

BUILDING A EUROPEAN CONTRACT LAW: Five Fallacies and Two Castles in Spain¹

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Introduction

I begin with a citation from Atiyah:

When laws and institutions grow organically in the English way, it is dangerous to tamper with the different bits which may seem useless and outdated. The proof of this is that the system works as a whole even if we cannot say why it works and what rational purpose the different bits may serve. Each part of the total edifice may well have its purpose, even where we cannot understand it.²

Law is compared here with an edifice, obviously a very old edifice with parts the purpose of which has been forgotten. This view on common law reminds me of another citation by one of the great legal scholars of this university, Paul Scholten, who in a famous paper of 1938 explained why he was not in favour of a recodification of the Dutch civil code of 1838. He wrote:

The civil code is a quiet possession. It is like a big old house. Some parts need repair, others have been torn down . . . some rooms have been modernized . . . The inhabitants long to improve it and complain of its defects, but they know very well that there will be no change . . . It is cosy and familiar, and the inhabitants feel at home.³

Again the metaphor of law as an old building is used. The tone of both citations is one of resignation in view of the outdated parts of law. Both citations show the attachment of the authors to their own legal system, but they also suggest that their general attitude to their legal system is not very different. As we know, Scholten's view was disregarded by the Dutch legislature; Atiyah's edifice has hardly changed.

The metaphor is appropriate indeed. It has become even a kind of common place. If you are conscious of it, you meet it everywhere. A curious side of this is that law buildings,

¹ Presentation at the Ius Commune Congress, 28 November 2002, Amsterdam.

² P.S. Atiyah, *Pragmatism and Theory in English Law*, London 1987, p. 34, cited by J. Smits, *The Making of European Private Law*, Antwerp/Oxford/New York 2002, p. 100.

³ P. Scholten, *Verzamelde geschriften*, vol. 3, Zwolle 1951, p. 29.

other than real buildings, are moving all the time. Walls are toppling in slow motion, sometimes they remain slanted for some time. Two or more buildings may develop into a new one. This metaphor fascinates me, and I will return to it several times.

Having said this, I come to my real subject: What to expect of European contract law against the background of the famous communication of the European Commission of 11 July 2001? This communication proposes four options for further action: option 1: doing nothing; option 2: soft restatement of general principles; option 3: improvement of legislation already in place; option 4: binding new legislation. The reactions concerning these options have been summarized by the Commission in a subsequent paper. My contribution to this discussion will consist of drawing your attention to some of the fallacies that should be avoided here.

1. The fallacy of ignoring the problem

The simplest way of tackling a new problem is often to deny it. This seems to be the prevailing attitude in the Netherlands. On the website of the Commission, I found no reactions from the Dutch government, nor from Dutch governmental organisations, nor from Dutch business or consumers organisations, nor from Dutch legal practitioners and their organisations. Only three academics gave their opinions.⁴ The Belgian attitude is quite different. Reactions were received from the Ministries of Justice, Finance and Economic Affairs. The Ministry of Justice coordinated these reactions, including some reactions from business and consumer organisations. The entire reaction is substantial and positive. It seems to me that the Dutch attitude should be the first and perhaps the most important of the fallacies to expose here.

Why is it a fallacy? Annex I to the communication of the Commission makes it perfectly clear that important, though scattered, fields of private law are already covered by European directives. They not only concern consumer protection but also matters such as late payments in commercial transactions, electronic money, cross-border credit transfers, commercial agents, electronic commerce and financial services, intellectual property, financial collateral arrangements and, last but not least, the monetary rules concerning the euro, touching private law on many points. A true internal market for all individual payments is one of the projects under way. The European integration process in fact entails an increasing flow of European legislation, including legislation on private law issues.

But this is not the only gateway through which European law is penetrating our national law systems. European concepts may have a disintegrative, disturbing effect on the national system. This means that the national authorities have to adapt their national rules, preferably by interpreting or by incorporating European rules in their general standards, like good faith or negligence. The result is a kind of creeping Europeanisation of national law. Mr Joerges has written extensively on the subject.⁵ A third gateway consists in the obligation of the national authorities to ensure an effective application and enforcement of Community law through domestic legal instruments. This is mainly, though not only a matter of procedural

⁴ Five members of Dutch law faculties, but two of them are in fact Belgians.

⁵ C. Joerges, 'Interactive Adjudication in the Europeanisation Process? A Demanding Perspective and a Modest Example', *ERPL* 2000, p. 1 ff.

law.⁶

A recent example of this is related to the Dutch scandal concerning by the abuse of the subsidies given by the European Social Fund. Such subsidies are bound to strict rules, which were violated grossly by the Dutch authorities. According to European law, the Netherlands are obliged to force the institutions which received these subsidies to return them. But the only instrument available is national Dutch law on undue payment or unjust enrichment. This gives problems especially in cases where the subsidy was transferred to a third party, who in fact spent the money. In such cases, the subsidy should be claimed from the third party, whose advantage distorted the market. In the laws of many countries, including the Netherlands, enrichment cases involving third parties are notoriously difficult and uncertain. This means that European law forces us to develop rules to meet this difficulty.

The conclusion must be that there is already a considerable amount of European private law and that we should expect that it will increase. There is, however, consensus about the fact that this European law up to now is badly coordinated and shows many inconsistencies. The expanding edifice of European law, intertwined with national law as it is, is extremely unsafe indeed. Nevertheless, we can be sure that the flow of European regulations will continue, irrespective of the trustworthiness of the building. For that reason, the issue of coordination of this increasing flow of rules cannot well be avoided. Coordination is not really possible if we concentrate only on option 3, limited to existing European law (*acquis communautaire*). You cannot solve a puzzle if new pieces are added all the time. The only solution is to combine options 2, 3 and 4. The river should have a bed, in which it can run on smoothly and without inconsistencies. The question of unifying European private law is basically a question of accelerating and improving a process that is in itself inevitable. If you cannot stop a process, you better join it, which enables you to influence it. The only choice is: Are we going to take a reluctant or an eager attitude?

2. The fallacy of fearing emotional obstacles

Having explained my basic position, I now come to the obstacles opposing it. Many of them are of an emotional or irrational nature. I will not go deep into them, because I think they should not stop us, exactly because they seem not rational. I mention some of these arguments: a) National legal cultures are irreconcilable, especially where civil law and common law are involved;⁷ b) The richness of many law systems, each with its own features,

⁶ A good overview of the problems of this gateway, focused on procedural law is given by T. Heukels and J. Tib, 'Towards Homogeneity in the Field of Legal Remedies: Convergence and Divergence', in P. Beaumont, C. Lyons and N. Walker (eds.), *Convergence and Divergence in European Public Law*, Oxford 2002, p. 111 ff. For a recent case concerning tort law, see ECJ 17 September 2002, *Muñoz v Frumar*, C-253-00.

⁷ This allegation is contradicted clearly by the phenomenon of legal transplants. In my experience, legal professionals understand each other very well, even if they come from quite different legal systems (UK, US, Russia, China). Probably they understand each other much better than they are understood by the lay people of their own country.

is an asset which should not be lost in a multicultural Europe;⁸ c) Codification as such is an outdated concept, popular in the nineteenth century, but ignoring the needs of modern society;⁹ d) We should fear the influence of a 'European Union bureaucracy, consisting largely of uprooted civil servants often entertaining an ambivalent relationship with their national legal culture'.¹⁰ All these fears and worries seem unfounded or grossly exaggerated to me. They resemble an emotional crossfire, characteristic of rearguard actions of the same kind as I had to fight working on the Dutch civil code.

But this does not mean that they are irrelevant. For, roughly speaking, they may boil down to a very real obstacle that is probably the hidden force behind those emotions. To explain this, I should begin by showing you the enigmatic keyword 'QWERTY', well known by all of you, even if you are not aware of it.

I have in mind a well-known article by P.A. David in the *American Economic Review* of 1985, called: 'Clio and the Economics of QWERTY'.¹¹ Clio is the muse of history. 'QWERTY' are the first six letters on the keyboard of your computer, as they also were the first six letters of the typewriter at the beginning of the previous century. They have been maintained on the keyboards of all our computers and survived the developments of hardware, software, the internet and what not. In fact, they certainly do not represent the most effective order of letters for users of a keyboard, even if their language is English. Nevertheless, the combination will probably be maintained for a long time because it would be a disaster if everybody were to be forced to learn a new letter order. David's article departed from the notion of 'hysteresis', which is Greek for retardation, a term used in physics as well as in economics. David replaced it by the term 'pathdependence', well known by the specialists of law and economics. In my view, the importance of this phenomenon in the field of law is greatly underestimated. Sudden changes in a law system will always provoke resistance. Legal scholars as well as legal practitioners will think that the advantages of innovation are not worthwhile compared to the loss of knowledge and skill entailed by it. They feel safe in the well-known surroundings of law's familiar edifice. I remind you of the citations from Atiyah and Scholten.

This is not matter of having a conservative attitude. What is behind it is the thought that the development of law should go by small steps, striking the right balance between innovation and continuity. In the case of codification or recodification, finding this balance will become a major issue. The new Dutch civil code is in many respects a continuation of the case law developed under the old one. Even the new Russian civil code, though it had to take

⁸ Contract law is essentially linked to economic issues relating to the Common Market. It is difficult to see the advantage of this 'richness', which is obviously a serious obstacle to the transparency of this market, especially after the ten candidate new Member States have entered.

⁹ Every unification has to start with a binding black-letter instrument, call it a codification or not. The argument seems to exclude any such instrument and, as a consequence, any unification. This is clearly contrary to international practice. It should be noted that many national codes were in fact unifications (the German HGB and BGB, the Swiss ZGB, the US UCC).

¹⁰ P. Legrand, *Against a European Civil Code*, *MLR* 1997, p. 44 ff, esp. p. 51. This argument neglects that a European contract law, drafted by leading experts in this field and based on sufficient consensus within the European Union, will limit considerably the power of the European civil servants whose future regulations will have to fit within the framework of this legislation.

¹¹ See also J. Pen, *ESB* 1994, p. 998.

into account major economic, political and social changes, was built on the foundations of the old one. It was thought to be unwise to force the judiciary to abandon familiar rules even where they fitted quite well into the new situation.¹²

It is clear that the QWERTY phenomenon constitutes a serious barrier to the development of European contract law. Only very determined efforts will be capable of breaking through it. This seems only possible by trying to enlarge the areas of consensus. The well-known Commission on European Contract Law (Lando) and the Study Group on a European Civil Code (Von Bar) have paid much attention to this, stressing the importance of option 2. Formulating general principles, even as soft law, may serve continuity by establishing a common core of contract law and by furnishing a basis for consensus. Others have sought the solution in building castles in Spain. I will point out two of them.

3. The first castle in Spain: Common historical roots

Many supporters of the concept of a European civil code ask attention for our common roots in Roman law. I will not digress here on the unrealistic hope for a revival of a *ius commune*. The time for historical interpretation is over. But I share the nostalgia for the beautiful times when we were all able to communicate in perfect Latin instead of in the barbaric vernacular in that I am using now.

4. The second castle in Spain: The invisible hand

It has been argued by several writers that unification of law should be left to a free movement of legal rules which will lead to competition in which only the best rules will survive. In this theory, the market mechanism is applicable to law systems and, in the view of Smits, also on individual rules of law.¹³ Automatically, the parties active on the market will select the rules that they think most effective in the sense of most favouring their interests. The example is cited of the fifty states of the U.S., each having their own company law and entrepreneurs being free to incorporate their companies in the state of their choice. This will automatically attract investors to the most beneficial state, which is the state with the lowest standards (Delaware), the so-called race to the bottom. I will not go into the merits of this theory as a way of explaining certain phenomena. What interests me here is the pretension of this theory that it relieves the legislator from the task of codifying the most efficient rule, because it will evolve all by itself in practice.

The theory has been linked to Darwinist concepts, such as adaptation to the environment, natural selection and survival of the fittest. Law is seen as a living organism shaped by its environmental conditions. As Smits states: 'A system of rules should primarily be looked at as a spontaneous order that emerges in response to the environment. In this sense the whole venture of creating a common European market automatically invokes a new,

¹² See W. Snijders, 'De exportpretentie van het Nederlands BW. De Russische ervaring', *Trema* 2002, October special, p. 430 ff.

¹³ J. Smits, *The Making of European Private Law*, Antwerp/Oxford/New York 2002, pp. 59-71.

partly unintended legal system.’¹⁴ What is supposedly at work here can be described as an invisible hand that will lead to better results than interference of a European legislator.

As a metaphor, the theory seems interesting. It describes and predicts possible future developments from a meta point of view. It reminds one of the famous word of Portalis: ‘Les codes des peuples se font avec le temps; mais, à proprement parler, on ne les fait pas.’¹⁵ But clearly it cannot serve as a basis for a practical policy of abstaining from interference in those developments. Portalis had to create the code he was talking about. It may be interesting from a scientific point of view to analyse the process that leads to the development of rules and to predict the way this process will take. But the prediction can only become true if the workers in the legal field make the necessary efforts to follow this way. If nobody interferes, the train will go on along the same railway track. If you do not like this, you have to make the effort of building another railway track, new railway yards and new stations. I just remind you of the QWERTY phenomenon. Again the building metaphor appears appropriate; it stresses the human efforts needed for breaking through QWERTY.

As far as judges are involved, the theory neglects that usually their main concern is to stay in line with their own case law. And they will have to come to a decision within a reasonable time. For those reasons, they will rarely indulge in the luxury of investigating the solutions offered by the national law systems of the other Member States of the European Union, though comparative law may be helpful where their own legal system is uncertain.

Moreover, the theory trusts that enterprises, serving their own interests, will unintentionally choose in their contracts the rules that are in the interest of society as a whole. Also this part of the theory is unrealistic. It is not the task of an enterprise to protect its customers against its own strong bargaining power, nor to protect weak parties in general. That is a matter for legislation. This brings me to the next fallacy.

5. The fallacy of the needs of business

Of course, the classical argument for a codification of European contract law is that it is in the interest of industry and commerce, operating in the European Common Market. It reduces transaction costs. It furthers transparency. It facilitates operating in all Member States of the European Union without the risks of an unknown legal system if the other party wants to retreat from the contract or does not perform his obligations. The combined reaction of Messrs Lando and Von Bar to the communication of the European Commission¹⁶ stresses this point with many examples, which at first sight seem quite convincing. It is certainly true that diversities of contract law are an obstacle to the full use of the Common Market. But the question is: How important is this obstacle?

The reactions to the communication of the EC from the business world itself show

¹⁴ J. Smits, ‘How to Predict the Differences in Uniformity between Different Areas of a Future European Private Law?’, in A. Marciano and J.-M. Josselin (eds.), *The Economics of Harmonizing European Law*, Cheltenham/Northampton 2002, p. 66.

¹⁵ Discours préliminaire, prononcé le 24 thermidore an 8, lors de la présentation du projet du Code civile, arrêté par la commission du gouvernement.

¹⁶ O. Lando and C. von Bar, ‘Communication on European Contract Law: Joint Response’, published also in 10 *ERPL* 2002, p. 183 ff.

that business is less interested in the issue of unified European contract law than we would expect, considering that business is supposed to be the first to benefit from uniform contract law. Reactions in favour of option 1 (doing nothing) are found mainly among the reactions from business. Most reactions stress the freedom of contract. Others are hostile to doing more than revising the existing directives (option 3). Usually they add that minimum consumer protection should be replaced by full harmonisation which excludes national variations, resulting, of course, in generalizing the lowest protection level.

I think that this is not at all amazing. Enterprises are intent upon the freedom of contract, which enables them to protect themselves by their contractual conditions. As far as their legal environment permits it, they have to run their business as profitably as possible (wealth maximization). Protecting workers, customers or consumers is not their cup of tea. They are mainly interested in finding contract partners whom they can trust. From an economic point of view, trust diminishes transaction costs.¹⁷ They are less interested in legal rules which may help if their trust turns out to be unjustified. If the other party does not perform his part of the contract, many entrepreneurs will not cry over spilt milk. They will just try to make good the loss by means of subsequent contracts with more reliable partners. Generally speaking enterprises tend to see matters of law as of minor importance in the whole field of commercial strategy. What is happening in practice is that business circles leave legal problems to their lawyers, who will just try to minimize the damage.

Against this background it is understandable that Mattei in his recent paper 'Hard Code Now!' has turned the argument of the needs of business upside down.¹⁸ Business does not need the unification of European law. *We* need such unification to protect our society *against* business. Mattei speaks of 'corporate rapacity'. Remember the 'race to the bottom'. Business will automatically seek the legal environment where protection of its potential contracting partners is weakest. Obviously, Mattei exaggerates when he relates this to post-colonialism and the protection of our destitute brothers in Southern countries. But I think that in essence he is right. The counterpart of corporate rapacity is 'corporate responsibility', but it would be a mistake to put our trust in this rather vague concept.

6. The fallacy of overemphasizing the political issue

This brings me to the political aspect. Some writers, inspired by the United States critical legal studies, have argued that drafting a European contract law confronts us with two contrasting views.¹⁹ The first one stresses the freedom of contract as a liberal concept,

¹⁷ B. Harvey, in B. Harvey (ed.), *Business Ethics: A European Approach*, s.l. 1994, p. 11.

¹⁸ U. Mattei, 'Hard Code Now', 1 *Global Jurist Frontiers*, 2002, article 1.

¹⁹ See, especially, M. Hesselink in a series of publications: M. Hesselink, 'The Structure of the New European Private Law', in E. Hondius and C. Joustra (eds.), *Netherlands Reports to the Sixteenth International Congress of Comparative Law: Brisbane 2002, Antwerpen 2002*, p. 7 ff, in particular p. 9 ff; M. Hesselink, 'The Politics of European Contract Law', *Global Jurist Frontiers*, vol. 2, issue 1, 2002, article 3; M. Hesselink, 'The PECL: Some Choices Made by the Lando Commission', in M. Hesselink and G.J.P. de Vries, *Principles of European Contract Law*, preadvies Vereniging voor Burgerlijk Recht, Deventer 2001, in particular p. 53 ff.; and M. Hesselink, *The New European Legal Culture*, Deventer 2001, based on his inaugural lecture of 27 June 2001 at the Universiteit van Amsterdam.

indicated by the term (party) ‘autonomy’. The second one stresses the need to protect weak parties, leading to mandatory law, as a socialist or at least left wing concept, for which the current term is ‘solidarity’. Mattei is a clear example of the second view. In the Netherlands, this contrast has recently become a much debated issue.²⁰

I admit that this point is an important one. But I wonder how much room the European framework leaves us for a choice between autonomy and solidarity. Choices of this kind have already been made in the fundamental rules and principles of the EC treaty. The Common Market requires a wide field for party autonomy, as every market economy does. Of course, mandatory law is needed to guarantee a level playing ground for the participants and an effective protection of weak players against ‘corporate rapacity’. But those rules, to a large extent, have already been developed. A European contract law will have to accept the boundaries of the protection resulting from this development, just as they have to accept the free movement of goods, persons, services and capital. Within those boundaries many choices are still open, but I wonder whether we will have the choice between a liberal and a socialist approach. I suspect questions of efficiency, effectiveness and transparency will get much more attention. Here again we meet the balance between innovation and continuity. Moreover, things like the duty of care, a duty of cooperation, a duty of information, which have been used here as examples, cannot be characterized as liberal or left wing.

7. The fallacy of neglecting the problem of court congestion

I come to my last point: flanking measures. Some five years ago I suggested to facilitate the work on a European civil code by founding an international institute with scientific, organisational and political tasks.²¹ I will not go into this matter again, but I would like to draw your attention to the fact that in many of the reactions this suggestion has been picked up. The institute now even has a name: the European Law Institute (ELI), alluding to the well-known American Law Institute (ALI). If we want to build a European contract law, the building company needs an office.

There are other flanking measures that need our attention. Unifying black-letter law as part of the entire unifying process is only a first step. The following steps must be set by practice, which means by the courts. This raises the problem of court congestion. At this moment, the implementation of European law principles is to a large extent entrusted to the national courts, which may put questions to the ECJ. To induce a Dutch court to ask questions may take several years. To obtain an answer will usually take again several years. In other Member States, the situation may be worse. Court congestion in some Member States now already leads to long lists of parties filing identical complaints with the Court in Strasbourg on the basis of violation of the words ‘within a reasonable time’ in Article 6 of the EHRC (‘. . . everyone is entitled to a fair and public hearing within a reasonable time . . .’). This state of things will certainly not be acceptable if a large part of European private law has been brought together in a binding instrument asking for interpretation. Effective unification

²⁰ A book on this subject by members of the Law Faculty of the Universiteit of Amsterdam will appear in 2003: ‘Privaatrecht tussen autonomie en solidariteit’.

²¹ W. Snijders, ‘The Organisation of the Drafting of a European Civil Code: A Walk in Imaginary Gardens’, 4 *ERLP* 1997, p. 483 ff.

cannot do without such a final decision by a court at the European level. If we do nothing at the national level, this means that, in all cases in which contract law is involved, four instances are needed to reach the final solution. This is fuel to the fire of court congestion.

Among the few authors giving attention to this problem are Messrs Lando and Von Bar in their combined reaction to the communication of the European Commission. They rightly state that the existing model whereby the national courts refer questions to the ECJ is already under strain and would doubtless not be workable any more after unifying a substantial part of private law. They appear to accept fundamentally a system resulting in four instances. As a remedy they mention the possibility of 'leap frogging' procedures, enabling cases to jump from lower national courts to the national Supreme Court or to a European court.

This is not the moment to go deeper into this issue. I only remark that it seems worthwhile to investigate the possibility of setting up a real European judiciary for European private law cases. European courts of first instance and appeal would enable bringing together judges from different countries, forcing them to cooperate. I think that the right instrument for unifying case law should be sought in that direction. Jurisdiction problems may be avoided by giving the plaintiff in mixed cases a choice between the local national and the local European court. This is in line and can be combined with a large possibility of leap frogging, in all directions, including from a lower national court to a European appellate instance or from a European court of first instance to a national supreme court, depending on the issues that need to be decided. It may give rise to a lot of forum shopping, but exactly this may lead to competition between the two jurisdictions, furthering their effectiveness. For a national judge, it might be a promotion to be appointed as a member of a European court. And a judge in a European court might be promoted to a higher national court.

Before I become too technical, I should end this paper. My last observation is that a well-functioning European contract law is only possible if we succeed in finding workable solutions for those technical aspects of procedural law. What is at stake here is access to justice. Without it, there is no point in unifying European law.