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## Contract Law in Europe and the United States: Legal Unification in the Civil Law and Common Law

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### I.

Allow me first to say what a great honor it is to present the Eason-Weinmann Lecture at Tulane Law School. When it was announced that I would have the pleasure of giving this lecture I became a little nervous after a look at the formidable list of my predecessors. On the other hand, while comparative lawyers do of course have opportunities to speak to other comparative lawyers—usually any number over 10 is considered a large crowd—they are rarely given the chance to address a wider audience in a place so well known as Tulane Law School for its long-standing interest in comparative legal studies.

A title, I was always told by my German master at school, is no more than a clothes-hook upon which to hang whatever you have made up your mind to say. While this may be a questionable statement it did give me some comfort when I realized that the topic I want to address does not exist at all. There is no European contract law at this stage, nor is there an American contract law. In the United States, not only does each of the fifty states have its own contract law, but the rules of the law of tort, restitution and property and on family and succession law are all state law as well. Uniform federal law has never made a serious attempt to displace the conflicting legislation and case law of the individual states.

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Nor have the state courts and legislatures ever pursued the unification or harmonization of their individual laws as an independent goal. The absence of federal laws is partly due to the fact that under the United States Constitution the competence of Congress to enact such legislation is limited. But Congress has remained inactive even in areas where such competence might exist. Admittedly, major efforts have been and are directed toward the adoption by the several states of model statutes worked out over a wide range of questions by the Conference of Commissioners on Uniform State Laws. Since it was formed in 1892, the Conference has promulgated no less than about 200 Uniform Acts, which have no force in and of themselves but are offered to the states for adoption. However, their contribution to legislative uniformity throughout the country is mixed. No more than ten percent of the Uniform Acts have been adopted by 40 states or more. While the Uniform Commercial Code, as the showpiece of the Commissioners' work, does cover important areas of commercial law, it says nothing on many problems of general contract law, e.g., on estoppel, fraud, misrepresentation, duress, coercion, mistake and principal and agent. It does cover contracts for the sale of goods but is silent on building contracts, leasing agreements, contracts for the provision of services etc. Moreover, many states modify Uniform Acts, either in the course of adopting them, or subsequently. Even where Uniform Acts have been adopted and the law is therefore uniform at least in some states, state courts may interpret them differently with no national tribunal to resolve the conflicts.

The major sources of legal uniformity in the United States today are probably federal legislation and regulations issued by federal agencies. Congress has legislative competence in areas such as bankruptcy, intellectual property, maritime law and the control of commerce with foreign nations. There is also comprehensive federal legislation on securities regulation, labor relations, banking, competition regulation and arbitration. Since the Interstate Commerce Clause is given a rather expansive reading these days Congress might theoretically pass uniform legislation virtually all across commercial and private law. It has never made any serious attempt to do so. Congress and its regulatory agencies did lay down far-reaching patterns of rules in selected areas of consumer protection, and there has also been a substantial expansion of federal legislation and regulation on product safety. In general, however, Congress uses its powers very selectively. It sees its role primarily as interstitial, respects the traditional areas of state competence and tries to avoid frictions with state law-making agencies. Remember that even

where there exists uniform federal law the various federal circuit courts of appeal often reach different interpretations. Theoretically, the United States Supreme Court has the power to resolve these conflicts. As a practical matter, however, conflicts on important problems are unresolved indefinitely simply because of the inability of the Supreme Court to hear more than a hundred cases per year.

It would seem, therefore, that despite the substantial growth of federal legislation and the work in many fields of the Commissioners on Uniform State Laws it is still true to say, in the words of Whitmore Gray, that “diversity in private law [is] still the norm and uniformity the exception in the United States today.”<sup>1</sup> European lawyers are often surprised to see that Americans do not feel more uncomfortable with the degree to which their law is not uniform. They find it a little perplexing that an integrated common market seems to be fully compatible with a fair amount of non-uniformity of law. The reaction of most European lawyers is to say that the United States is a special case based to such an extent on a particular set of historical and political circumstances that the American experience is of little utility to other countries and should not influence the decisions they have to make on the harmonization or unification of European law. It would seem, however, that the American case is not as singular as many people feel, and that there are other common law jurisdictions which take a similar view.

One example is the United Kingdom. When the two kingdoms of England and Scotland were merged in 1707 the Treaty of Union provided that the Laws which concern public Right, Policy and Civil Government may be made the same throughout the whole United Kingdom; but that no alteration be made in Laws which concern private Right, except for evident utility of the subjects within Scotland.

Of course the separate existence of English and Scots law did not and could not preclude a unified commercial law governing companies and business associations, employment, intellectual property, financial services, insurance and consumer protection. In the classical private law subjects, however—persons, family and the whole law of contract, tort and property—English law and Scots law remain separate and distinct to this day. It is in the words of Hector MacQueen “at least interesting” to European observers to see “that the United Kingdom does provide a still-

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1. Whitmore Gray, *E pluribus unum: A Bicentennial Report on Unification of Law in the U.S.*, 50 *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABELSZ]* 111, 155 (1986); see also Mathias Reimann, *Amerikanisches Privatrecht und europäische Rechtseinheit—Können die USA als Vorbild dienen?*, in *AMERIKANISCHES PRIVATRECHT UND EUROPÄISCHES PRIVATRECHT* 132 (Reinhard Zimmerman ed., 1995).

working example of how a reasonably large and active single market can develop, thrive and function despite internal diversity of law.”<sup>2</sup>

Another example is Canada which is clearly a functioning single market despite the fact that the private law systems of Quebec and the other common law Provinces have remained separate for more than 230 years. In the Canadian experience the substantive unification of basic areas of private law is obviously considered unnecessary where clear and reasonably uniform conflict of law rules exist.

There is therefore evidence that common law jurisdictions accept internal legal diversity with a fair amount of equanimity. They do not see the unification of law as something that is meritorious and desirable *per se*. Rather it is seen as a step to be taken only where the uniform solution can be shown as clearly required for a functioning and successful common market or a manifest improvement of the law. Civil law jurisdictions in general and the European Union in particular seem to take a different position. They consider the unification of private law, especially of the basic rules of the law of contract and tort, to be a matter of great importance and a worthwhile and laudable undertaking even where it is not clearly supported by the practical requirements of a functioning economic community. I shall first provide evidence for the European approach by a brief discussion of what is called the Europeanization of private law, in particular of contract law. I will conclude with a few speculations about the basic reasons that might explain why civil lawyers tend to have a strong preference for legal uniformity and often associate legal diversity with chaos.

## II.

When the European Economic Community was founded in 1957 it was made clear in the Treaty that the competent authorities had the power to harmonize, approximate or unify the law of the Member States where this was necessary for the establishment or functioning of the common market. In the early years, however, measures harmonizing or unifying private law were taken only in special fields of commercial law, such as company law, competition law and the law of intellectual property. The idea of a common private law for Europe was first launched in the 1980s. It was developed neither within the European Community nor by

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2. Hector MacQueen, *Response*, in *TOWARDS A EUROPEAN IUS COMMUNE IN LEGAL EDUCATION AND RESEARCH* 261, 263 (M. Faure, Jan M. Smits & H. Schneider eds., 2002); see also Otto Kahn-Freund, *Common Law and Civil Law, Imaginary and Real Obstacles to Assimilation*, in *NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE* 137, 142 (Mauro Cappelletti ed., 1978).

business circles, legal practitioners, judges or politicians. It was produced by legal academics interested in comparative law. Building on the work of legal historians such as Paul Koschaker and Helmut Coing, I published an article in 1981 mapping various ideas of how comparative legal scholarship might advance the attainment of what I called “European common private law”.<sup>3</sup> This might have remained a barren idea had not the Danish law professor Ole Lando had the brilliant idea in 1982 to form the “Commission on European Contract Law”, a private self-appointed group of academics from all Member States of the European Community which had no official or governmental status, accreditation or financial support. It took this group about twenty years to produce the “Principles of European Contract Law”<sup>4</sup> which identify, in a form and structure similar to that of the American Restatement, the common core of general contract law of all European Union Member States. The rules laid down do not enjoy the force of law; their force is based on influence, not on power. Even so, they have meanwhile been the subject of countless articles, conferences and seminars. They have been invoked in arbitral proceedings and awards as an international standard of contractual obligation. They have been of some influence on the revisions of the civil code in a number of countries, and are clearly the most advanced and internationally most widely noted project on the way towards the harmonization of European contract law.<sup>5</sup>

It is not without good reason that the general rules of contract law have first been used by comparative lawyers to show that the idea of a common private law for Europe has a demonstrable and realistic basis. Even though the contract law of the European states, like private law in general, was hidden away behind the walled enclosures of the national legal systems for 250 years, there is evidence that the philosophical foundations,<sup>6</sup> fundamental conceptions and common evaluations of contract law have not been deeply affected. In the meantime, however,

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3. Hein Kötz, *Gemeineuropäisches Zivilrecht*, in Festschrift für Konrad Zweigert 481 (Herbert Bernstein, Ulrich Drobnig & Hein Kötz eds., 1981).

4. PRINCIPLES OF EUROPEAN CONTRACT LAW, Part I (Ole Lando & Hugh Beale eds., Part I, 1995); PRINCIPLES OF EUROPEAN CONTRACT LAW (Ole Lando & Hugh Beale eds., Parts I & II, 2000); PRINCIPLES OF EUROPEAN COMMON LAW (Ole Lando, Eric Clive, André Prüm & Reinhard Zimmermann eds., Part III, 2003).

5. The Principles of European Contract Law are very similar to the UNIDROIT Principles of International Commercial Contracts which were first published in 1994 and lay down general rules on international commercial contracts. See PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (UNIDROIT ed., 2004); Michael Bonell, *UNIDROIT Principles 2004*, 9 UNIFORM L. REV. 6 (2004).

6. See JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* (1991).

the idea of a European common private law has gone far beyond contract law and has indeed spread in the European academic scene like wildfire. As we shall see there is today a veritable academic industry of proliferating follow-up projects. The technique of the Commission on European Contract Law has been adopted by other groups of academics focusing, for example, on European tort law, European trust law, European insolvency law, European family law, and European civil procedure. There are now books developing what they call the “European common law” of a given area. This is a law which is applied by no European court, but whose virtual existence these books assume as their working basis and whose substance they explore with the working tools of the comparative method not by disregarding the national legal systems but by discussing them as local variations on a European theme.<sup>7</sup> “Casebooks for the Common Law of Europe” have been published which make available to students materials from national codes, national cases and national legal literature in an attempt to show the extent to which common principles and rules underlie the European legal systems.<sup>8</sup> Needless to say that there are now a number of legal periodicals which proclaim on their mastheads their devotion to the development of European private law. And the Max Planck Institute in Hamburg recently published a two-volume “Handbook of European Private Law”, soon to appear in English, which describes in 2000 pages the European context of 457 key terms in the light of their historical and comparative dimensions and the existing European law.<sup>9</sup> There are hardly any comparative law professors in Europe these days whose work is not somehow connected with the “Europeanization of private law”, a process whose details and ramifications are described to an English-speaking audience in two recent masterly contributions by Reinhard Zimmermann.<sup>10</sup>

Comparative lawyers in America might look with envy at the situation in Europe. In Mathias Reimann’s view, “in Western Europe

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7. See HEIN KÖTZ, *EUROPEAN CONTRACT LAW* (translated from German by Tony Weir, vol. 1, 1994). This book deals with formation, validity and content of contracts and with agency, contracts for the benefit of third parties and assignment. See also CHRISTIAN VON BAR, *THE COMMON EUROPEAN LAW OF TORT* (Vol. 1, 1998) (Vol. 2, 2000).

8. See, e.g., HUGH BEALE, BÉNÉDICTE FAUVARQUE-COSSON, JACOBIE RUTGERS, DENIS TALLON & STEFAN VOGENAUER, *CASES, MATERIALS AND TEXT ON CONTRACT LAW* (2d ed. 2010).

9. *HANDWÖRTERBUCH DES EUROPÄISCHEN PRIVATRECHTS* (Jürgen Basedow, Klaus J. Hopt & Reinhard Zimmermann eds., 2009).

10. Reinhard Zimmermann, *Comparative Law and the Europeanization of Private Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 539 (Reinhard Zimmermann & Mathias Reimann eds., 2006); Reinhard Zimmermann, *The Present State of European Private Law*, 57 *AM. J. COMP. L.* 479 (2009).

comparative legal studies have indeed gained a momentum and a significance unprecedented in the last hundred years.”<sup>11</sup> American observers might argue, however, that comparative scholarship in Europe is mainly a purely academic exercise. They might argue that comparative scholarship is an adjunct of the real world of legal practice. What practical importance does the Europeanization of private law have for practitioners, judges and lawmakers? What is its spillover into the world of action?

It is indeed true that the original calls for the Europeanization of private law were made by academic lawyers with a historical and comparative bent. They called attention to the fact that both England and Continental Europe experienced what was called a common law. The English common law was national law rooted in the authority of the crown and the royal courts. The European common law was the *ius commune* which was transnational law based on the university-centered intellectual tradition of studying and teaching the medieval Roman law. What was first needed in their view was work by academic lawyers and law teachers to revive and reconstitute the common principles and rules which existed and still exist in the European legal systems. As it would take some time to achieve a common understanding of these matters, the general view was that it would be premature to rush off too quickly to comprehensive uniform legislation, let alone to the enactment of a European civil code.

However, what began as an academic enterprise has meanwhile been transformed to a significant extent into a political project. One reason was that it became clear in the 1990s that account must also be taken of the existing European law—often called the *acquis communautaire*—which includes not only the many directives passed by the European Community on private law questions, but also the relevant case law of the European Court of Justice. Most private law directives deal with consumer protection. Some tackle the special case of formation of particular consumer contracts, such as those concluded “on the doorstep” and in the field of package travel. Others are more ambitious since they do not focus on formation and disclosure but challenge the very notion of contractual autonomy. Examples are the

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11. Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 691 (2002). For reasons not to be discussed here, he thinks, however, that “the recent success of European comparative law is easily overrated”. It has proceeded “on an extremely traditional and narrow path: its underlying conception of ‘law’ is positivistic, its methods are rather simple, and its goals are consciously one-sided.” *Id.* at 692.

Unfair Terms Directive of 1997 which introduced a mandatory judicial fairness control for all non-negotiated provisions in consumer contracts, the Directive of 1997 on the protection of consumers in respect of distance contracts, and the Consumer Sales Directive of 1999. There was a controversial debate at the time on whether the European Community had the competence to pass these directives under Article 95 of the EC Treaty. This would have required proof that any disparity of national rules on, say, doorstep selling or consumer sales would really form a serious barrier to cross-border trade and/or impede the proper functioning of the internal market.<sup>12</sup> This is indeed what was stated again and again in the preambles to the various directives. If this assumption were correct it would mean that any difference between the private laws of the Member States could be accused of standing in the way of the completion of the internal market and must, on that ground alone, be eliminated. This conclusion is hard to accept. The American example shows that a large and economically fully integrated market does not depend to a significant extent on the existence of uniform legislation on general contract law or contractual consumer protection. In Europe cross-border transactions are made difficult primarily because of language barriers, distance and different commercial usages and habits. In many cases little depends on the contractual rights made available by the applicable law. Sometimes it is too costly to enforce these rights. Sometimes, a party's belief in the proper performance of the agreement is based not on any legal rules, but on the expectation that the other party may wish to become a "repeat player" and desire to do business with him again. In other words, the real driving force behind these directives seems to me to have been not the removal of real trade barriers but simply the prevailing political consensus of the Member States to establish a certain minimum level of consumer protection.

The various directives on consumer protection were passed in the course of some twenty years and are therefore ill-adjusted to each other, needlessly complex and based on different conceptions of consumer protection. While such inconsistencies would probably have been accepted in the United States without much ado, the general view in Europe was that there was a need for legislation that would consolidate, streamline and update the directives. No help was to be expected in this regard from the Commission on European Contract Law. It had started its work on the Principles of European Contract Law before the

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12. See European Court of Justice, Case C-376/98, *Germany v. European Parliament* [2000] ECR I-8419.



enactment of the first directives. It decided to continue on the chosen path, leave the *acquis communautaire* aside and confine its attention on what is called the *acquis commun*, in other words, on the principles and rules of contract law common to the European national legal systems. In order to fill this gap the Commission encouraged the formation in 2002 of a special “Research Group on the Existing Contract Law”. With its approximately fifty academic members, this group produced in 2008 a set of principles and rules which were mainly derived from the existing European directives on consumer protection and the pertinent case law of the European Court of Justice but also included references to the Principles of European Contract Law and the Convention on the International Sale of Goods (CISG). Thus it tried to feel its way toward the more ambitious objective of formulating a general European Contract Law.<sup>13</sup>

The idea of codifying the European common private law had indeed been around for many years. Already in 1989 the European Parliament had nailed the flag of codification to its mast. Recognizing that “the Community has today harmonized many individual aspects of private law” it came to the conclusion which must sound astounding to American ears that such “legal coverage of individual subjects does not meet the needs and objectives of a single market without frontiers.” On that ground it was resolved to ask the Commission “that a start be made on the necessary preparatory work for a European Civil Code of Private Law.”<sup>14</sup> This Resolution was at the time surely a little over-ambitious and starry-eyed if only because it was unclear whether the demonstrable need for such a code really existed, where the competence to engage in such a far-reaching unification project might lie, and what the political chances of success might be in the foreseeable future. Nonetheless the idea of codifying or at least paving the ground for a European common law was accepted with enthusiasm by European legal scholars. In 1989 a “Study Group on a European Civil Code” was formed at the inspiration and under the chairmanship of Christian von Bar. This “Study Group” sees itself as the successor of the Commission on European Contract Law although it has a different structure and working method and has enlisted the help of hundreds of comparative lawyers from all European countries.

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13. For details and further references, see H.C. Grigoleit & Lovro Tomasic, *Acquis Principles*, in *HANDWÖRTERBUCH DES EUROPÄISCHEN PRIVATRECHTS*, *supra* note 9, at 12. For a critical evaluation, see Nils Jansen & Reinhard Zimmermann, *Restating the Acquis Communautaire? A Critical Examination of the Principles of the Existing EC Contract Law*, 71 *MOD. L. REV.* 505 (2008).

14. See the Resolution of the European Parliament “on action to bring into line the private law of the Member States”, *Off. J. EC* 1989 C 158/400.

Its various subgroups and working committees have meanwhile drafted sets of model rules not only on contract law in general and on contracts for the sale of goods, the leasing of goods, the provision of services, mandate and agency and the provision of personal securities, but also on torts, restitution, transfer of movable property, gratuitous transfers and trusts and even on what it calls the “benevolent intervention in another’s affairs.”<sup>15</sup>

In 1999 the Council of the European Union requested the Commission to produce “an overall study on the need to approximate the Member States’ legislation in civil matters.” This gave the Commission the go-ahead to issue in 2003 an “Action Plan” for a “more coherent European contract law” and to start work on what it called, somewhat enigmatically, a “common frame of reference establishing common principles and terminology in the area of European Contract law.”<sup>16</sup> In 2005 the task of preparing a draft of this “common frame of reference” was entrusted by the Commission to a “Joint Network on European Private Law” which consists mainly of the two groups mentioned above, namely the “Research Group on the Existing Contract Law” and the “Study Group on a Civil Code”. Based on their earlier work these two Groups were able within three years to produce a “Draft Common Frame of Reference.”<sup>17</sup> This Draft provides model rules not only on general contract law and the law of sales, but also on nearly the whole law of obligations, property and trust, and thus covers many areas in which the comparative search for common rules of European law has only just begun or a common understanding of these rules has not yet been reached.

The Commission took a more cautious approach. An expert group was asked to draft an “instrument” covering merely sales contracts and service contracts associated with sales.<sup>18</sup> In a “Green Paper” published in

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15. For details, see Martin Schmidt-Kessel, *Study Group on a European Civil Code*, in *HANDWÖRTERBUCH DES EUROPÄISCHEN PRIVATRECHTS*, *supra* note 9, at 1453.

16. Off. J. EC 2003 C 63/1.

17. PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW, DRAFT COMMON FRAME OF REFERENCE (DCFR), OUTLINE EDITION (Christian von Bar, Eric Clive, Hans Schulte-Nölke et al. eds., 2009). The full text of the DCFR (including comments and comparative notes) was published in 2009 in six volumes comprising more than 6000 pages. For details, references to the immense literature and critical commentaries, see Reinhard Zimmermann, *Common Frame of Reference*, in *HANDWÖRTERBUCH DES EUROPÄISCHEN PRIVATRECHTS*, *supra* note 9, at 276; Horst Eidenmüller et al., *The Common Frame of Reference for European Private Law, Policy Choices and Codification Problems*, 28 *OXFORD J. LEG. STUD.* 659 (2008); Nils Jansen & Reinhard Zimmermann, “A European Civil Code in All But Name”: *Discussing the Nature and Purposes of the DCFR*, 69 *CAMB. L.J.* 98 (2010).

18. Commission Decision of 26 April 2010, in 2010/233/EC.

2010, the Commission invited comments on the kind of endorsement this “instrument” should get.<sup>19</sup> One option was to publish it in the official gazette as a “model law” recommended to the Member States for enactment either as their national law or as a law available to the parties alongside the co-existing national law. To support this option the Commission referred expressly to the model laws used in the United States. However, this option was rapidly laid aside. It was believed to be not ambitious enough and to remain a dead letter.<sup>20</sup> The Commission decided to take another option. The text produced by the expert group on a “Common European Sales Law” was published by the Commission as a Draft Regulation<sup>21</sup> which would create within each Member State’s national law a second contract law regime available to the parties on an “opt-in” basis, provided, however, that their contract is a “cross-border transaction” and at least one party is either a consumer or a “small or medium-sized enterprise”. Critics have argued that the entry-into-force of the “Common European Sales Law” in the Form of a Regulation might stultify the necessary further debate, sow the seeds of a European Civil Code and lay down rules which can be changed only if all Member States agree and are therefore practically immune to reconsideration in the light of the changing needs of trade usage, commercial practice and custom. On the other hand, it is clearly a major advantage of the Regulation that it would not replace national contract law. Instead, parties would be allowed to choose between national contract law and the “Common European Sales Law”. There would be regulatory competition between the systems and the result of that competition would show whether the transaction costs following from the application of national contract law are really as significant as the legal staff of the European Union and many if not most academics have so far assumed.

### III.

The pros and cons of legal unification have been discussed for centuries. One of Voltaire’s attacks on the civil and ecclesiastical establishments of his time was directed against the diversity of French law: “*N’est-ce pas une chose absurde et affreuse que ce qui est vrai dans un village se trouve faux dans l’autre? Par quelle étrange barbarie se*

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19. 1 July 2010, COM (2010) 348 final.

20. Cf. the comment on the “Green Paper” by the Max-Planck-Institute for Comparative and Private International Law in: 75 *RabelsZ* 370 (2011), at no. 20-31.

21. 11 October 2011, COM (2011) 635 final.

*peut-il que des compatriotes ne vivent pas sous la même loi?*"<sup>22</sup> The counterargument had already been made by Montesquieu a few years earlier: "*S'il est vrai que le caractère de l'esprit et les passions du cœur soient extrêmement différents dans les divers climats, les lois doivent être relatives et à la différence de ces passions et à la différence de ces caractères.*"<sup>23</sup> This is not the place to discuss the problem in detail. What is of interest here is that the United States, Britain and Canada, and perhaps all common law jurisdictions, take a comparatively cautious and guarded view of unification. They seem to take the position that, in a large country with a federal system, the authority of the central law-making agencies to pass uniform law should be exercised only where legal uniformity is supported by a compelling political or economic interest. On the other hand, legal diversity is seen as basically unacceptable not only in civil law countries but also in the European Union, which may be described as a civil law jurisdiction with Britain as a major retarding factor. Accordingly, the unification of law through the top-down approach of an exercise of central government power is given a high ranking. True, the level of unification in the European Union is low compared with that of its Member States, but legal unification has made enormous progress in Europe over the last 20 years, and chances are that further progress will be made in the foreseeable future. In the United States, on the other hand, there seems to be nothing special, let alone sacred, about legal unification. It is not pursued as an independent goal. It is pursued incrementally and is used only where a special interest group, either on the federal or state level, has been able to demonstrate that in a certain area law reform can best be achieved through a uniform rule. Failing such proof, American lawyers still seem to follow the Brandeis concept of the United States as a giant laboratory for legal policy in which any state can move forward in any direction by legislation or judicial decision and thus gain experience and reach views which enrich the debate on legal policy and serve as an encouraging or horrifying example to other states.

European lawyers have often noted, sometimes with amazement, that while the United States is clearly a fully integrated common market, "diversity in private law is still the norm and uniformity the exception."<sup>24</sup> The explanation is generally that American law is a very special case mainly because American lawyers share a common legal culture: They

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22. VOLTAIRE, *DIALOGUES ET ANECDOTES PHILOSOPHIQUES* VIII, 10-11 (Edition Garnier Frères: Paris 1966).

23. MONTESQUIEU, *DE L'ESPRIT DES LOIS* livre XIV ch. 1 (1748).

24. Gray, *supra* note 1, at 155.

are often trained in “national law schools” which focus on national law, provide students with a fairly national perspective and pay little attention to the law of the state where they sit. American lawyers speak the same language, share a common learning experience and are admitted to the legal profession on the basis of state bar examinations that examine nearly exclusively on “national general principles of common law” rather than the law of any locality. They are therefore able to communicate and argue with each other so effectively that they have come to accept the disorder of the law as a fact of legal life and have indeed been immunized or “desensitized . . . to the advantages of unification and harmonization.”<sup>25</sup>

There is little doubt that the situation is entirely different in Europe. We speak different languages, often communicate in broken English, have no “European law schools,” few European “teaching materials” and are operating under the legal systems of, say, France, Germany or Spain which are more different than the laws of Massachusetts and California. All this is perfectly true. But the question remains what the proper method of dealing with these problems is: Should we in Europe engage in a patient effort of creating a common European legal culture?<sup>26</sup> Or should we tackle the diversity of European private law by rushing off to comprehensive uniform legislation over a broad range of private law subjects?

In an interesting recent study, Daniel Halberstam and Mathias Reimann have sought to ascertain on a comparative basis the level of legal uniformity within twenty federal systems including the United States and the European Union.<sup>27</sup> Their conclusion is that, on average, law is significantly more unified in civil law systems than in common law jurisdictions. This would not be surprising if the legislative powers of the central government were generally stronger in civil law systems. This is not the case, however. There must therefore be other reasons pushing for uniformity than the mere existence of strong central

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25. *Id.* at 159.

26. This is what Melvin Eisenberg suggested. European lawyers interested in the harmonization of European law should in his view focus “not only on doctrinal unification, but on institutional design”, including the “denationalization of European law-school curricula, legal scholarship and bar examinations.” See Melvin Eisenberg, *Why Is American Contract Law So Uniform? National Law in the United States*, in *EUROPÄISCHES VERTRAGSRECHT* 23, 41 (Hans-Leo Weyers ed., 1997).

27. Daniel Halberstam & Mathias Reimann, *Federalism and Legal Unification: Comparing Methods, Results and Explanations Across 20 Systems* (forthcoming in D. Halberstam, M. Reimann & J. Sanchez-Cordero (eds.), *FEDERALISM AND LEGAL UNIFICATION* (Paris: Int'l Academy Comp. Law, 2012)), available at <http://ssrn.com/abstract=1557690>.

legislative powers. In the authors' analysis the most important legal reason is

the civil law tradition's habit to find law in a single authoritative text rather than in a multitude of individual decisions or scattered statutes. Codifications unify law with one stroke and on a massive scale . . . . Such massive national codification projects are almost unknown in common law jurisdictions. Again, while the U.S. Congress could surely enact a national or commercial private law code (at least one covering contracts, torts and movable property), it has never made so much as a serious attempt to do so. Nor do Australia or Canada, India or the United Kingdom have national codifications on a civil law scale.<sup>28</sup>

The dichotomy between the civil law and the common law has recently come under attack in comparative scholarship. The discrepancies between the systems have often been overrated. Reinhard Zimmermann takes the view that the two systems are "no strangers";<sup>29</sup> Basil Markesinis observed a process of "gradual convergence"<sup>30</sup> and James Gordley called the old distinction "out-dated."<sup>31</sup> Nonetheless, there are still important differences in the structure of both civil and criminal procedure, in the machineries of justice, in the training and ways of thinking of judges and the roles played by judges and advocates in the trial of civil actions.<sup>32</sup> Another characteristic feature of civil law systems is the idea of codifying essential fields of private law and the associated technique of using the code as a source of rules and general principles which pre-empt the field and are assumed to carry within them the answers to all possible questions. The longstanding acceptance and use in civil law countries of codes as the centerpieces of private law may have contributed to the natural and instinctive propensity of civil lawyers to systematize, generalize and unify. Originally, codification was a product of the era of enlightenment. It sought to free the individual from his medieval shackles by subjecting the traditional authorities in religion, politics, law and culture to rational criticism and to make it possible for people to create a new view of the world on the basis of reason. In the

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28. *Id.* at 41.

29. Reinhard Zimmermann, *Savigny's Legacy, Legal History, Comparative Law, and the Emergence of a European Legal Science*, 112 L.Q. REV. 576 (1996); *see also* Reinhard Zimmermann, *Comparative Law and the Europeanization of Private Law*, *supra* note 10, at 558.

30. THE GRADUAL CONVERGENCE: FOREIGN IDEAS, FOREIGN INFLUENCE AND ENGLISH LAW ON THE EVE OF THE 21ST CENTURY (Basil Markesinis ed., 1994).

31. James Gordley, *Common Law and Civil Law: Eine überholte Unterscheidung*, 1 ZEuP 498 (1993).

32. *See, e.g.*, Hein Kötz, *Civil Justice Systems in Europe and the United States*, 13 DUKE J. COMP. L. 61 (2003); Hein Kötz, *The Jurisdiction of Choice: England and Wales, or Germany?*, 6 EUR. REV. PRIV. L. 1243 (2010).

legal field the idea was to replace the diverse and unmanageable traditional law by comprehensive legislation consciously planned in a rational and transparent order. In England, despite Jeremy Bentham, these ideas could never make headway against the sober, practiced and traditionalistic conservatism of English lawyers. On the Continent, however, the enlightened authoritarian rulers of Prussia, France and Austria eagerly availed themselves of the proposals made by legal academics and passed comprehensive codes which unified the law and enabled the citizens, through an exhaustive treatment of all major areas of private law, to know their rights and duties within society. The drafters of these codes realized that room had to be left for judicial decisions to make the law applicable to unforeseen cases. On the other hand, the drafters wanted to remain faithful to the idea that a code was to provide a comprehensive and exhaustive treatment of the field. The compromise was, first, to use in many places broad and general clauses designed to be filled in by judicial decisions and, second, to include in the sections on contract law a full set of non-mandatory “default rules” meant to accommodate, as to each type of contract, the typical interests of the parties in a fair and balanced manner. Precedents will of course be used as persuasive guides to the appropriate interpretation of code provisions. Ultimately, however, authority for a particular result must be shown to flow from the framework provided by the code. This is the general approach not only of civil law judges. It is taught to students in civil law faculties, guides the legal staff of the ministries of justice in civil law countries, and shapes the outlook of many scholars supporting the unification of European private law through a European Civil Code or a Code on the law of obligations or contract. Common lawyers, on the other hand, do not feel at home with this approach, perhaps because of their antipathy toward the hierarchical ordering by central law-making bureaucracies, perhaps because of their empiricist tradition of taking into account spontaneous social change and the gradually accumulating experience of developing community standards, usages and customs.

It would no doubt be attractive to end this paper with an attempt to conclude where the development will go. Despite my natural desire not to commit myself when I may be proved wrong in the next 100 years, my prediction is that we will finally end up in Europe with a code on contract law or the law of obligations, but this will take some time. Instead of imposing grand formulations as mandatory substitutes for local and industry-specific practices, we would do better to emphasize the choices that parties are likely to select because the solutions offered

provide a superior answer to the concrete problems they face.<sup>33</sup> This is why I think that the Commission takes the right approach in allowing parties to make a choice between European and national contract law. It will take some time before we know what success, if any, the “Common European Sales Law” will have in its competition with national contract law regimes. It will also take some time to realize that uniform European legislation will only be workable in practice if the minds of European lawyers have been prepared for it by a thorough Europeanization of legal education and legal writing. Finally, it will take some time to convince English lawyers that a code would not sound the death-knell to an orderly process of reasoning from case to case.<sup>34</sup> At any rate, the time is not yet ripe for the replacement of national law by uniform European legislation. I am saying this as a civil lawyer who believes in the virtues of codification, and I hope this makes my statement believable. After all, as the English mathematician G.H. Hardy once said: If the Archbishop of Canterbury says he believes in God, that’s all in the way of business. But if he says he does not, one can take it he means what he says.

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33. I am taking this sentence from Arthur Rosett, *Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law*, 40 AM. J. COMP. L. 682, 697 (1992).

34. For a full discussion of the pros and cons of codification from an English lawyer’s viewpoint, see HUGH COLLINS, *THE EUROPEAN CIVIL CODE, THE WAY FORWARD* (2008).