regulations 1994, 1999 leaving the judiciary of each jurisdiction free to interpret the principle in accordance with national law.

*Lord Mansfield 's treatment of Good Faith*

In view of Coing's remarks about the interdependence of English and Continental legal systems, discussed in Chapter 2, it is remarkable that no reference was made in his paper to the historical significance of Lord Mansfield (1705-93), not least because in the 18<sup>th</sup> Century he tried, albeit unsuccessfully, to fuse Common law and Equity (Holdsworth, 1937 p.224). As a judge Lord Mansfield was able to apply the principles of Roman law, which he had first mastered as a young man at Oxford, in giving judgment and, by the expedient of enrolling lay assessors with the necessary knowledge of commercial practice and *mores*, he was responsible for settling contemporary English commercial law. That he was able to do so without coming into conflict with established authority now seems remarkable. In *Carter v Boehm* (1766) a case concerning unequal access to information, Lord Mansfield applied the Civil Law doctrine of good faith<sup>19</sup>. However, as is well-known, he did so in a manner which subsequently rendered it applicable only in contracts, primarily of insurance, considered to be 'of the utmost good faith' (*uberrimae fidei*). It is evident that Lord Mansfield considered the principle of good faith and fair dealing to cover pre- as well as post-contractual relations but it is equally evident that the duty could not be characterized as all-pervading. In *Carter v Boehm* Lord

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<sup>19</sup> (1766) 3 Burr 1905

Mansfield, with regard to contracts of insurance, drew very distinctly the line between behaviour which is ethically acceptable and that which is not:

Good Faith forbids either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary. But either party may be innocently silent, as to grounds open to both, to exercise their judgment upon.

Following Lord Mansfield's lead, English judges construed the principle as a pre-contractual duty to inform which existed under circumstances where significant circumstances and facts known to a promisee cannot otherwise be discovered by the promisor. This distinguishes 'of the utmost good faith' from 'good faith and fair dealing' as a general principle. While it may be argued that the two concepts are distinctly different, it could be said that contracts under which one party has exclusive access to knowledge vital to the interests of the other party form a distinct 'subset' under an over-arching doctrine of good faith. Whichever analysis is preferred, English practitioners are apprehensive lest the intrusion of the Civil Law doctrine into English law results in all contracts being treated as if they were contracts *uberrimae fidei*. The possibility of this standard becoming universally applicable to commercial transactions was anticipated by Goode (1998, p.20) who argued that the doctrine of good faith should not be extended to obligations "in respect of which the parties' interests are essentially antagonistic." Judicial opinion on the extent of the obligations arising from the UTCCRs is discussed below.

Comparative Law scholars with Civil Law backgrounds are apt to infer that English judges of the 19th century, lacking Lord Mansfield's erudition, failed to develop for the Common Law a doctrine of good faith consistent

with that of the Civil Law tradition, and that the confinement of the doctrine very largely to contracts of insurance was the consequence of an historically haphazard process of legal development. Writing from from a Roman-Dutch law perspective, Du Plessis (2005, p.1) summarized the conclusion of Schneider, a German author who endeavoured to chart a course for greater approximation of the English and Civil Law standards of good faith:

[T]he need to promote good faith in cases involving unequal access to information may require looking beyond the existing *uberrimae fidei* contracts, and also by analogy imposing duties to disclose when dealing with contracts that do not fall under this category. By adopting such a course English law would not only give renewed recognition to the link identified so long ago by Lord Mansfield, but also show that it is much closer to Continental jurisdictions than thus far has been appreciated<sup>20</sup>.

To “impose duties by analogy” is of course to widen the ambit of *uberrima fide* - as much as to say that it is time for Common Law practitioners to adapt the definition of good faith in order to approximate it to the standard prevalent in Civil Law jurisdictions.

According to Zimmermann and Whittaker (2000, p.58) the ‘potentially promising’ nature of good faith in terms of its capacity for furthering legal integration in Europe had been raised at a meeting at University of Trento in 1994 as a result of Zimmermann’s studies in South Africa into “the way in which *bona fides* and equity had become fused in Roman-Dutch contract law” (ibid.). The authors use these terms as part of a shared vocabulary but do not advert to the confusion that would result in the mind of anyone who assumed that those legal categories have the same connotation under the

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<sup>20</sup> Schneider, Nicole (2004) *Uberrima fides. Treu und Glauben und vorvertragliche Aufklärungspflichten im englischen Recht* Berlin: Duncker & Humblot.

Common Law as they do in Civil Law jurisdictions, including Roman-Dutch law. Indeed it is the fact that there a wide spectrum of variation in how good faith is interpreted within the Civil Law tradition that presents a challenge for contemporary ‘legal science’. In order to appreciate the differences it is necessary to understand the divergent interpretations of Equity on the Continent and in England.

#### *Fourteenth Century developments*

Gordley (2000, p.95) has indicated that the late-medieval jurists, notably Baldus (1327-1406), developed an objective test of good faith under three aspects of conduct: each party should keep his word; neither should take advantage by misleading or by driving too harsh a bargain; each should abide by obligations an honest person would recognize even if not expressly undertaken. The prospect of a juridical world in which the same terms of art are employed in jurisdictions with close affinities but which do not have an identical meaning thus presents itself. Under the influence of jurists who followed Baldus, the Civil Law standard of Equity had been defined in Aristotelian terms (Holland op. cit., p.71) and thus to differ significantly from what Common Law practitioners have traditionally understood. English understanding is strongly influenced by the legacy of St Germain’s *Doctor and Student*, widely studied in the 17<sup>th</sup> Century, which encapsulated the teaching of the late mediaeval scholastics for whom questions concerning Equity remained firmly yoked to matters of good conscience. Lévy-Ullmann (1935, p.308 f.) cited cases from the 15<sup>th</sup> Century Close Rolls indicating that the Chancery Court was known as *le Court de conscience*<sup>21</sup>. Applications for subpoenas at that time invariably

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<sup>21</sup> Close Rolls 7 Edw. IV

included the formulaic expression ‘come la bon foy et conscience demandent’ or, alternatively, ‘As good feith and consciens requyren’. If good faith subsequently came to be defined in English law as simply the absence of *mala fides* (European Communities Act, 1972, s.9; cf. Walker, 1980 p.530) this may reflect the determination of Lord Chancellors from the late 17<sup>th</sup> Century onwards to ensure that Chancery was regarded as a court of law and that its judgments were neither whimsical nor arbitrary (Baker and Langan 1982, p.9). Although there has never been a doctrine of good faith and fair dealing in English commercial law, analogous concepts of good faith and Equity have remained live principles in cases where there has been a fiduciary relationship between the parties.

#### *Unreasonable and unconscionable*

The authors of the *Principles of European Contract Law* sought to find a correlation between good faith and the reasonableness of the reasonable person engaged in commerce. It was stipulated that “reasonableness” is ‘to be judged by what persons acting in good faith, would consider reasonable’ (Article 1: 302). This appears to imply a redefinition of the English test of objective reasonableness. In the mind of the European ordinary citizen the concepts of acting in good faith and acting reasonably might well be ones that cannot readily be understood except in relation to each other. The “reasonable man” has been defined by Lando and Beale (2000, p.126) as the reasonable person engaged in commercial transactions. Redefinitions of this kind produce new problems for, as Whittaker (2008, p.24) notes, “the remarkably open-textured nature of good faith” potentially leads to “a very considerable degree of legal uncertainty.”

It is likely that lack of objective clarity about the ambit of the term ‘good faith and fair dealing’, among other legitimate concerns, is what Lord Ackner had in mind in *Walford v Miles* [1992] when he described the principle as ‘unworkable in practice’<sup>22</sup>. Despite the numerous statements to the effect that ‘English contract law does not recognize a general concept of good faith’ Zimmermann and Whittaker (2000, p.15) concede that the position in English law regarding good faith ‘appears to be much less unequivocal’ than a continental lawyer might have been led to conclude on the basis of his own preconceptions of the *modus operandi* of the Common Law. In *Union Eagle Ltd v Golden Achievement Ltd* [1997] an otherwise straightforward case concerning whether time can be said to be ‘of the essence’ of a contract, an attempt was made to correlate unreasonableness and “unconscionable behaviour”<sup>23</sup>. The claimant had argued that the non-acceptance of a tender ten minutes after the passing of a previously stipulated deadline was ‘unconscionable’. The intention was to persuade the English bench to accept that the expressions *unconscionable* and *unreasonable* could in the particular context be treated as synonyms and thus to realign what constitutes ‘unconscionable’ behaviour with a concept of unfairness based on grounds of ‘lack of reasonableness.’

In discussing the English and German approaches to pre-contractual obligations, it was stressed by Sims (2003, p.171), that the concept of good faith is apt to confuse those who understand it merely as reflecting a subjective state of mind of an individual - such as the purchaser of goods with or without knowledge of whether they had been dishonestly appropriated by the vendor - rather than as an objective term. She

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<sup>22</sup> [1992] 2 AC 128, 138

<sup>23</sup> [1997] AC 514

paraphrased a leading German case which described good faith under §242 of the BGB as a “sophisticated legal-ethical concept” which “constitutes grounds for a legal intervention under circumstances whereby such a fundamental change has overtaken the post-contractual position of the parties that it would be inconsistent with the principles of justice to hold the aggrieved party to the contract” (Sims op. cit., p.14)<sup>24</sup>. It is only comparatively recently that the question concerning the degree to which good faith poses an opportunity for, or a threat to, closer legal integration has been addressed.

### *Historical perspectives*

In the year that the United Kingdom became a member state of the European Community it was strongly implied by Coing (1973, p.517) that under the terms of the Treaty of Rome the time had come for English legal concepts to be approximated to the traditions of its Common Market partners with the ultimate goal of creating a United Europe. He observed that, despite the characteristic differences that separate the Common Law and the Civil Law jurisdictions, there had always “in the course of centuries been give and take from [England] to the Continent and *vice versa*” (ibid., p. 516). Indeed the early 19<sup>th</sup> Century has been described as “a critical period” during which “a partial reception of ideas derived from the civil law of continental Europe” was incorporated in to English legal thought (Simpson 1986, p.12). When rationalists of the Natural Law school in France had completed the *Code Civil*, Pothier’s *Treatise on the Law of Obligations* (1761- 4) became highly influential, one High Court judge declaring the authority of an early 19<sup>th</sup> Century translation of the French

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<sup>24</sup> BGH NJW 1959, 2203]



jurist's treatise into English to be 'as high as can be had, next to a decision of a court of justice in this country' (ibid. p.17). England and the Civil Law jurisdictions were evidently quite close during this era regarding the judicial consideration of academic authority. Thus Tindal, CJ:

The Roman law forms no rule binding in itself on the subjects of these realms, but in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion by that law - the fruit of the researches of the most learned men, the collective wisdom ages, and the groundwork of the Municipal law of most of the countries of Europe<sup>25</sup>.

### *Voluntarism and Utilitarianism*

It may also be noted that many of the ideas expressed by Pothier regarding the principle of *consensus ad idem*, especially the union of the two wills, are to be found also in the writings of Savigny, one of the founders of the Historical, as distinct from the Natural Law, school of jurisprudence. While Savigny believed that Law has its existence in the 'general will' (*Gesamtwille*), he argued that "customary observance is not the cause of Law but the evidence of its existence". (Savigny, System i.16, cited in Holland op. cit., p.262 ). This may be contrasted with the characteristic English view, based on historical development rather than abstract reasoning, which is that what begins as custom gradually acquires the force of law by being formally recognized as such.

During the 19<sup>th</sup> Century both English and German courts recognized the importance of upholding decisions solemnly entered into by natural and legal persons. Sir Thomas Holland's analysis, perhaps unintentionally,

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<sup>25</sup> Acton v Blundell (1843) 12 M & W 324)

revealed the differences in philosophical orientation underpinning German law. He found that the doctrine of the agreement of the wills, as defined by Savigny, however well-grounded it might be in the German philosophical tradition, is not entirely logically consistent. Holland posed the hypothetical question of a contract, one of the parties to which induced the other party to enter into legal relations while resolved at all times not to perform his part under it. Since commentators would universally agree that the agreement should have legal effect, Holland inferred that it is the will *as expressed by one party to the other* that in fact constitutes the contract (op. cit., p. 262). He was able to cite Langdell in support of his contention: “Mental acts, or acts of the will, are not the materials out of which promises are made. A physical act on the part of the promisor is indispensable”<sup>26</sup>

The legal traditions of European countries such as France and Sweden reflect the prevailing philosophical tendency during the centuries since the rise of the Natural Law school of jurisprudence. In the case of Germany, although the BGB was ultimately to owe much to the German philosophical tradition as well as Roman law precepts, opinion was divided. According to Kantorowicz (1937, p.334), in a lecture entitled *Rechtsphilosophie*, delivered in 1821, Hegel attacked Savigny for his Romanizing policy which he considered a national insult. The philosopher, recognizing that Savigny was engaged in the skilful engrafting of a foreign legal system, would have preferred national law to have embodied the principles of traditional custom law as had been advocated by Thibaut in 1814.

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<sup>26</sup> Langdell *Summary* s. 180

The principle of Utility, the greatest happiness for the greatest number, by its very nature required practical application and it may be for this reason that it became the guiding principle informing politics, law reform and penal reform in 19<sup>th</sup> Century England. Utilitarianism associated with Bentham, James Mill and J.S. Mill is regarded as one of the principal recent British contributions to Western philosophy. The following doctrine, as expressed by J.S. Mill (1866, p.480) was widely held in 19<sup>th</sup> Century Britain:

governments ought to confine themselves to affording protection against force and fraud: that, these two things apart, people should be free agents, able to take care of themselves, and that so long as a person practises no violence or deception to the injury of others in person or property, legislatures and governments are in no way called on to concern themselves about him

In fact Mill regarded the limited protection in respect of violence and fraud as not strictly logical and that this limitation has arisen simply because “the expediency is more obvious” (ibid., p.482). Nevertheless such opinion was, and remains, broadly characteristic of the ‘classical’ liberal on both sides of the Atlantic. Continental jurists do not always appreciate, even today, that the presence or absence of an element of the kind of deception, or fraud, alluded to by Mill strongly colours the distinctively English notions of what constitutes bad faith or good faith. However, this is in the process of undergoing change. Lord Bingham averred that Reg. 4(1) of the Unfair Terms in Consumer Contract Regulations 1999 “lays down a composite test covering both the making and substance of the contract, and must be applied bearing clearly in mind the objective which the regulations are designed to promote.” These he characterized in *Director General of Fair*

*Trading v First National Bank* [2002] as “good standards of morality and practice”<sup>27</sup>.

### *Contemporary influence of Civil Law*

If each jurisdiction within the European Union were left to define good faith with reference to the prevailing business *mores*, an English definition of good faith would be significantly different from that in most Civil Law jurisdictions. However, counter-intuitive as it may seem, part of the effect of the UTCCRs is to compel English judges to apply a standard of good faith closer to that of the Civil Law because an analogous English doctrine to good faith and fair dealing has never been enunciated. In a previous case Lord Bingham had insisted that “English law has characteristically ... developed piecemeal solutions in response to demonstrated problems of unfairness” *Interfoto Picture Library v Stiletto Visual Programmes Ltd* [1989]<sup>28</sup>. Prior to the Directive 93/13/EC, to which the Regulations give effect, Lord Bingham was not alone in allowing the distinctive English approach to co-exist with, and gradually approximate itself to, Civil Law standards without the necessity of adopting or formulating a distinctive legal doctrine. Lord Denning (op. cit., p.175) expressed satisfaction that Parliament had undertaken to give the consumer adequate protection from disadvantageous contract terms imposed by the economically stronger party, thereby obviating the need for the narrow construction of contract terms on the part of judges in order to reach conclusions that concur with their own notions of justice. Accordingly he was quite sanguine about the ‘incoming tide’ of legislation initiated in the European Union which tended in the same direction. Other judges have been less so. The year before the

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<sup>27</sup> [2002] 1 AC 481 HL at [17]

<sup>28</sup> [1989] 1 QB 433, 439).

directive which effectively ‘implanted’ the Civil Law concept of good faith in English law, Lord Ackner declared the doctrine of good faith and fair dealing to be “inherently repugnant” to the traditionally adversarial position adopted by the Anglo-Saxon man, or woman, of business engaged in commercial negotiations *Walford v Miles* [1992]<sup>29</sup>. This attitude has been criticized by Sims (op. cit., p.167) in terms that make plain the different approaches to contract making that exist under the Common Law and within jurisdictions which recognize the principle of good faith: “This assessment of the contractual relationship, she states:

makes the fundamental error of regarding contracts as essentially short-term exchanges, where the sought after benefit is obtained almost instantaneously (*sic*), and the potentially negative side effects of purely self-interested behaviour do not matter ... Where parties are engaged in continued reaction, their overall conduct is therefore likely to be conciliatory rather than adversarial; a fact which is reflected in good faith-based duties ... but not in a purely antagonistic view of contract.

According to Zimmermann and Whittaker (2000, p.218) there is another dimension to good faith and fair dealing to which Sims does not allude. “[G]ood faith is used to deter or to sanction (*sic*) certain behaviour in the formation of a contract which is considered socially unacceptable by the law” - the context making it clear that ‘prohibit’ rather than ‘permit’ is meant. Accordingly, a virtue is made of creating a degree of uncertainty in the mind of anyone considering following an ethically questionable course of action. Musy (2001, p.5) characterized the position under English law thus: the courts, when confronted by a party claiming “a breach of good faith duties”, have been said to offer remedies but to prefer to do so

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<sup>29</sup> [1992] 2 AC 128, 138

“without referring to a general principle [of good faith], which apparently seems to create a problem regarding the predictability of the legal outcomes of cases”. He does not allude to other considerations, such as the moral responsibility of each person for his or her own actions, which were deemed paramount at the time that the ‘classical’ doctrine evolved.

*The moral context of freedom of contract*

By the late 19<sup>th</sup> Century the doctrine of freedom of contract under the Common Law had become well-established. In the words of Sir George Jessel MR

If there is one thing more than another which public policy requires it is that men of mature age and competent understanding shall have the utmost liberty in contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice<sup>30</sup>.

The public policy elements in High Court judgments were developed in response to the increasing volume of litigation as a consequence of the industrial revolution and demographic trends. Such elements, characterized as ‘formalism’ by Atiyah (1979, p.388), were derived from what Simpson (op. cit. p.14) described as the ‘fashionable theories of the political economists’ of the 19<sup>th</sup> Century. ‘Plainly,’ writes Atiyah, ‘the growth of formalism was closely related to the ideas of the political economists and to the rise of the market economy’ (op. cit. p.389). The philosophical ideas of David Ricardo (1772-1823), author of ‘On the Principles of Political Economy and Taxation’ (1817), had led to friendship with Bentham and

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<sup>30</sup>*Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462

James Mill. Their ideas in turn were associated with those of John Austin, mentioned in Chapter 3, who was an advocate of the codification of the Common Law who for a time held the chair of Jurisprudence at University College London (Atiyah op. cit., p.372).

Notwithstanding the fact that the leading German legal scholars had discovered that the prior arrangement by Roman *juristae* of the Justinian *Corpus iuris* greatly facilitated their attempts to create a 'legal science' it is clear from the pages of Holland's *Jurisprudence*, published a decade before the BGB was completed, that a sympathetic relationship had developed between English and German legal scholarship between 1820 and 1850. As previously discussed, in German thought such obligations as arose did so on the basis of a strongly 'voluntarist' doctrine, the essence of a binding agreement being characterized as the convergence of the contracting parties' wills. In Savigny's words "they must definitely have intended one thing or another and, in fact, both the same thing" ("sie müssen irgend etwas, und zwar Beide dasselbe, bestimmt gewollt haben" (Holland op. cit. 262)". Atiyah (op. cit., p.407) points out that it was not unknown for this 'Rousseau-like language' consciously to be echoed by English judges. It seems appropriate to endeavour to ascertain what part, if any, was played by the doctrine of good faith in relation to this doctrine of the two wills. The absence of good faith at the pre-contractual stage on the part of one or other of the parties may be classified as behaviour that so impinges on the will of the party not at fault that it would not be just and right to insist that the latter remained bound by his undertakings. This seems to be the

rationale of the UTCCRs which was summarized by Lord Bingham in *Director General of Fair Trading v First National Bank* [2002]<sup>31</sup>.

Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 of the regulations.

Holland, however, did not devote space to a discussion of the place of good faith and fair dealing. The closest that he came to acknowledging the existence in the Civil Law jurisdictions of such a duty, even if only in embryonic form, is contained in the following:

Partly under the influence of the Canon Law, partly from the strong sense of the obligation of a promise characteristic of the Teutonic races, the nations of the continent early ignored the narrow definition of 'causa' and the distinctions between 'contractus' and 'nuda pacta' which they found in the writings of the Roman lawyers. (op. cit., p 284)

Accordingly, it may be inferred that good faith had no substantial position in the *Corpus iuris* that Savigny so admired. The only possible exception was under the Praetorian code but this was discretionary and only operated where the *Lex* could not resolve a case. It is likely that good faith played only a subordinate role in 19<sup>th</sup> Century 'legal science' in Germany because, as implied by Holland, the Hellenistic origins of the principle found their counterpart in the Germanic customary law - championed by Thibaut and others of the Natural Law school - which took root in Northern Europe following the demise of the Roman Empire in the West.

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<sup>31</sup> [2002] 1 AC 481 at (36) and [45]



Although editions of Holland published after 1900 made reference to the German code, and to those of other nations, there was no systematic attempt to assess the combined impact of Roman law and of the Canon law on the law codes of the modern era. In view of the scant treatment accorded by Holland to good faith, one infers that he considered it to be merely derivative and not a primary source of either ancient or contemporary jurisprudence. Indeed, it may plausibly be argued that the inclusion of *Treu und Glauben* in the BGB was merely adventitious.

### *Good Faith as a Catalyst for Harmonization*

The lack of a general principle of good faith and fair dealing in English law, taken together with the irrelevance, generally speaking, of whether a breach of contract is intentional or not, have been said to:

reflect English law's focus on large scale commercial transactions, made by hard-nosed traders dealing at arm's length. But whatever forms the background to these attitudes, taken at face value, it would seem that the making, performing or breaking of contracts is conducted in a context which is permitted by the law to be nasty and brutish, the parties being entitled to flout all considerations of decency and fair play." (Zimmerman and Whittaker op. cit., p.41.)

Within this particular analysis there is the implication that there should be a closer approximation between morality and legality than has been traditional in England and Wales. It does not follow that because the English legal system traditionally refused relief except in contracts *uberrimae fidei* that the *mores* on which that system it is based condones behaviour that is, in the Hobbesian phrase, "nasty and brutish". An alternative account of the position under English law a generation ago is given by Baker and Langan (op. cit., p.540) with reference to the decision

in *Fry v Lane* [1886-90]<sup>32</sup> which was applied in *Lloyd's Bank v Bundy* [1975]<sup>33</sup>

The relationship of banker and customer is ... in general an ordinary and commercial one: but special circumstances such as the age and financial embarrassment of the customer, may operate to impose a fiduciary duty upon the bank in its dealings with him.

Equitable relief may be granted if a fiduciary relationship could reasonably be construed so that the doctrine of undue influence might be applied. This was the approach taken by Lord Denning MR (Bradgate 1995, p.562) even if the House of Lords subsequently rejected as too uncertain his assertion of a judicial power of intervention whenever there was inequality of bargaining power (ibid. p.36). Although the bank's representative "acted in the utmost good faith and was straightforward and genuine" (*Lloyd's Bank v Bundy* [1975] p.766), ultimately the "grossly inadequate" consideration proved decisive to the outcome of the case. In this context Lord Denning's definition of an 'unconscionable transaction' is significant. This is said to occur where the weaker party

is so placed as to be in need of special care and protection and yet his weakness is exploited by another far stronger than himself so as to get his property at a gross undervalue (ibid. 763)

Perhaps sensing that the increasing influence of Civil Law might allow the bands of authority represented by English case law to be loosened, Lord Denning insisted in *Siskina (Cargo Holders) v Distos Compania Naviera SA* [1979] "Now that we are in the Common Market it is our duty to do our part in harmonizing the laws of the countries of the Nine ... It is our duty to

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<sup>32</sup> [1896-90] All ER Rep 1094

<sup>33</sup> [1975] (ftnt 3 All ER 757)

apply the Treaty according to the spirit and not the letter”<sup>34</sup>. This approach was refuted on appeal as allowing too wide a discretion, Lord Diplock insisting that, by virtue of Art. 100 of the Treaty of Rome, laws were to be harmonized solely by means of directives issued following a proposal of the Commission; he maintained that there was “little encouragement” in Art 100 “for judges of national courts to jump the gun by introducing their own notions of what would be suitable harmonization”<sup>35</sup>. In fact as Fletcher (1982, p.63) points out, in Case 71/76 *Thieffry v Conseil de l’Ordre des Avocats a la Cour de Paris* [1977] this approach had already been shown to be not in accord with the Court of Justice’s ‘teleological’ role in fostering the realization of the goals of the EU’s founders<sup>36</sup>. Lord Diplock’s disapprobation of judicial activism with regard to legal harmonization under the Treaty meant that during the 18 years that elapsed between *Bundy* and the issuing of Directive 13/93/EC, it was not possible for a distinctively English doctrine of good faith and fair dealing to be articulated.

Lord Bingham’s dicta in *D-G of Fair Trading v First National Bank* [2002] seem *prima facie* to be the routine implementation of regulations pursuant to a Directive in the manner approved by Lord Diplock<sup>37</sup>. Doubtless comfort could be drawn from the American experience in the last century. There, where the Restatement (Second) of Contracts paragraph 205 states “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement”, good faith has become an aid to the construction of a contract. Weigand (2004, p.184) states that the

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<sup>34</sup> [1975] AC 210, 225):

<sup>35</sup> [1979] AC 259

<sup>36</sup> [1977] ECR 765

<sup>37</sup> [2002] 1 AC 481 HL at [36] and [45]

adoption of the principle of good faith in the Uniform Commercial Code has not had the effect of creating a new cause of action in the event of failure either to perform or to enforce a contract in good faith. Instead contracts are interpreted by the courts within their commercial contexts, and good faith and fair dealing assist in deciding whether one or more of the terms of the contract itself has been breached. It is submitted that in regard to pre-contractual duties, English courts are likely to be wary of extending the doctrine of good faith. However, in the prevailing English and European context, the omission of any reference in the Regulations to the need to have due regard to customary business practice (the meaning of *Verkehrssitte* in BGB §242) further enhances the position of the consumer.

### *Reticence and fraud*

“Simple reticence does not amount to legal fraud however it may be viewed by moralists”: thus was the Common Law position during the second half of the 19<sup>th</sup> Century summed up by Lord Campbell in *Walters v Morgan* (1861)<sup>38</sup>. The statement needs qualification for it is not applicable if a false statement is made in ignorance of the fact that it was false, and the maker subsequently learns his mistake but he elects to keep silent. This was the decision in *With v O’Flanagan* [1936]<sup>39</sup> which followed the judgment of Fry J in *Davies v London Provincial Marine Insurance Co* (1878)<sup>40</sup>. Nevertheless, in commercial contracts, the traditional position - according to Lord Campbell in *Walters v Morgan* (supra) in words which echo Lord Mansfield’s judgment in *Carter v. Boehm* (1766) - has been that as long as there is “no fiduciary relationship between vendor and purchaser, the

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<sup>38</sup> (1861) 3 De GF & J 718, 723

<sup>39</sup> [1936] Ch 575, [1936] 1 All ER 727

<sup>40</sup> (1878) 8 ChD 469 at 475

purchaser is not bound to disclose any fact not exclusively within his knowledge which might reasonably be expected to influence the price of the subject to be sold.”

Following judgment in the Poussin case<sup>41</sup> in which an art expert from the Louvre kept silent about a wrongly attributed painting at an auction prior to sale, thereafter asserting the State’s right to acquire the piece at the auction price, certain academic writers in France revealed that they were rather closer to the position taken by Lord Campbell than they were to that of the Cour de Cassation whose task it had been to interpret the ambit of *bonne foi* under the *Code Civil*. Such cases are significant in that they stand in contrast to the language of Hesselink (2004, p.497) who argues simply

the concept of good faith in itself should not keep common law and civil law lawyers divided. ... The adoption of a general good faith clause in itself does not say anything about which rules will speak through its mouth. Good faith does not differ much from what the English lawyers have experienced with equity. The real question is whether the rules adopted by the courts mentioning good faith should be included in a European code or restatement.

Hesselink’s assessment is optimistic. With reference to judicial practice in Germany, it has been pointed out by Sims (op. cit., p.16) that numerous commentators believe that the operation of the good faith principle under §242 BGB allows judges to evade proper analysis of individual cases, and that at times the principle –

has degenerated to little more than judicial window dressing tagged on to every judgement as if mere citation of §242 can lend credence to any analysis, any solution.

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<sup>41</sup> Civ. 1er, 13 décembre 1983, Bull. civ. I, no 293

### *Reaching a Consensus*

Since different societies, and their legislatures, have different conceptions of what business practices are socially unacceptable the Court of Justice has refused to force the pace of harmonization in this area by imposing a single standard, preferring to allow good faith to continue to have different nuances of meaning in different Member States. More frequent reference to the principle of good faith can be expected on the part of the English bench in the future. Nonetheless, if what Musy avers (op. cit. p.5) is true, then there is an argument for a gradualist approach as regards the Common Law jurisdiction since good faith's detractors not unreasonably fear that the implantation of such a source of legal uncertainty would have unforeseeable consequences in the short to medium term. However, with the anticipated increase in the number of cross-border transactions in accordance with the Common European Sales Terms, it is possible that Europeans will arrive sooner rather than later at a consensus on what forms of malpractice in business warrant 'judicial interference' and legal or financial redress. As the Utilitarian J.S. Mill observed more than a century ago -

There is a multitude of cases in which governments, with general approbation, assume powers and execute functions for which no reason can be assigned except the simple one, that they conduce to general convenience (op. cit. p.482).

Under conditions of liberal democracy perhaps the expression 'with general approbation' deserves emphasis. European legislatures can be expected to operate in the manner described by Mill whenever traditional business *mores* are not adequate to meet the needs or expectations of the present. If this leads to progressively greater legal certainty among economic actors in the European Union, one of the reasons traditionally

given for the approximation of law among the Member States will have been realized.

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## Chapter Five

### The Evolution of Thought Within the Commission

In the absence of reliable empirical evidence on the desirability of a more integrated European private law it is not difficult to detect an almost palpable sense of relief in the manner in which Staudenmayer (2006, p.235), the chairman of the group overseeing the Commission's three Communications since 2000, greeted the results of a questionnaire by the law firm Clifford Chance. The immediate question that arises, however, is what the surprising dearth of comparable evidence, collated by or on behalf of the Commission, tells us about its attitude over the years to the whole question of the harmonization of Contract Law. Evidently the Commission believed for many years that it had no need to produce hard evidence in support of its contentions. The evidence adduced by Eurobarometer (320 and 321) about transaction costs incurred by SMEs in the absence of a European sales law (CESL) is open to question, as is the Commission's assumption that the effects of other factors inhibiting trade, such as differences in language and business *mores* do not need to be addressed

with the same urgency as differences concerning the formation and termination of contract.

The architects of the PECL cannot have intended simply that their work should provide a starting point for an optional instrument but rather that in its totality it should form the “basis for judicial and arbitral interpretation of private transactions” (Lando 2000, p.59) Such an ambition can only be realized in one of three ways: firstly, through a process by which the Member States voluntarily adopt a set of rules by enacting an international treaty, secondly by selective adaptation over time (much criticized by some for being a ‘piecemeal’ approach) or, thirdly, by a gradual process of harmonization through the judicial process. Since the Commission has not revealed a decided preference for the first of these, which would constitute a ‘hard law’ approach, it must be inferred that it prefers, at least for the time being, the ‘soft law’ approach implicit in the other two as a means of attaining the desired end of what the European Commission (2003) termed a ‘more coherent’ European contract law. Since there is an ever-present risk of a drawn out process of judicial harmonization losing momentum altogether, it might have been expected that the Commission would favour the hard law approach. However, the policy of ‘harmonization by directive’ was found to be unsatisfactory (Whittaker 2009, p.616, 2012, p.579), the EU Commission itself noting that “significant variations between national implementing measures” led to their being inconsistently applied (COM (2003) 68 final at p.27; Biukovic, 2008, p.288). Frustrated in its initial policy, the Commission turned its attention to the approximation of consumer protection provisions.



The drafting of the proposed CESL, discussed below, provided a further opportunity to incorporate all the best aspects of the disparate legal traditions of the member states. CESL Recital (12) insists that “there will be no disparities between the laws of the member states in this area where the parties have chosen to use [CESL]” and that, in consequence, Article 6(2) of the Rome I Regulation, “has no practical importance for the issues covered by the Common European Sales Law”. Article 6(2), which equates to Art. 5(2) of the Rome I Convention on the International Sale of Goods (CISG), ensures that a consumer habitually resident in another country is not put in the position of losing the protection of that country’s consumer protection provisions if the standard should happen to be higher where he or she resides. The American commentators Bar-Gill and Ben-Shahar (2012, p.2) observe that, an unforeseen consequence has been that the freedom to choose an inferior standard of consumer protection in return for a discount on the price, has been extinguished.

As a culmination of the Commission’s deliberations since it became aware a decade ago that there was unlikely to be sufficient support for the promulgation of a European Civil Code, the CESL constitutes primary evidence for the evolution of the Commission’s thought in recent years. References to the CESL in this chapter will be included insofar as they shed light on this, and on the status of the Draft Common Frame of Reference. Whittaker (2012, p.599) concluded that the CESL imposed so onerous a burden of pre-contractual disclosure on the ‘trader’ - i.e. the business in a ‘business-to-consumer (B2C) contract) as to render ‘not very promising’ the chances, or likelihood, of the CESL coming to be regarded as standard European terms. However, this is to consider the CESL

principally in terms of cross-border trade within the EU. Whittaker's criticisms certainly seem justified if it is accepted that a certain narrowness of thinking was displayed on the part of those within the Commission who had hoped to see the promulgation of a European Civil Code by 2010. This notwithstanding, an attempt will be made in what follows to consider the CESL in the wider context of global trade and to assess whether there are grounds for optimism. Since this is best understood in the light of the Commission's policy at the time of the passing of the Single European Act, it is appropriate to consider the evolution of thought within the Commission over a generation.

### *International conventions*

In its Communication of 2001 the Commission stated that it was

interested in gathering information on the need for wider-reaching Community action in the area of contract law, in particular to the extent that the case-by-case approach might not be able to solve all the problems which might arise.

These words suggest that the Commission saw the need for a bolder approach to the question but was not prepared to act against the consensus of opinion among those most closely interested in the matter. This position was taken notwithstanding their estimation of the published works on the law of contract, of tort and property law of the Trento Common Core Project which "would provide a useful foundation" for a European Civil Code (ibid.)

In the eyes of the Commission, if a mandatory set of agreed European contract law terms could succeed in fostering a distinctive European identity in the market place, it would have much to commend it since it would harmonize well with the existing *acquis* and offer uniform

protection to all consumers within the member states. The comparable but less far-reaching set of rules adopted by the Rome I Regulation, which represents ‘standard terms’ in signatory countries unless the parties opt to exclude its provisions, have established the concept of an optional instrument as the standard by which any European contract law terms would be judged. Article 6(2) of the Regulation, which, as noted by Bar-Gill and Ben-Shahar (2012) implicitly recognizes the existence of different standards of consumer protection among signatory countries, preserves this choice for parties continuing to contract under the terms of the Convention.

From the European Commission’s perspective, a significant defect of the CISG provisions adopted under the Regulation is that they do not apply to contracts made by means of electronic communication, a form of economic activity that Commission has been anxious to encourage. The original Convention articles appear to have been drafted principally with business-to business contracts in contemplation. Where parity of bargaining power between the parties is deemed to exist many of the safeguards put in place for the consumer are not applicable. The greater emphasis on the importance of business to consumer contracts, and those between large businesses and SMEs, provided an opportunity for a distinctly European legal instrument to be drafted without fear that it would be made redundant by the continued operation of the CISG. Until 2009 the United Kingdom’s position was that it intended to ratify the convention “subject to the availability of Parliamentary time” (Hansard, 2005). That this had never been a priority suggests that the *status quo* benefited certain vested interests. Should contracting parties conclude that the enhanced consumer protection under the proposed regulation for a Common European Sales

Law (CESL) would be disadvantageous, the choice of law provision enshrined in the Rome I Regulation would still suffice.

### *Political Considerations of the Commission*

The wider context of such provisions for the protection of the consumer is discussed below. In order to understand the significance of the recent emphasis by the Commission on accomplishing identifiable aims, it is necessary briefly to consider the changes that have taken place since 1980. The Single European Act, which came into effect in January 1987, was expected by Jacques Delors, then Commission President, to become “the economic and social cornerstone of European revival after years of stagnation” (Delors,1986). In the course of a speech given to mark 10<sup>th</sup> Anniversary of European University Institute, he identified a number of barriers - “physical, technical and tax” - to economic and technical integration (ibid.). If the progressive approximation of legal systems is what Delors had in mind, the phraseology chosen would seem to have been an oblique way of advocating it. Significantly perhaps, ‘harmonization’ of “Community policies and instruments” is specifically referred to only in the final paragraph of his speech. Delors also stated that nothing of what he outlined would be achievable without the Commission acquiring certain powers of implementation which, he insisted, “it must be given” (ibid.). By January 1987 the European Community had increased since its inception from six to twelve member states. Subsequently Delors realized that in the wake of the political events of 1989, with European Community attention turned towards the East, it could more than double again, as it has. In consequence national leaders were presented with the political difficulty of reconciling domestic opinion to such an expansion, for a European

Community that spreads its boughs wider must of necessity have institutional roots that go down deeper and are correspondingly stronger. Naturally enough there were calls for a reinvigorated campaign to make a European ‘law of obligations’, comprising both contract and tort by virtue of the Rome I and Rome II Conventions, a reality.

### *The New Poverty*

During his speech Delors also considered that the economic and technical integration of the European Community should be secondary to the European Parliament’s project for political union advanced at that time. However, the Commission concentrated its efforts on certain social and quasi-political aspects of the high earning, high spending economy that characterized the era which ended dramatically in 2008. At the same time the problem of the long-term unemployed, which Delors alluded to as ‘the new poverty’ (ibid.), proved intractable. In view of the continuing difficulties in the Eurozone economic area the Commission insists on having a role, in addition to that of government at the national level, in combating it. These considerations represent the broad political background to the increased focus on the approximation of national laws, the lowering of barriers to trade and the quest for an acceptable ‘optional instrument’. To postulate a timid disposition on the part of the Commission is not an adequate explanation for the fact that it preferred to follow a tentative approach. Rather, its discretion may be connected with, firstly, the correct interpretation of the Commission’s powers under the TFEU and, secondly, with the priority the Commission has given to strengthening the *Acquis communautaire* with regard to protecting the interests of the consumer.

### *Consumer Protection today*

If the plans for a Europe-wide Civil Code came to be seen as something abstracted from the day to day concerns of Europe's peoples, it is largely because the question of the convergence of European Law, in particular the Law of Contract, has become an adjunct of the Commission's policy of taking its *ad hoc* provisions for the benefit of the consumer and recasting them for inclusion in an improved *Acquis communautaire*. It is not immediately apparent whether this has been understood as an end in itself or whether it would serve as a model for further far-reaching reform of that body of law overseen by the CJEU. The Commission's approach was summarized by a former Commissioner for Consumer Affairs –

In today's Europe the law is seen as means to empower, where in the past it tended to be viewed predominantly as a means to prevent. For the European Commission better regulation is at the heart of our work. So in looking at the modernization of European consumer law, we need to build consumer trust through effective and relevant laws underpinning consumer rights, and we need to simplify the legal environment for business to ensure a proportionate single set of rules for a single retail market. This involves a fundamental overhaul of consumer law from commercial practices to consumer contracts. (Kuneva, 2008).

The natural inference to draw from these remarks is that the harmonization of contract law in Europe should take place only within the context of the revision of the efficacy of the directives for consumer protection that have been issued over the last quarter of a century. The emphasis on such considerations reflects the impact of the Court of Justice's interpretation of TEC Art 95 in the Tobacco Advertising judgments (*Germany v. Council and Parliament* 2000; 2006), discussed below, by which the Commission

learnt that it lacks anything approaching a general power to enhance the internal market. It is likely that the constitutional considerations raised by these judgments account, either in full or in part, for the hesitant approach to the whole question of harmonization since the European Council meeting at Tampere, Finland in 1999 when it had given fresh impetus to the quest for the elimination of ‘obstacles to the good functioning’ of civil proceedings<sup>42</sup>. The Commission’s three successive *Communications regarding a common European contract law* in 2001, 2003 and 2004 were genuinely consultative in purpose. Having consulted with stakeholders following the first, the Commission indicated ‘the way forward’ with the last. The ‘interim communication’ of 2003, commonly referred to as ‘the Action Plan’ (Council Report, COM 2003), contained plans to establish a template - i.e. the Common Frame of Reference - to serve as a model for the future, and the observation that:

Only through continuous involvement of all Community institutions and all stakeholders can it be ensured that the final outcome of this process will meet the practical needs of all economic operators involved and finally be accepted by all concerned. For this reason, the Commission has decided to submit the present Action Plan as a basis for further consultation.

Moreover, the Commission indicated that its immediate ambition was in fact limited in scope: “The creation of a common frame of reference is *an intermediate step* towards improving the quality of the EC ‘acquis’ in the area of contract law.” (ibid. - emphasis added).

### *Consumer Protection and the Draft Common Frame of Reference*

A significant number of initiatives in favour of consumer protection appeared at the behest of the Commission during the years 2001 - 2007.

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<sup>42</sup> Tampere European Council 15 and 16 October 1999 *Presidency Conclusions* at para. 38

The *Consumer Protection Green Paper* (2001) - by definition a consultative measure - was published a decade after the 'Convention on the Law Applicable to Contractual Obligations', which had taken a decade to negotiate, came into force. However, in 2006-7 the publication of a further Green Paper, in which the consolidation of no fewer than eight Directives was proposed, signalled that the Commission had embarked on a policy of establishing consumer protection as a priority for the European Union. The fact that this policy was not pursued in tandem with the preparation for publication of the Draft CFR suggests that the Commission had no desire to see either project unduly delayed. In spite of this, the Commission's stance regarding consumer protection lacked transparency. The laconic remark that 'relevant CFR findings will be incorporated into the EU consumer contract law review' (European Commission 2007, 447 at 10-11, cited in Biukovic, 2008, p.302 ftnt.125) was as much as the Commission was prepared to divulge at the time that the DCFR was in preparation. As Biukovic (*ibid.*) points out, the natural inference was that "no further explanation" would be forthcoming. During the following year a proposed consolidated consumer contract law for the purpose of regulating on-line selling - a measure entirely consistent with the eight directives undergoing consolidation - was published in order to consolidate in a legislative instrument the *ratio* of judicial pronouncements over the previous two decades. The Commission, perhaps not wishing to be seen to detract from the preparation of the DCFR in its final stages, appears to have neglected the opportunity presented by the consolidation measure to advertise its merits to a wider audience.



### *The legal position under the treaties*

The institutions of the European Communities are bound to act within quite narrow parameters set down by Article 7 TFEU and Articles 13 and 21 TEU for the realization of objectives “assigned” to the Community under the original treaty of accession. Articles 114 and 115 TFEU provide for the enactment by the Council of directives intended to enhance the functioning of the internal market. This includes directives obliging the legislatures of member states to provide for the greater approximation of laws and of business practices: by the Unfair Commercial Practices Directive 2005 the Commission sought to achieve “fully harmonized standards of behaviour for businesses in making, performing and breaking (*sic*) their contracts with consumers”.

### *The Court of Justice’s role*

Article 263 TFEU implicitly precludes the Court of Justice of the European Union from judicial activism in pursuit of its goal of uniformly interpreting in accordance with the so-called teleological principle the treaty of accession and the instruments of secondary legislation. In consequence, after half a century the results seem disappointing to those representatives of a European ‘legal science’, who wish to see a commitment to rapid progress replace the unsystematic approach to harmonization that results from reliance on the vagaries of European Community case law. As mentioned above, it is case law itself that has checked, at least temporarily, any ambition to employ a code, or other instrument capable of being enforced, in order to achieve the degree of harmonization that was envisaged in the 1950s. The proposed CESL may be regarded as a means to avoid reversion to a merely sectoral approach to harmonization.

### *Impact of Tobacco case judgments*

Until the late 1990s no-one had tested the common assumption that legal diversity “causes transaction costs and lowers economic trade and welfare”. At the turn of the century, in its judgment in the first of the two *Tobacco Advertising* cases, the Court of Justice of the EU stressed that the mere fact that diverse mandatory laws exist and are regarded as posing an abstract or notional risk to the vitality of the internal market, does not of itself justify legislative intervention on the part of the European Community<sup>43</sup>. In other words there has to be a ‘real and present’ problem resulting in direct and measurable consequences - such as the persistence of an unacceptably high number of long-term unemployed throughout the Member States - for such intervention to be justified. As a consequence of this, confirmed by a second *Tobacco Advertising* judgment subsequently, the Commission learnt that its activities must be limited to taking particular measures in response to specific problems or anomalies encountered from time to time<sup>44</sup>. The two judgments cast doubt on the question, at once academic and practical, whether the Council and Commission actually have the authority to adopt either a Code of Contract Law or a European Civil Code that would be applicable across the European Union.

### *Conventions on Contractual and non-Contractual Obligations*

The Rome I Convention also presented the Commission with a legal challenge to its competence from an unexpected quarter. Art. 3 of the Convention states that the applicable contract law must be ‘the law of a

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<sup>43</sup> *Germany v Parliament and Council* [2000] ECR I-08419 at para. 83

<sup>44</sup> *ibid.* and *Germany v. Parliament and Council* [2006] ECR I-11573 at paras. 37-38

country’ - as distinct from one of the academic exercises such as ‘the Principles of European Contract Law’ - which in turn raised the question whether national laws could in time be replaced by a Europe-wide code. In 2008 the Rome Convention was replaced with the Rome I Regulation which seems to have been a device designed, in part at least, to leave open the possibility of imposing a European Contract Law Code at an unspecified date in the future<sup>45</sup>. As Biukovic (2008, p.308) surmised, Art 3 would have to be redrafted if the Rome I Convention were to be adopted as a Regulation and this is indeed what happened. It is not unreasonable to suppose that one reason why the Regulation was promulgated a generation after the Convention was negotiated was in order to accomplish this. The natural inference, it follows, is that the notion of a European Civil Code has not been abandoned, but is merely considered inexpedient at present<sup>46</sup>. If the Draft Common Frame of Reference evolved to become a fully fledged optional instrument it would be one more such “regime” in addition to those of the existing Member States. This might be one of the reasons, if not the sole reason, why the Commission has evinced a preference for a normative instrument. Should circumstances change and the Commission become more confident about its powers, the question of codification of the law of contract may be addressed with renewed vigour. This might happen if the proposed regulation for CESL is less effective than anticipated in achieving economic regeneration.

The possibility had always existed that in view of Sweden’s traditionally much higher standard of consumer protection than is typical of other liberal

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<sup>45</sup> Regulation 593/2008

<sup>46</sup> Andreas Stein speaking on behalf of the Commission at a BIICL conference on 7<sup>th</sup> February 2011 expressed scepticism regarding the workability of anything more than an optional instrument.

democratic states, her admission to the European Union would usher in a period of enhanced consumer protection, and this has proved to be the case. Moreover, the inclusion, by Article 38, of consumer protection in the Charter of Fundamental Rights of the European Union, which, although generally regarded as ‘soft law’ (Costa, 2010), does form part of the Lisbon treaty, has given the EU’s Commissioner for Justice, currently Viviane Reding, an enhanced role in consumer affairs because the office includes the Fundamental Rights portfolio. The Commission’s initial failure to predict that there would be resistance in Sweden to the adoption of the policy of maximum harmonization played its part in formulating the concept of an optional instrument - by which national rules which predated the harmonized ones could ‘perfectly co-exist’ (Gomez and Ganuza 2011, p.9) with the latter - being seen as the more attractive. The resulting Common European Sales Law appears to be likely to supplant the DCFR as the main vehicle for developing a corpus of distinctly European contract terms. However, the potential for the Convention on the International Sale of Goods to form the basis for B2B transactions remains a theoretical possibility (Clive 2011, para.9).

It is likely that the Commission’s policy in respect of the European consumer was a by-product of its attempts to achieve “the very best balance between opportunities for businesses and consumers, for legal certainty and the necessary flexibility” (Reding 2012, para.31) since the CESL offers “comparable or higher level of protection than most national laws” (ibid., para.26) to the consumer. Although Reding’s language appears both optimistic and objective, in reality such expressions as “the very best level” and “comparable or higher” have the capacity to have a

negative impact on legal certainty. Whether consumers in Scandinavian countries will accept the ‘comparable’ level of consumer protection offered by the establishment of a supposedly optimal level of consumer protection remains to be seen. In the mean time the Commission stresses the positive, arguing that those who do business under the CESL will gain a competitive advantage, the Commission’s aim being to “make sure that the Common European Sales Law will develop into a trademark of our internal market” (ibid., para.28). It remains the case, however, that, according to a *Which?* report (Lyttle 2011, p.2), as many as 62 percent of those respondents who had never entered into a cross-border transaction cited apprehension about obtaining either replacement goods or repayment of the price in the event of goods found to be damaged or defective on arrival as their principal reason. The fact that the support of consumer groups for the proposed CESL is lukewarm at best reflects the lack of consultation with them prior to drafting.

### *Supplanting the Draft Common Frame of Reference*

One of the virtues of a parallel optional law regime is that barriers to cross border trade created by differences in law, custom and language can be lowered without unduly disturbing the provision for national contract law. It is the ‘barrier’ represented by differences in law that is most often singled out for comment. For instance the following assertion was made by Turini and van Ypersele who were cited in the Commission’s Proposal for the CESL in 2010:

legal complexity is higher when trading with a country whose legal system is fundamentally different while it has been demonstrated empirically that bilateral

trade between countries which have a legal system based on a common origin is much higher than trade between two countries without this commonality<sup>47</sup>.

While this observation may be true as a general statement it is submitted that it is potentially misleading in a European context where in reality the legal systems are not ‘fundamentally’ different. Moreover, given that the contract law of most member states is based on the Civil Law the second assertion would appear to imply that the proposed regulation for a CESL is actually superfluous.

The number of obstacles to increased economic activity in the European community, it is often argued, is of itself no reason for failing to take action where measurable progress can be made. Since May 1989, when the codification of private law was first urged by the European Parliament, two resolutions have urged that the progressive harmonization of certain aspects of private law is essential to the completion of the internal market. This according to Smits (1998, p.331), rendered what had hitherto been an academic debate among jurists “a hot political item”. When the Commission’s Green Paper was published in July 2010 the Commission maintained that because contract law remained in a ‘fragmented’ state across the European Community, legal uncertainty for those engaged in commerce was thereby increased and consumer confidence declined correspondingly. The references to European contract law being ‘fragmented’ indicates that the thinking of staff in the Commission has been strongly influenced by the arguments and terminology of leading academic proponents of a European Civil Code. The policy options upon

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<sup>47</sup> Turrini, A. and van Yperselse, T. (2010) ‘Traders, courts, and the border effect puzzle’ *Regional Science and Economics* 40 at p.

which stakeholders were consulted according to the terms of the Commission's Green Paper ranged from a set of non-binding contract rules through to harmonization of national contract laws by means of a Regulation, or their replacement with a European code. Ms Reding was quoted in the Green Paper (EC, Commission 2010).as arguing that the international financial crisis provided an 'historic opportunity' to make a 'quantum leap towards a more European contract law.'

### *The Common European Sales Law*

In May 2010 an expert group had been convened whose brief was -

to transform the so-called Draft Common Frame of Reference ... into a simple, user-friendly, workable solution adapted to the needs of consumers and the reality of the business environment.(ibid.)

One senses here an underlying note of frustration at the inability during the previous two decades of European legal scholars to produce anything conforming to this description.

The outcome of the consultation led to the publication of a *Regulation of the European Parliament and of the Council on a Common European Sales Law* in October 2011. This document is concerned to demonstrate that the consumer should 'suffer no deprivation' of his customary protection. The Common European Sales Law (CESL) is defined as 'a parallel contract law regime', one which if chosen by the parties supersedes national law. Its legal basis is defined as Art 114 of TFEU (formerly Art. 3h of the Treaty of Rome); in terms of proportionality and subsidiarity, it is defined by Art 5 of the Treaty of European Union (TEU) agreed at Maastricht. The reasons given for deciding on a Regulation on an option were, firstly, the inadequacy of 'a non-binding instrument such as a toolbox' under the CFR

to achieve the desired objective and, secondly, to have replaced national laws with ‘a non-optional European contract law’ might have entailed significantly increased costs for those ‘domestic traders’ not wishing to engage in cross-border commerce. The latter reflects the kind of political considerations that have to be weighed at the stage when policy is being formulated.

The purpose of the CESL was summarized by Whittaker (2012, p.587): “The economic objectives ... rest on the possibility of a trader to do business cross-border on a single, uniform legal basis and therefore a single set of standard terms.” From the point of view of the Commission the CESL has additional virtues. Firstly, it avoids the element of national diversity inherent in a policy of minimum harmonization of consumer protection; secondly, it is based on the principle of agreement between the parties (ibid., p.583); lastly, it is considered a proportionate response to the obstacles to economic growth usually attributed to the existence of internal borders and differing legal traditions.

For certain legal scholars, notably in Germany, the implied criticism of a European Civil Code, namely that the means were not directly proportionate to the ends to be achieved, calls into question the decades of work invested in trying to establish a European rather than national ‘legal science’. For Eidenmüller *et al* (2012), the CESL is over-prescriptive. The extensive duties of disclosure on the part of the seller, together with the formality surrounding the consumer’s rights of withdrawal, receive especial criticism. Much of this seems to be doctrinal in nature, as much as to say that fewer standard terms under the *Acquis communautaire* should



be included automatically. Moreover concerns about the quality of consumer protection are not eliminated on account of the optional nature of the instrument (Lyttle 2011, p.8)<sup>48</sup>. Eidenmüller *et al* (op. cit.) go on to express concern that in spite of these imperfections the CESL might ultimately prove a success and that to forestall this eventuality it should be abrogated before it takes effect. They argue that what is needed is further debate on the extent and nature of contract law harmonization in Europe, rather than the speedy legislative enactment of a flawed product.

The concerns expressed are not simply those of perfectionists but rather reflect the implicit recognition that the promulgation of the CESL is a potentially mortal threat to the eventual realization of a European Civil Code. As discussed in Chapter 1, two of Eidenmüller's co-authors, Jansen and Zimmermann, had cast doubt on the notion that the DCFR had constituted a 'roadmap' for the approximation of contract law in Europe, whereas Schulte-Nölke (2007) had been more favourably disposed. Schulte-Nölke's attitude can be traced to the pioneering work he had undertaken on the concept of the 'Blue Button' which lies at the heart of the CESL. Notwithstanding the consumer protection principles enshrined within the CESL by virtue of Art 114 TFEU, and the passing on of the concomitant costs to the European consumer or SME, the possibility remains, as Eidenmüller *et al* fear, that if enough buyers do 'press the Blue Button' the CESL will represent European standard contract terms for many years.

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<sup>48</sup> Andreas Stein, representing the Commission at a BIICL conference on 7<sup>th</sup> February, conceded that promulgation of an Optional Instrument may undermine consumer protection

It is important to recognize that the CESL is not envisaged as a so-called “twenty-eighth national jurisdiction” but as a second contract law regime within each of the Member States. It is intended that the parties agree which domestic law should govern the agreement according to the existing principles under the Rome I Convention and then proceed to elect to use the CESL if they so agree. This two-stage test, necessitated by the the pegging of the CESL to the provisions of both the Rome I and Rome II Conventions in accordance with the provisions of the Treaty of Amsterdam, appears at first sight cumbersome and Whittaker devotes much of his review of the CESL to the consideration of the operation of the default rules in the event that the parties agree to use the CESL but neglect to undertake the first step in the process described above. It is submitted, however, that while it may take time for the parties to become accustomed to the new arrangements, the use of the CESL should become relatively problem free in the longer term. Moreover, it is likely that in terms of business to business transactions under the CESL both prospective parties would seek legal advice before using the provisions for the first time. The benefits would accrue through building up a longer-term business relationship.

#### *The duty of disclosure to the Consumer*

Greater difficulty is likely to be encountered in business to consumer transactions because of the extensive pre-contractual duties of disclosure imposed on the trader. Here the ambit of good faith and fair dealing come to the fore. The question arises as to whether the trader in a contemplated business to consumer transaction is obliged - and if so to what extent - to advise the consumer that, by opting to do business on ‘European terms’,

he or she may surrender a higher level of consumer protection that otherwise would be available by virtue of Art 6(2) of the Rome I Regulation, since this information is not included in the Standard Information Notice provided for by those who drafted the CESL. Accordingly the principle of good faith and fair dealing operates in such a way as to increase legal uncertainty and to place the responsibility for disclosure on to the enterprise whose activities the CESL is intended to foster. Whittaker (2012, p.600) detects a further paradox: the cost-saving benefit to traders will be undermined if, as a result of their disclosure of the potential loss of protection to consumers, some consumers elect to do business only within the terms of domestic legislation while others are content, in the words of the Recitals, to ‘make a conscious choice’ by clicking on ‘the blue button’ and proceed with the transaction on the basis of the CESL.

The argument that the CESL unnecessarily presents another layer of complexity appears not to take into account that such a Sales Law would be subject to litigation across the European Union. Cases representing a body of precedents would soon develop which taken together with the interpretation of the CESL itself would constitute a ‘toolbox’ for keeping the working of the CESL under review. A successful CESL would probably make a Common Frame of Reference redundant in terms of business to consumer contracts. There is no suggestion that the proposed CESL should supplant CISG altogether and it is likely that the latter is intended to remain the standard ‘default terms’ in ‘business-to-business’ contracts.

### *Trader to trader transactions*

It is unclear how significant in economic terms cross-border business to consumer transactions really are, although it seems likely that a marked increase in volume of such trade would enhance a spirit of ‘European-ness’ among citizens. In the case of business to business contracts where neither party is a SME, the exclusion of the operation of the principle of good faith by mutual consent may be possible under article 8(3) of the Proposal, according to Whittaker (op. cit., p.598.). While such a course of action may prove feasible it is intended that the CESL should be adopted in its entirety or not at all. We can be sure that traders based outside the EU, who primarily do business in a limited number of Member States with whose legal systems they are acquainted, are looking favourably at the Proposal. It would be surprising if the usual benefits of increased economic activity do not manifest themselves in the future if there is widespread use of the CESL across the EU. If increased volumes of trade encourage healthy competition the principal beneficiary will be the consumer. A standard set of European terms ought over time to stimulate increased volumes of trade with those countries whose contract law is ‘fundamentally different’ from the Civil or Common Law systems. European businessmen negotiating agreements beyond the EU may get better terms under the CESL than they do where contracts have to be negotiated separately and the advantage lies with the party in whose territory the contract is made. While these considerations are admittedly conjectural, it may be observed that the likely benefits outlined here form no part of the Commission’s reasoning for wishing to introduce the CESL. The inference that naturally arises from this omission is that the proposed CESL is in reality the end product, provisionally at least, of the two decade long Project for a European Civil

Code. Corroboration for this may be found in the habitual patterns of thought that are revealed in the recitals and articles.

## CONCLUSION

For the foreseeable future the European Commission can be expected to continue devising policies which produce measurable economic benefits for consumers while continuing to engage in the debate regarding what form of closer integration in the EU is desirable. The notion of what Helmut Kohl liked to call a “Common European Home” remains viable and lies at the heart of much of the deliberation that takes place in the Commission. However, if political unification remains the ultimate goal, Commission staff have been noticeably reticent about matters of detail. Greater frankness in the preparation of both the Draft Common Frame of Reference and the Common European Sales Law would have gone far towards allaying suspicions that the Commission had a hidden agenda in these areas. The fact that Staudenmayer (2006, p.237) felt the need to deny the existence of such an agenda indicates that a considerable degree of mistrust had been allowed to build up in the eight years since the Study Group for a European Civil Code had been instituted.

Completing the approximation of the Common Law to the Civil Law tradition in a relatively short space of time seems to have been regarded as simply a matter of political will. However, a generation ago Fletcher (1982) advocated

an attitude of permanently raised consciousness among the participants of the European - and indeed in any other regionally-based - programme of legal integration so that they maintain a sensitivity to the external implications of developments taking place internally within the organization or Community to which they belong, and furthermore make every effort to create and encourage,

rather than suppress or discourage, opportunities for progress towards inter-regional legal harmony.” (op. cit., pp.4-5)

This opinion of this Common Law practitioner does not contradict remarks made a decade later by Edward (1994, p.264), a Scottish judge who sat in the European Court of Justice. He described the experiences of English lawyers during the years immediately following the United Kingdom’s accession to the European Community in terms of “exasperation” for those of both the Civil Law and Common Law traditions. However, the fact that English law concerns itself with facts more than principles meant that practitioners from both traditions were not slow to realize that successful harmonization would depend not on abstractions but on “what exists on the ground” (ibid., p.264). He continued -

The search is for solutions that offer compatibility rather than uniformity of laws. The search for common ground between diverse legal systems is unlikely on the whole to home in on the distinctive doctrinal solution of one or other of the major systems. The chosen solution is more likely to be eclectic or ‘homegrown European’.

The fact that two jurists from different, some would say rival, legal traditions within the United Kingdom can quite independently reach similar conclusions must be accounted for by reason of their lack of concern either for economic considerations or for driving forward ‘ever closer’ European integration. By contrast, as the speeches of Viviane Reding plainly reveal, the view that considerably enhanced consumer confidence will yield measurable economic benefits continues to be the principal motivating factor among those in the Commission most concerned with pressing simultaneously for greater political integration in the European Union, and

greater convergence of Contract Law. Many would argue that it is naïve to suggest that through the approximation of laws alone the EU can enter a period of vibrant economic growth in a non-inflationary consistently expanding economy. To some extent the Commission has become a prisoner of its own rhetoric: issues of legal principle have become separable only with difficulty from broader policy considerations in which the economic performance of the EU remain paramount. A contributory reason for this may be that those who founded the European Communities closely identified the question of the “accelerated raising of the standard of living” under Art. 2 of the Treaty of Rome 1957 with their wider political vision.

Confidence in obtaining justice in any but the consumer’s home jurisdiction is likely to remain low for the time being. Not least among non-tariff barriers to increased cross-border trade are the different conventions and rules relating to the discovery of documents during litigation. For the lawyer as much as for the consumer such divergence will be considered an additional bar to that posed by language differences. All such differences in legal culture reflect differences in outlook (*mentalité*) in relation to the assumptions which lie at the heart of that culture. In the absence of the removal of these and other non-tariff barriers the desired economic benefits of the Common European Sales Law may well be modest. Biukovic (2008, p.313) points out that the Commission embarked on a policy of supporting “further economic integration of national markets” without clarifying the question of “whether diversity in laws is an actual obstacle” to the functioning of an integrated market. The fact that a consolidated consumer contract law was proposed by the Commission less than a year after the



publication of the DCFR, in October 2008, lends support to this contention. Biukovic's remarks appear to be oblique criticism of those who nominated the authors of the PECL and, subsequently, appointed the Study Group for a European Civil Code.

The Commission's Explanatory Memorandum on the CESL (COM 2011: 635) concentrated on traditional concerns over lost cross-border trade worth "tens of billions" of Euros annually "due to differences in contract law" resulting from "fragmented" (so-called) legal systems. One virtue of Schulte-Nölke's 'Blue Button' is that it is orientated towards trading partners in a globalized market. The prospect of doing business on European standard terms has met a favourable reception overseas even if in North America it is regarded as undermining the principle of freedom of contract (Bar-Gill and Ben-Shahar, 2012 p.20-21). Paradoxically the principal benefits that the EU is likely to receive are increased volumes of trade with countries beyond its borders as distinct from the ones that it was looking for in terms of increased cross-border trade among the member states. Although evidence is only anecdotal, it seems that a greater degree of confidence can also be expected on the part of European sellers to countries whose business *mores* have traditionally created uncertainty about contractual obligations being honoured.

The manner in which harmonization was approached by the Commission during the 1990s suggests that the issue was one of adaptation by jurisdictions that do not share the Civil Law tradition. This has been amply illustrated by the decision to include good faith and fair dealing in the Unfair Terms in Consumer Contracts Regulations 1993 in spite of the fact

that the doctrine was not universally recognized among EU member states. Evidently there were political considerations taken into account in initiating a policy decision which pre-empted the larger question of whether the harmonization of Contract Law among the Member States could be brought about either by the Common Law jurisdictions choosing to adopt Civil Law standards, or by developing compatible doctrines of their own. In order for the UTCC Regulations 1993, 1999 to be applied consistently across the Member States of the EU there would have to be an agreed standard of what duties are imposed on contracting parties. Accordingly, the Court of Justice was left in an invidious position by those who drew up the regulations.

#### *Risk of legal nationalism*

Among European legal scholars, advocates of the 'defragmentation' of the law of obligations have not been punctilious in differentiating the harmonization of the essential principles of European law from a policy promoting the homogenization of European law according to Civil Law principles. Implicitly the continued existence of the Common Law as a learned tradition in its own right has been called into question. Had the trend that was decisively rejected by the Commission in 2003 been allowed to continue the Common Law might have come to be regarded by future generations of English, as well as European, jurists as simply an aberration from the dominant Continental tradition which lasted only as long as English history developed differently from that of her European neighbours. One senses that the narrower vision and closer horizons of the technocrat have predominated during the last decade. Fletcher (1982, p.10) pointed out that the Commission's programme of political integration, while not authorized by the Treaties was 'implicitly sanctioned' as being

necessary to the realization of the EU's objectives. He argued (ibid., p.11) that if policy makers and European jurists combined for the express purpose of "progressively weakening the identity and powers of the State" by attacking "the traditional nexus between individual State autonomy and a distinct and in many ways idiosyncratic legal system belonging to that State" and in so doing strengthened the identity and powers of the European institutions, increased levels of legal nationalism would result. Such an easily predictable phenomenon would inevitably render the realization of a 'Europeanized' private law a distant prospect.

Underlying the debate about the speed and goals of harmonization in the late 1990s there remains an unresolved tension between the adherents of an essentially rationalist approach to law-making and those who see law as evolutionary, reflecting back the prevailing *mores* and values of the citizenry to the society it serves. If this tension - which is intimately connected with the 'epistemological chasm' to which Legrand referred - proves ultimately irresolvable, nations must learn to respect each other's characteristic differences and pursue a policy of approximation based on the practical application of the principles of justice, as advocated by Edward (above, p.120). If European companies make use of the harmonized 'European Standard Terms' represented by the CESL in cross border transactions, or in dealings with the European Union's near neighbours, an authentically European 'legal scholarship' will eventually coalesce around the interpretation placed on the instrument by practitioners. It seems desirable that this should be permitted to develop organically, that is according to the existing standards in 'the Community' - albeit one comprising some four hundred million people. If, on the other

hand, short term considerations lead to harmonization on the basis of Civil Law principles alone, the result will be essentially as Modernist in spirit as the *Code Civil* of 1804. It would be difficult to construe anything of the kind as constituting significant progress. In short, lasting harmonization of European contract law will only be accomplished when a European 'legal scholarship' is established by disinterested comparative lawyers who, like Friedrich von Savigny before them, do not have as their ultimate aim the promulgation of a Civil Code.

### *Conflict resolution through education*

The ideological division between the Natural Law and Historical Schools of jurisprudence was more apparent in the 19<sup>th</sup> Century, especially in Germany, than it has been since 1900 when the BGB took effect and the codifiers in that country finally prevailed. During the last century Savigny's many admirers, unaware of the disdain that Savigny himself evinced for codification, have recognized in the BGB a distillation of the *Rechtswissenschaft* advocated by their most celebrated jurist. It must be recognized that this 'legal scholarship' was essentially Roman rather than German or 'European' in character. It is less clear what advocates of a 'Europeanized' legal scholarship, such as Professors von Bar and Zimmermann, hoped to achieve in the decades either side of the millennium since both were, and remain, champions of a European Civil Code. It seems reasonable to infer that the legal scholarship that they contemplated was not an end in itself but simply a means to prepare the ground among European jurists for acceptance of such a code. It has been argued above that the historical examples and analogies adduced in favour of a 'novum Ius commune Europaeum' by these two legal scholars, among

others, are flawed. It has been argued, too, that much of the terminology, such as ‘defragmentation’ and even the word ‘harmonization’ itself, which has been employed by modern legal scholars in place ‘approximation’ is probably tendentious. Two negative consequences have followed. Firstly, for three decades unsound scholarship was offered as a basis for constructing a Europe-wide Law of Obligations intended to make redundant well-established national traditions. Secondly, this same unsound scholarship has been taken at face value by those in the Commission of the European Union responsible for directing policy. This may be readily inferred from the vocabulary used in a number of public references on the part of the Commissioner for Justice, cited in the Chapter Five above, particularly with reference to ‘fragmented’ legal systems. It is no exaggeration to state, therefore, that it was the unqualified acceptance of less than rigorous scholarship on the part of the Commission a decade ago that was indirectly responsible for the sudden and drastic reassessment of its policy priorities in which it was obliged to engage, for had caution been exercised earlier a more nuanced policy would almost certainly have been developed. It seems inconceivable that the role of the academic lawyer from the Civil Law tradition in the formulation of policy in the European Union will be as prominent in the foreseeable future as it was in the decade after 1989.

Ever since the judgments of the Court of Justice in the *Tobacco Advertising* cases early in the new millennium, talk of a European Civil Code, or of the codification of Contract Law, has been more in the nature of an aspiration than an achievable goal. To the advocates of one or other of these codes an optional instrument, such as the DFCR or the CESL, must appear as no

more than a pale imitation. It is likely that the ambition to create a code to serve the populations of an enlarged European Union, and thus give it greater cohesion, has only been deferred<sup>49</sup>. The point about cohesion is important. If presented as a ‘tidying up’ exercise for the purpose of consolidation, a proposal for codification has much to recommend it - not least to the pragmatist. However, anyone would be naïve to believe that, without reference to longer term political ambitions which have always tended to be integrationist in character, codification on a Europe-wide basis was either a matter of enhancing legal certainty in certain defined areas or simply a mechanism to stimulate economic activity.

The likelihood of increased legal nationalism resulting from a successful drive to establish a code of ‘Europeanized’ contract law has been mentioned. It is submitted that such a codification could only be promulgated successfully among countries which had already codified their systems and which were willing to put the ideal of greater European cohesion ahead of national policy considerations. It is in theory possible that at a future date a majority of member states with Civil Law legal systems might attempt to override the objections of those countries which traditionally have followed the Common Law. Any attempt to impose such a code by the *fiat* of the Council of Ministers or the Commission would be widely regarded as an unwarranted imposition. This would not be the first time in European history that such an eventuality had come to pass. It has also been mentioned that the so-called ‘Reception’ of Roman law in

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<sup>49</sup> On February 7<sup>th</sup> 2011 Diana Wallis MEP, the then *rapporteur* on the harmonization of the law of contract for the European Parliament, gave an illuminating, if disingenuous, answer to a question at the BIICL conference on this subject: asked whether a European Civil Code was ‘now a dead letter’, she replied that such a code had ‘never been a *live* letter’, before going on to say that she considered that it would take at least a generation to achieve.

Germany from the late 15<sup>th</sup> Century onwards was at times bitterly opposed. The majority of German academic lawyers today, having the benefit of hindsight, argue that the benefits of doing away with regional legal systems based on custom law render any legitimate grievance thereby caused regrettable but necessary for the greater good. It is submitted that in a Europe in which government rests on popular consent the proper way to harmonize private law is by engaging, not ignoring, public opinion.

As mentioned in Chapter 1 (above, p.9) the first modern advocate of a new *Ius commune Europaeum*, Helmut Coing, was also a keen advocate of Comparative Law as a means of developing a European dimension to legal education supported by scholarships and increased attendance by law students at universities outside their home countries (Coing, 1990)<sup>50</sup>. It is submitted that a foundation for a 'Europeanized' contract law, of the kind envisaged by Edward and Fletcher (above, p.119) might ultimately be achievable by this means. Such a foundation would be more durable than one justified according to the selective use of historical precedents of the kind employed by Coing and subsequently by his uncritical admirers (above, p.37f.). Increased sharing of knowledge among European students and legal scholars would also seem preferable to the embarkation by the European Commission on the renewal of a policy which ultimately requires the use of a *dirigiste* measure such as regulation or directive in order to achieve its end. No doubt such an end is as honestly as it is devoutly desired by its advocates, but many of the implications of its implementation, as well as the pitfalls, remain but dimly perceived.

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<sup>50</sup> See Gordley, J. (2000-01) 'Comparative Law and Legal Education' 75 (4) *Tulane Law Review* 1003-1014, p.1005

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