

THE STRUCTURE OF THE NEW EUROPEAN PRIVATE LAW

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1 Introduction

For more than ten years there has been a debate going on in Europe on the future of European private law, and especially on the desirability and feasibility of a European Civil Code. This debate has recently gained special focus when the European Commission placed the need for a European Code of Contracts on the political agenda.¹ Assuming that at least part of private law could and should be common in the future², the question arises what structure this future common European private law should have. For most participants in the debate the default model for such a structure would be a European civil code³. In this paper I address the question whether a classical code in the sense of the French *Code civil* of 1804, the German *Bürgerliches Gesetzbuch* of 1900 or indeed the Dutch *Burgerlijk Wetboek* of 1992 would be the most appropriate form for the new European private law. I will discuss eight aspects of the structure of European private law which cast some doubt on the desirability today of a civil code (or a code of contracts) in the classical sense. Some of these considerations are very practical, some others are more theoretical. In my paper I will pay special attention to Dutch law since this is meant to be a Dutch national report.

2 A Classical Civil Code

The two main characteristics of a classical civil code are its (presumably) comprehensive and coherent character⁴. Comprehensive in the sense that, as a result of abstraction, it deals in principle with all matters of private law (as opposed to public law), not in the sense of exclusivity: the legislator (or the courts) may come up with specific rules outside the code (e.g. in separate statutes). The code is presumed to be coherent in the sense that there is no contradiction between the rules

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1. Communication from the Commission to the Council and the European Parliament, COM(2001) 398 final (11.07.2001), No. 52.

2. I have addressed this question elsewhere. See my 'The Politics of European Contract Law: Who Has an Interest in What Kind of Contract Law for Europe?' (Paper presented at the conference entitled 'Communication from the Commission on European Contract Law' organised by the Society of European Contract Law on November, 30th and December, 1st, 2001 in Leuven, Belgium; the contributions will be published in 2002 by Stephan Grundmann (ed.)). In brief, my position is that it may be worthwhile to substitute national private law by European private law where the latter is 'better' in substance. For me, that means, among other things, that it should be sufficiently social.

3. See e.g. ARTHUR HARTKAMP, MARTIJN HESSELINK, EWOUDE HONDIUS, CARLA JOUSTRA, EDGAR DU PERRON, *Towards a European civil code*, 2nd ed., Nijmegen and The Hague/London/Boston 1998.

4. See my *The New European Legal Culture*, Deventer 2001, p. 11 and following, with further references.

contained in it, that each rule has one true meaning, and that it provides only one right answer to each legal question. Other characteristics of a classical code include its systematic character and its use of abstract rules and concepts. The new Dutch civil code of 1992 has the characteristics of a classical civil code.

3 The Private/Public Divide

The assumption that a civil code deals with all matters of private law and is applicable to all conflicts between private parties is based on another assumption, i.e. that it is possible (and indeed useful) to distinguish between private law and public law. Private law is usually defined as the law which governs relationships between citizens as opposed to public law, which is the law which deals with the relationships between citizens and the state, or among state institutions. However, this clear-cut distinction does give rise to some doubt. Not only as a result of the development of administrative law and, especially, of functional fields of the law which do not seem to fit in very well with this distinction; there is also a more fundamental *critique*.

First, in many countries the cases where the state 'acts as a private person' are problematic. Classical examples include the case where a municipality buys new office equipment. In many countries private law (the civil code) applies directly or by way of analogy to such cases. However, if a European Civil Code were to be enacted, should that code then also apply to (some) national (and European) public authorities? Moreover, in some countries national administrative law and private law are increasingly intertwined. For example, the recent Dutch *Algemene Wet Bestuursrecht* (1994), which codifies the 'general part' of administrative law, contains many structural and conceptual aspects which resemble the general part of private law (patrimonial law) contained in Books 3, 5, and 6 of the civil code which were enacted in 1992. With the enactment of a European Civil Code this strong link between national private law and national administrative law would be broken. Unless, of course, national administrative law was to be adapted to the new European Civil Code. This would mean, however, that administrative law in Europe would also indirectly undergo further harmonisation⁵.

Even more problematic in this respect are the so-called functional fields of the law. In many European countries private law is rapidly disintegrating into functional fields of law. Usually, these functional fields are the most dynamic branches of the law: labour law, medical law, environmental law, information law, construction law, to name but a few. Their main characteristic, apart from their functional, pragmatic and non-dogmatic approach, is that they usually contain a mix between private and public law aspects. Some nostalgic civil law scholars will say that all these fields are in essence private law. However, they essentially miss the point. First, because these fields are mixes of private and public law (the relative quantity depending on the politico-economic climate of the day: regulation/deregulation). Secondly, because the approach to the law in those functional fields is much more pragmatic and less dogmatic. They have, as it were, abandoned the 'general part' of private law. It

5. See generally on the Europeanisation of administrative law J.H. JANS, R. DE LANGE, S. PRECHAL, R.J.G.M. WIDDERSHOVEN, *Inleiding tot het Europees bestuursrecht*, Nijmegen 1999.

would be anachronistic to dissect these fields into a private part, to be regulated on the European level in a European Civil Code, and a public part, to be regulated on the national (and maybe sometimes the European or another international) level. In addition, such an approach would also be un-European: the European legislator has not demonstrated any great sensitivity to the public/private divide. On the contrary, the EU has consistently adopted a functional approach to the law, in which private law as much as public law is instrumental to the political aims which the EU means to achieve by way of its directives and regulations⁶. The difference between the various Directorates-General of the European Commission seems to have been more determinant of the structure of European private law than a dogmatic, esthetical or political dedication to the private/public divide.

As said, private law is usually defined as the law which governs relationships between citizens as opposed to public law, which is the law that deals with the relationships between citizens and the state, or among state institutions. This definition is quite descriptive. However, there is another recurrent definition of private law which is much more political. In this definition private law is the law relating to the private area which is free from State intervention. In the latter view the only function of private law is allocation: *suum cuique tribuere*. In that view private law has an internal logic of its own which is politically neutral and is only concerned with giving every person what she or he is entitled to⁷. Especially, private law in that view has no distributionist nor any other paternalistic function: rather it is held that private law should not be instrumentalised for political aims. In that view the main pillars of private law are absolute property, freedom of contract and fault liability. This view has been forcefully attacked, especially in the United States, by the Sociological, Realist and Critical Legal Studies movements⁸. They challenged the idea that absolute property, freedom of contract, fault liability and party autonomy were the natural, apolitical foundations of private law, and they showed that this view of private law was instead closely linked to a *laissez-faire* Liberal (Conservative) view of the economy and society at large. Instead, they argued that there is no pre-legal entitlement and that all law is public law⁹. This second definition does indeed seem to be untenable in Europe today. There is no reason to accept any pre-legal right to property or binding force of contract or limitation of liability to fault, which should be protected by the courts. Even if one accepts, in one variant of natural law or another, that people have pre-legal rights to property, that promises (or agreements) should be binding or that no-one should be liable except when she or he has caused damage by her or his fault, as soon as one is of the opinion that the State should protect and enforce such a right with the aid of the law, the State shall do so only to the extent and in the way agreed upon democratically

6. See further my *The New European Legal Culture*, p. 37 ff.

7. Compare Daniela Caruso, "The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration", 3 *European Law Journal* (1997), pp. 3-32.

8. See M.D.A. FREEMAN, *Lloyd's Introduction to Jurisprudence*, 6th ed., Sweet & Maxwell, London 1994, p. 669, and DUNCAN KENNEDY, *A Critique of Adjudication [fin de siècle]*, Cambridge Massachusetts 1997, both with further references.

9. See MORTON J HORWITZ, *The Transformation of American Law 1870-1960; The Crisis of Legal Orthodoxy*, New York/Oxford 1992.

(including the democratically accepted rigid constitutions and international treaties which protect fundamental rights including private property). Therefore, property is protected, promises (agreements) are binding and people are liable for their torts only when and to the extent that the law says so (Constitutional law and private law). In that sense all law, including private law, is indeed public law: there is no area of the law which is free from paternalistic, distributionist and other functional and instrumental intervention by the State. Also in practice it has become obvious in the course of the 20th century that large parts of private law are subject to State intervention, which is driven by political concerns many of which are distributionist (strict liability, worker's, tenant's and consumer protection in the special part, whereas objective causation rules, the doctrines of abuse of right and of good faith in the general part have similar effects). Moreover, as said, the whole *acquis communautaire* is instrumental, also in the case of private law.

These developments raise the question whether it still makes sense to uphold a sharp distinction between private and public law. Moreover, within the English legal system there has never been a strong tradition of distinguishing private law and public law, although some scholars - who incidentally share an interest in Civil Law - have recently made use of this terminology¹⁰. Therefore, it may be worthwhile to go ahead with the functional and piecemeal approach which the European legislator has adopted and to address functional fields of the law rather than to embrace the grand idea of including all private law within a civil code¹¹, and thus reviving a distinction which does not seem desirable neither from a political nor from a practical perspective. Instead, it may be advisable to enact one or more functional European codes, for example in the area of distribution law, company law, or labour law.

4 Civil Law, Commercial Law, Consumer Law

Another instance of the fragmentation of private law is not new at all. Indeed, it has been present from the first codifications: the division of private law according to the status of the persons involved. In many European countries different (or additional) rules apply depending on whether the parties are ordinary citizens or merchants. In addition, more recently a new category has developed: the consumer.

In the first wave of codifications most continental European legal systems adopted both a civil code and a commercial code. However, since the first half of the 20th century the significance of this distinction has gradually decreased. And some countries, notably Italy (1942) and the Netherlands (1992), officially abolished the distinction on the occasion of the implementation of their new civil codes¹².

10. See e.g. PETER BIRKS (ED.), *English Private Law*, Oxford 2000. Moreover, Professor Ewan McKendrick occupies a Chair in "English Private Law" at Oxford.

11. Compare PIERRE LEGRAND, "Against a European Civil Code", *MLR* [Vol. 60] 1997 44-62.

12. In the Netherlands the distinctions between *kooplieden* and other persons, and between *dadens van koophandel* and other acts was abolished as early as in 1934. See R.J.Q. KLOMP, *Opkomst en ondergang van het handelsrecht : over de aard en de positie van het handelsrecht, in het bijzonder in verhouding tot het burgerlijk recht, in Nederland in de negentiende en twintigste eeuw*, Nijmegen 1998, p. 165.

Interestingly, however, during the last decades of the 20th century a counter-development started to arise as a result of the birth of "consumer law". Thus a new distinction arose, between general civil law, which was thought to be largely based on party autonomy, and specific consumer law, which exceptionally was more protective¹³. In the course of the 1980s and '90s in many European countries consumer law developed into an important branch of the law (not least as a result of the many European directives), with a great deal of autonomy *vis-à-vis* general private law. In France, all consumer regulations have even been brought together in the *Code de la Consommation* (1997). This development was enhanced by the way in which European Union bureaucracy is organised in Brussels. Different Directorates-General are responsible for the Common Market and for Consumer Protection, a factor which has significantly increased the tendency to enact separate rules for consumers and commercial parties. However, there are also counter-developments: many countries have tried to integrate consumer law into their civil codes as far as possible, thus trying to maintain the integrity of civil law. A clear example is the 1992 Dutch civil code. Another recent example is the Principles of European Contract Law which were drafted by the Lando Commission and which are meant to apply to all contracts independent of the status of the parties involved¹⁴.

There are some strong arguments against schizophrenic European private law, as Ugo Mattei has called it¹⁵. First, the distinction between consumer contracts and commercial contracts is very problematic. Compare Mattei¹⁶: "Since there is no such thing as a separate market for consumers (demand) and a separate market for producers (supply), contract law has to face the problem of how to merge supply and demand into a single market. The creation of two different bodies of law at odds with each other would ignore this reality, and, as a result, reduce the chance of building efficient private law institutions for modern Europe." Secondly, by (re)introducing "schizophrenic contract law" the definition and proof of status (consumer or professional) becomes all -important, whereas it seems much more efficient to concentrate on contract rather than on status.

However, adopting uniform European contract law, as proposed, for example, by the Lando Commission in its *Principles of European Contract Law*, carries its own risks as well. That is, if one is concerned that European contract law should be sufficiently "social"¹⁷. If contract law is dealt with on a general, abstract level there

13. See for the Netherlands R.P.J.L. TJITTES, *De hoedanigheid van contractspartijen; Een rechtsvergelijkend onderzoek naar de betekenis van de (onderlinge) hoedanigheid van partijen voor de totstandkoming en de vaststelling van de inhoud van rechtshandelingen*, Deventer 1994.

14. OLE LANDO, HUGH BEALE (EDS.), *Principles of European Contract Law, Parts I and II, Prepared by The Commission on European Contract Law*, The Hague 2000.

15. UGO MATTEI, "Efficiency and Equal Protection In The New European Contract Law: Mandatory, Default and Enforcement Rules", 39 *Va. J. Int'l L.* 537.

16. MATTEI, *loc. cit.*, p. 538.

17. See in favour of social European private law THOMAS WILHELMSSON, *Social Contract Law and European Integration*, Dartmouth 1995; BRIGITTA LURGER, *Vertragliche Solidarität, Entwicklungschancen für das allgemeine Vertragsrecht in Österreich und in der Europäischen Union*, Baden-Baden 1998; JAN B.M. VRANKEN, "Over partijautonomie, contractsvrijheid en de grondslag van gebondenheid in het verbintenissenrecht" in: J.M. BARENDRECHT, M.A.B. CHAO-

is a serious risk that those rules will not be sufficiently social and protective as far as weaker parties are concerned, as a result of the argument that such rules would otherwise not fit in with major international commercial contracts. The end result may then be that general contract law will be mainly autonomy-based and hardly protective at all. Indeed, it seems worrying that the PECL are very similar to the UNIDROIT Principles of International Commercial Contracts, which are exclusively intended for commercial contracts. Does this mean that the PECL have applied business logic to consumers?¹⁸.

Or should general contract law be 'neutral', and should the protective rules (in protection of categories which are presumed to be weaker, like consumers, employees, tenants) be regarded as special private law, as opposed to general private law, which should be placed elsewhere (maybe even outside the code)? However, this approach also has certain bear its risks. In the first place, there is no such thing as neutral general contract law. Autonomy based contract law is not neutral but Liberal (in the European sense), that is Conservative, or 'right wing', and it is highly questionable whether today's general contract law should be based exclusively or mainly on party autonomy¹⁹. Secondly, a system where all the protective rules are moved into (the) special part(s) makes the autonomy-based general contract law of little relevance since, on the one hand, the multinationals and other strong commercial parties will make their own contractual arrangements in long and detailed contracts for every imaginable contingency and will therefore probably find the default rules contained in the code of general contract law of little use for their purposes, whereas, on the other hand, for consumers, employees, tenants and other weaker parties many (or even most) of these rules would not be applicable whereas the important rules would be found in the Consumer, Labour or Housing (part of the) Code.

Concluding, from both a practical and a political perspective it is not all that obvious whether European private law should be unitary as far as the status of parties is concerned. In any case, a classical civil code which contains only general private law does not seem to be the obvious structure for framing the needs of European citizens and business.

DUIVIS EN H.A.W. VERMEULEN (EDS.), *Beginselen van contractenrecht: Opstellen aangeboden aan B.W.M. Nieskens-Isphording*, Deventer 2000; CHRISTOPHE JAMIN, 'Plaidoyer pour le solidarisme contractuel', in: Gilles Goubeaux et al. (ed.), *Études offertes à Jacques Ghestin; Le contrat au début du XXIe siècle*, Paris 2001, and my 'The Politics of European Contract Law: Who Has an Interest in What Kind of Contract Law for Europe?', cited above, footnote 2.

18. In their Preface and Introduction the PECL frequently refer to business. See e.g. p. xxv ('international business community').

19. See DUNCAN KENNEDY, 'The Political Stakes in "Merely Technical" Issues of Contract Law', 10 *ERPL* (2002), pp. 7-28. See further below, VIII.

5 A Multi-Level System

A third fragmentation trend is what has been referred to as the development of European law into a multi-level system of governance where several institutions are responsible for the development of certain aspects of the law but no institution is in charge of private law in its entirety²⁰. Christian Joerges suggests that: "the much criticised patchwork character of European private law initiatives reflects the lack of a hierarchical order, and that Europe's legal pluralism will inevitably result in disintegrative effects within formerly national systems." Accordingly, he argues that "legal scholarship should try to imagine and conceptualise a "law of Europeanisation" rather than some pan-European system that might be codified or compiled out of Europe's common legal heritage." Rather than creating new static coherent structures or rigid institutional arrangements we should find a dynamic solution for the interplay between EU law and 15 national legal systems of private law. In the process we will inevitably have to give up some of our hopes for national normative coherence.

The problems would not disappear (they would not even become significantly minor) in this respect if the EU decided to enact a European code of general contract law or even a European Civil Code²¹. The presence of such a code would inevitably give rise to many questions with regard to the connection with the rest of the law. First, some parts of private law would presumably remain national: the general law of obligations, the law of specific contracts (especially protective regulation), the law of contracts concluded by the State (administrative law), (real) property law (transfer of property), the law of persons, the law of succession, the law of evidence, the law of civil procedure. This would presumably be the case for national public law, parts of which may be closely connected to private law (administrative law, criminal law, constitutional law). Secondly, a part of private law (in the sense of the law applicable to conflicts between private persons) would indeed be administered on a European level, but presumably not in the civil code. A first example is provided by European competition law. This branch of the law frequently has a decisive influence on the contractual relationship between private parties (distribution and franchise contracts are among the most typical examples) but it is unlikely that it will be transferred from art. 81 EC Treaty into a European Civil Code.

Another important example is provided by human rights. In some European countries an important source of private law is the Constitution. In those countries human rights do not only have a vertical effect (they may be invoked by citizens *vis-à-vis* the State) but also a horizontal one (they may be invoked by citizens *vis-à-vis* other citizens). This horizontal effect may be either direct or indirect. In the former case, in her or his suit against another citizen, a citizen has a claim and a remedy

20. See especially CHRISTIAN JOERGES, "Interactive Adjudication in the Europeanisation Process? A Demanding Perspective and a Modest Example", *ERPL* 2000, p. 1-16. See also OLIVER REMIEN, "Einheit, Mehrstufigkeit und Flexibilität im europäischen Privat- und Wirtschaftsrecht", *62 RabelsZ* (1998), p. 627 ff.

21. As said, the Commission recently instigated the debate by publishing its *Communication on European Contract Law* (see above footnote 1).

which are directly based on the Constitution. In the latter situation, the claim and remedy are based on a provision in the civil code, e.g. on a provision for liability in tort or on a general good faith clause in contract cases. A typical example is the German cases where the *Bundesverfassungsgericht* has declared that extensive personal securities provided for the debts of close relatives are invalid due to a violation of the fundamental right to live one's own life (*Persönlichkeitsrecht*, art. 2 *Grundgesetz*) which is protected in relationships between private persons by art. 138 *BGB* on immorality (*Sittenwidrigkeit*)²². Another example comes from Italy where it was held that the Constitutional obligation of solidarity (*solidarietà sociale*) has a horizontal effect between contracting parties by way of the general good faith clauses contained in artt. 1366, 1374 and 1375 *Codice Civile*²³.

Within the European context fundamental rights are not only protected by national law but also by international law, notably the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950). This Convention gives citizens an individual right of complaint in Strasbourg (when all national remedies/instances have been exhausted), and in some countries also in their own national courts²⁴. This means that yet another authority is involved in the administration of "private law". Moreover, the European Convention chaired by Valéry Giscard d'Estaing is currently preparing a European constitution which will undoubtedly contain a chapter on fundamental rights²⁵, similar to the Charter of Fundamental Rights of the European Union (Nice, 2000)²⁶. This raises the question of the relationship between that Charter or the Constitution and a possible European Civil Code (or, for the time being, national civil codes). The Charter contains a large number of provisions which may be of direct relevance for private law (i.e. for relationships between citizens). Moreover, the values contained in it may be regarded as the common values of the European Union which could be the basis of a European Civil Code. The Preamble states²⁷: "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity." The Charter contains rights, freedoms and principles relating to Dignity (Chapter 1), Freedom (Chapter 2), Equality (Chapter 3), Solidarity (Chapter 4), Citizens' Rights (Chapter 5), and Justice (Chapter 6). A hint as to its horizontal effect is to be found in the same preamble²⁸: "Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the

22. Decision of 19 October 1993, *BVerfGE* 89, 214, *NJW* 1994, 36. See PALANDT/HEINRICHS, 60th ed., 2001, ¶138 no. 37ff.

23. See e.g. *Cass.*, 20 April 1994, nr. 3775, *Corr. giur.* 1994, p. 566, note CARBONE. "che l'ossequio alla legalità formale non si traduca in sacrificio della giustizia sostanziale e non risulti, quindi, disatteso quel dovere (inderogabile) di solidarietà, ormai costituzionalizzato (art. 2 Cost.), che, applicato ai contratti, ne determina integrativamente il contenuto o gli effetti (art. 1374 c.c.) e deve, ad un tempo, orientarne l'interpretazione (art. 1366 c.c.) e l'esecuzione (art. 1375)."

24. See in the Netherlands art. 93 *Grondwet* (Constitution), which gives such provisions direct effect.

25. See on its progress <http://european-convention.eu.int>

26. See for the full text with comments <http://ue.eu.int/df/default.asp>

27. P. 11.

28. P. 12.

human community and to future generations.²⁹

There is yet another level. Some parts of the private law which is applicable in the Member States of the European Union are dealt with on a global level. For example, the most important contract is dealt with, as regards international cases, on a world-wide scale in the United Nations Convention on Contracts for the International Sale of Goods (CISG) (Vienna, 1980). This convention has now been ratified by 61 countries all over the world²⁹.

Therefore, it is very unlikely, also from the perspective of the hierarchy of sources of law, that all (or even most) of the private law applicable in Europe will be dealt with on the same level of governance, let alone in one single European civil code. Private law (like public law) will rather continue to be dealt with on various levels including (as a result of globalisation) increasingly on a world-wide level. This means that control over the development of private law will increasingly be in the hands of various institutions. This will inevitably have some consequences for our hopes of normative integrity (within and among each of the levels).

6 Integrity Today

The use of codes is based on the assumption that it is possible to derive right answers to questions of law relating to specific cases from the words and the system of the code. This assumption also underlies the use of statutory rules generally. However, what is typical of a code is that it is more comprehensive (it deals with a greater part of the law) and it is usually more systematic: not merely a set of articles, but a system which itself has a normative meaning. However, today, *n'len déplaise* Ronald Dworkin³⁰, there is increasing scepticism with regard to the possibility to deduce right answers for concrete cases from abstract rules and general principles (rule scepticism), also in Europe. According to some observers this is the majority view today³¹. The most radical sceptical view concerning a European Civil Code would therefore be that it would be completely useless to enact any code at all.

Of course, (normative) integrity is a highly important characteristic of any legal order, because it is ultimately based on the fundamental value of equality. That value is deeply embedded in the European tradition. See for example art. 14 ECHR and, more recently Chapter III of the European Charter. Therefore, an argument in favour of a code could be that it would express the aspirations of a legal order to attain normative integrity, without necessarily believing that the mere enactment of such a code would in itself lead to (or even enhance) normative integrity. It would have the (rhetorical) function of a symbol which shows that the legal community does still believe in this great idea and does not surrender, in a post-modern sceptical way, to the infinite fragmentation of the law.

A less radical sceptic would therefore advise the drafting and enactment of a code which does not pretend to contain all the right answers but which in its style

29. See UNCITRAL Status of Conventions and Model Laws, update 14 March 2002 (see www.uncitral.org).

30. See especially his *Law's Empire*, London 1986.

31. See in the Netherlands J.M. BARENDRECHT, 'Door muren kijken; suggesties voor hervorming van de civiele cassatierechtspraak', *NJB* 2002, p. 297.

and its structure would openly recognise that in any dispute resolution important choices will inevitably have to be made no matter how accurately the abstract rules of the code and its system are drafted. A contemporary code should therefore be open and discursive³². It should provide an efficient language and terminology (categories) for the debate and it should indicate which interests are at stake and which policy choices the legislator has made. An interesting example is provided by the American Restatements (Second). In this second wave of restatements strong criticism of the first Restatements, from Realists and others, was taken into account³³. In the Restatements (Second) there was a clear shift in emphasis from the black-letter rule to the comments, which were much more extensive than before. The Restatements (Second) did not attempt to bring an end to the debate, but rather tried to state which positions had been taken and to leave it to the courts to decide. As a result there was also a shift in interest from the black-letter rule to the comment. The new restatements were also much less rigidly formulated. The black-letter rules frequently confined themselves to listing a number of aspects that should be taken into account when resolving the conflict. Similarly, also the PECL contain a number of rules which are rather discursive. Sometimes they do little more than provide the relevant elements for debate. Often they merely mention a set of factors which should be taken into account³⁴.

7 Default Rules or Mandatory Rules?

There is a tendency in the European private law debate to mainly focus on default rules. The best example is provided by the *Principles of European Contract Law*³⁵. This focus is explained in part by the fact that those parts of private law which are mainly mandatory are usually regarded as being 'too political'. The academics who draft these sets of principles, it is argued, are 'legal scientists' and not politicians.

32. This is not the same as 'soft'. See below, VII.

33. See CHARLES E. CLARK, 'The Restatement Of The Law Of Contracts', 42 Yale L J 643-667, HESSEL E. YNTEMA, 'What Should The American Law Institute Do?', 34 Michigan Law Review (1936) 461-473, ALBERT A. EHRENZWEIG, 'Das Desperanto des zweiten Restatement of Conflict of Laws', in: ERNST VAN CAEMMERER c.s. (eds.), *Ius Privatum Gentium (Festschrift Max Rheinstein)*, Vol. I, pp. 343ff, p. 344. Compare LAWRENCE M. FRIEDMAN, *A History of American Law*, 2nd ed., Touchstone, New York 1985, p. 676f, G. EDWARD WHITE, 'The American Law Institute and the Triumph of Modernist Jurisprudence', *Law and History Review* (1997) Vol. 16, p. 1, and RICHARD HYLAND, 'The American Restatements and the Uniform Commercial Code', A.S. HARTKAMP ET AL. (EDS.), *Towards a European Civil Code*, 2nd ed., Nijmegen and The Hague/London/Boston 1998, pp. 55.

34. See, for example, art. 4:107 (3) (Fraud): 'In determining whether good faith and fair dealing required that a party disclose particular information, regard should be had to all the circumstances, including: (a) whether the party had special expertise; (b) the cost to it of acquiring the relevant information; (c) whether the other party could reasonably acquire the information for itself; and (d) the apparent importance of the information to the other party.'

35. See on the PECL my 'The Principles Of European Contract Law: Some Choices Made By The Lando Commission', in: MARTIJN W. HESSELINK, GERARD DE VRIES, *Principles of European Contract Law*, Deventer 2001, pp. 5-95.

Therefore, they should leave those issues to politicians and should only concentrate on the "general part" of private law which is supposed to be politically fairly neutral. However, there is something of a paradox here: if sets of principles like the PECL are not law themselves but merely an academic exercise which establishes the common core or which may at most be regarded as a draft or proposal made by some academics and containing what in their view would be good law for Europe, there is no reason why these committees should limit themselves to the so-called non-political branches of the law. They could also draft restatements of labour law and the like. Similarly, the European Civil Code project (Von Bar group) could also address the more "political" subjects. Or, rather, they should indeed include these branches of the law. Because, if these principles are also meant to be used as models, sources of inspiration et cetera for national and European legislators and courts, they now seem inadequate because they too much resemble the Liberal 19th century Civil Codes, which were completely bare of any protective regulation. Or, to put it differently, they do not properly restate our private law because many relevant branches of private law are missing³⁶.

Another explanation which is frequently given for the focus on default rules, is that the common market mainly needs rules on general contract law and that the basic rule of contract law (and indeed the basic prerequisite of a well functioning market) is freedom of contract³⁷. However, this neo-liberal reinvention of crude capitalism is severely contested by others. The market must be regulated, they argue³⁸, and therefore we need a hard code now!³⁹ Moreover, the differences in mandatory rules are the real obstacles to the proper functioning of the common market. Those are the rules that the parties cannot contract around. This leads to the suggestion that if the functioning of the Common Market must be enhanced it is not the general rules of non-mandatory contract law that should be harmonised or unified but rather regulation, i.e. the mandatory rules of general contract law and especially those of special contract law. Those seem to be the true impediments to the Common Market, not the non-mandatory rules of general contract law. With regard to the latter, from an economic perspective, at best transparency is needed.

Therefore, there is a strong case for a European Civil Code which mainly or even only contains mandatory rules. Such a code would look very different - for one thing, much more empty - from a traditional civil code. It would hardly contain any rules of general contract law (no rules on performance, non-performance et cetera; to give an indication in the PECL only 6 rules are said to be mandatory⁴⁰). However, if a European Civil Code should only contain mandatory regulation would it still make sense to keep these rules separate from other regulation, i.e. regulation by public

36. The Study Group on a European Civil Code (Von Bar group) is currently drafting rules for the protection of consumers in certain specific contracts.

37. In this sense, for example, KLAUS PETER BERGER, "Auf dem Wege zu einem europäischen Gemeinrecht der Methode", *ZEuP* 2001, p. 4 ff.

38. See e.g. THOMAS WILHELMSSON, "Private Law in the EU: Harmonised or Fragmented Europeanisation?", 10 *ERPL* (2002), p. 77-94.

39. See especially UGO MATTEI, "Hard Code Now!", *Global Jurist Frontiers* (2002): Vol. 2: No. 1, Article 1.

40. See PECL, Introduction, pp. xxix.

law?⁴¹

8 Ideological Pillars

Most civil codes in Europe were conceived in the 19th Century when the Liberal *laissez-faire* ideology was dominant in Europe. It is not surprising that this ideology has determined the structure of private law. The pillars of the civil codes in Europe have been absolute property, binding force and freedom of contract and fault-based liability in tort. Towards the end of the 19th and during the course of the 20th century these dogmas came under increasing pressure. However, the main institutions of the 19th century private law construction were never undermined as such. Rather, the desire for change was internalised within the system. New institutions were added in order to moderate their effect. Abuse of right, good faith, strict liability, and unjust enrichment operated as safety valves that removed the pressure on the system. Moreover, specific rules, first in special statutes outside the code, were later in some countries admitted into the (new) code. This led to the invention of the distinction of general private law and special private law, the former being applicable to "normal" cases where the parties are on an equal footing and special private law which is exceptionally protective of weaker parties. As a result, the structure of most civil codes is still primarily based on the assumption of equal bargaining power where party autonomy reigns. The general law is autonomy-based, protective law is exception.

It is doubtful, to say the least, whether this 19th century structure which is so obviously linked to the *laissez-faire* conception of the State should be the model for the 21st century's private law in Europe. Rather a 19th century-like code, exclusively or primarily based on the principle of party autonomy, seems wholly unacceptable from a present-day political perspective. It would bring us back to a *laissez-faire* conception of the economy which the courts and the legislators in all European countries successfully overcame during the course of the 20th century. For the 21st century we need a Code which contains these important social achievements⁴². Today, one can no longer claim that private law is essentially based on autonomy and thereby tuck all the so-called exceptions away in a correction device like good faith or abuse of right. A European code of general contract law should be based on both (conflicting) principles which underlie contemporary politics and private law: autonomy and solidarity.

41. This brings us back to the relevance today of the private/public divide which was discussed above, III.

42. In the same sense THOMAS WILHELMSSON, *Social Contract Law and European Integration*, Dartmouth, Aldershot 1995; BRIGITTA LURGER, *Vertragliche Solidarität, Entwicklungschancen für das allgemeine Vertragsrecht in Österreich und in der Europäischen Union*, Baden-Baden 1998; JAN B.M. VRANKEN, "Over partijautonomie, contractsvrijheid en de grondslag van gebondenheid in het verbintenissenrecht" in: J.M. Barendrecht, M.A.B. Chao-Duivis and H.A.W. Vermeulen (eds.), *Beginselen van contractenrecht: Opstellen aangeboden aan B.W.M. Nieskens-Ishording*, Deventer 2000; CHRISTOPHE JAMIN, "Plaidoyer pour le solidarisme contractuel", in: Gilles Goubeaux et al. (ed.), *Études offertes à Jacques Ghestin; Le contrat au début du XXI^e siècle*, Paris 2001.

However, the present-day social and political situation in Europe is even more complex. Both individualisation and migration have led to a situation which can best be understood as pluralist, including large amounts of values emanating from sources other than the Western tradition as well (e.g. Islam). This raises the question of which values we have in common. In this respect the Charter of Fundamental Rights of the European Union may provide an interesting starting point. As said, according to the Preamble the Union is founded on the values of human dignity, freedom, equality and solidarity. It may be worthwhile to attempt to build the edifice of European private law on these four elegant pillars rather than on the monolith of party autonomy.

9 The Power of Abstraction

The law relating to contracts could be stated, and indeed is stated in the various European legal systems, on various levels and in various modes of abstraction. For example, in the Dutch civil code, the law relating to a consumer sales contract is dealt with in 6 different degrees and types of abstraction whereas the Portuguese code contains even further layers. However, in our post-modern age many scholars have become sceptical about the use of abstractions and even suspicious of some of their implications. What are the advantages and the drawbacks of abstraction today?

The main practical function of the law's structure is of course that it should allow for efficient communication⁴³. Abstraction may contribute to efficient communication. Between specialists that is, because abstraction (in the sense of stripping off those elements which are considered to be irrelevant) may also lead to the exclusion of non-experts (because without these concrete elements the category is no longer immediately recognisable to them), which is an important social cost especially since the law is meant to be equally relevant to all citizens. Another area where a code plays an important role in communication is education. A well structured, general code can easily communicate to a law student what the main policies are and in which categories she or he is supposed to express her- or himself if one wishes to sound like a lawyer when she or he speaks⁴⁴. However, teaching law with the code as a starting point also carries some risks. First, after graduation a law student may think that the categories she or he has learned actually exist out there and (worse) that they are the only correct way of framing reality. This may lead to problems when communicating, in interdisciplinary collaborations, with members of other professions (economists, social scientists to name but a few) who have learned to conceive the world in different categories, or, in international collaborations, with lawyers from other jurisdictions with a different taxonomy (common law v civil law, Hindu law et cetera). Secondly, teaching the law from a code leads to a conception of the law and legal problems as something which starts from general principle and leads logically (by way of deduction) and smoothly to the resolution of concrete problems. In this model of teaching, which is the dominant mode on the Continent, a student is hardly ever confronted with the problematic match between the harmony

43. See JACQUES VANDERLINDEN, *Comparer les droits*, Brussels, 1995, pp. 227-304.

44. See DUNCAN KENNEDY, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System*, Cambridge, Massachusetts, 1983.

of the abstract system of categories and the chaotic character of concrete reality. In other words, a neat, logical and harmonious system communicates the wrong messages with regard to the real character of the law and dispute resolution which is much more chaotic, illogical, unpredictable, unfair, and complex than the system of the code might suggest. Therefore, the drafters of a code should not make too much of an effort in making their edifice as rational and logical as possible. Exactly because such harmony and clarity can be most easily attained on an abstract level, the most logical, harmonious and abstract code is likely to be the most useless one in practice. Even if abstract categories are used it may make sense to use categories which are more recognisable to practitioners and even for ordinary citizens. Categories that fit better with the way in which they conceive the law. For example, when one looks at the way in which practitioners organise their law firms and their specialities one rarely finds a lawyer or a section in a firm which specialise in the law of obligations, or the law of restitution, or juristic acts. No, more likely one will find merger & acquisition, litigation, company law, medical law, environmental law, labour law. These are functional categories which seem to fit the needs of practice. What would be convincing new, less abstract categories? For contract law, the Tilburg team within the European Civil Code project has proposed new categories to deal with the law of services⁴⁵. Most legal systems deal with most services in a combination of general contract law and the general law of services (*mandat, Dienstvertrag opdracht*). The Tilburg team now proposes 10 new categories in addition to general contract law.⁴⁶ Thus they divide the broad category of service provision into 10 activities. This means tremendous progress, although, admittedly, some of the proposed categories still seem rather abstract and therefore not very recognisable. However, the two obvious alternatives for the activity approach (contract and status) would have their own drawbacks. Partly as a result of freedom of contract, partly as a result of the gradual fading away of differences between traditional professions, it would be very difficult to sum up the 10 (or 20) most frequently concluded types of contracts or economically most important professions. Clearly, an even more functional approach to categories would go hand in hand (in the sense that they would mutually facilitate each other) with a structure of the law which no longer makes a division between private and public law, but rather divides the law into functional fields which are mixed (private and public).

Another aspect of abstraction in a traditional code (and indeed in all statutes) is that it is contained in articles. Such articles are impersonal and stripped of all irrelevant facts. Moreover, the law may look very inhuman when it is formulated in a very abstract way. The 1992 Dutch code provides some startling examples.⁴⁷ After

45. MARCO B.M. LOOS, 'Towards a European Law of Service Contracts', *ERPL* 4(2001), p.565-574.

46. They propose the following categories: advice, agency, construction, design, information, intermediation, processing, storage, transportation and treatment.

47. See e.g. art. 3:32, the article which determines e.g. whether to people have concluded a binding contract: 'A juridical act requires an intention to produce juridical effects, which intention has manifested itself by a declaration.', or art. 6:1: 'Obligations can only arise if such results from the law.' As if the law lived a life of its own which has nothing to do with people and their behaviour!

all, the law is meant to organise human behaviour. Therefore, it would make sense for the law to address its actors as recognisable categories and with recognisable labels: 'buyer', 'seller', 'landlord', 'doctor' are more convincing labels than 'debtor' or 'creditor' from the general law of obligations, which hardly convince us that they are meant to indicate flesh and blood people. Moreover, a very deliberate use of certain terms by the legislator (or the courts), which raises them to the status of concepts and categories, leads to an excessive focus by legal actors and observers on the language of the law. What really matters in the law are the relationships between people and the policy choices by lawmakers with regard to the resolution of conflicts between people. The function of language is nothing more than to communicate these policy choices. However, legal practice and legal science today are still far too preoccupied with the language of the law⁴⁸. There is a widespread belief that for a lawyer a good command of language is essential because language plays a crucial role in the law. Although there are many parallels between the common law and civil law traditions in Europe⁴⁹, here we find a major difference between them. English judges, and as a result their observers, have traditionally paid less attention to the uniformity of their terminology than their colleagues on the Continent. Whereas many (appellate) courts on the Continent tend to exactly follow the terminology provided by the code, to phrase their *attendus de principe* as if they were a new article in the code, and to literally repeat their considerations in previous decisions⁵⁰, English judges are generally much less strict in their use of terminology. What one judge calls 'rescission' is referred to as 'termination' by another⁵¹. Foreign observers (and some systematically-oriented British academics) find this very disturbing. However, a loose use of terminology is of course only confusing for those who expect the same label to be consistently used when referring to a certain situation or policy. For those who are interested in the policy itself it may even be very enlightening when a court rephrases its policy on every occasion. It may help us to understand what they really mean. For example, for nearly ten years the Dutch *Hoge Raad* continually has repeated since the Plas/Valburg case that the negotiations may reach a stage where breaking off leads to liability to the extent of the expectation interest (the so-called 'third stage'), always in nearly exactly the

48. In the same sense 'Horatia Nuir Watt, 'La fonction subversive du droit comparé', RIDC 3-2000, 503 ff.

49. See my *The New European Legal Culture*, pp. 21 ff.

50. See e.g. *BGH*, 11 October 1994, *NJW* 1995, 47, *LM* § 242 *BGB* (Bb), no. 151: 'Nicht jede einschneidende Veränderung der bei Vertragsabschluß bestehenden oder gemeinsam erwarteten Verhältnisse rechtfertigt jedoch eine Vertragsanpassung nach den Grundsätzen des Wegfalls der Geschäftsgrundlage. Weitere Voraussetzung eines solchen Eingriffs ist vielmehr, daß ein Festhalten an der vereinbarten Regelung zu einem untragbaren, mit recht und Gerechtigkeit schlechthin unvereinbaren Ergebnis führen würde und der betroffenen Partei nicht zuzumuten ist.', a standard phrase which the *BGH* used many times before (see e.g. *BGH*, 13 November 1975, *NJW* 1976, 565, *MDR* 1976, 382, *LM* § 242 *BGB* (Bb), no. 80) and after that decision.

51. See Lord Wilberforce and Lord Diplock in *Photo Production Ltd. v Securicor Transport Ltd.* [1980] AC 827 (p. 844 and p. 851 respectively). Compare G.H. TREITEL, *The Law of Contract*, 10th ed., London 1999, p. 702 ff.

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same terms⁵². The advantage is of course that we now know that the judges of our Supreme Court have still not changed their minds: the policy is still the same. However, because of its abstract formula, we still have no clue what the policy is: when may a party be liable for the expectation interest because it breaks off negotiations before a contract has actually been concluded?

10 Final Remarks

There are other developments which should be taken into account. An important one is the fact that today no one any longer considers the code to be the only (maybe not even the main) source of private law. First, of course, one of the main characteristics of the development of private law on the European Continent in the 20th century is the central role which the courts have gained as the creators and developers of private law. Moreover, there are other legal actors and formants⁵³. A code is merely one of them: apart from the courts, legal scholarship, legal education, legal practitioners (professionals), and other institutions are other actors which make important contributions to the development of the law. A contemporary European code should take this into account. To say the least, a modern code (or the Constitution) should explicitly deal with the relationship between the various legal formants. It is not at all obvious that the code should today be the starting point and focal point of all legal reasoning. Another aspect is the dynamic character of the law which is probably one of its most important characteristics. The structure of private law should explicitly take into account the fact that the law develops, which means that it should not be static and immobilising. It should rather provide a framework for the process of developing private law. An aspect which should be taken into account when conceiving the structure of European private law is that we are living in an electronic age. Therefore, if a code is going to be drafted it should be conceived as an electronic code right from the beginning, with all the technical features which are possible today (hyperlinks et cetera). In such a code, for example, there is no need for general parts, abstractions et cetera since (unlike in the paper age) repetition has no cost. Moreover, an electronic code can be updated much more easily. It could even be a democratic project on the Web: a program which organises referendums of the web and asks citizens whether the code should be changed (direct democracy).

Most of these developments which haven been taken into account in this paper had not yet taken place when most of our classical codes were first conceived, in the 19th century, and not even when most of the recodification projects started in Europe, half way through the 20th Century. However, today we are familiar with them and it does not seem likely that they will go away. Therefore, before embarking upon the preparation of a European Civil Code (an endeavour which as the Dutch

52. HR, 18 June 1982 (Plas/Valburg), *NJ* 1983, 723, note Brunner, *AA* 32 (1983), 758, note Van Schilfgaarde.

53. See Rodolfo Sacco, *Introduzione al diritto comparato*, 5th ed. Torino 1997, p. 43 ff; Rodolfo Sacco, "Legal Formants: A Dynamic Approach To Comparative Law", 39 *AJCL* (1991), pp. 1-34, pp. 343-401.

experience shows may take a considerable amount of time and energy⁵⁴), or of a Code of Contracts in the broad sense in which the European Commission understands it, it seems advisable to thoroughly rethink the structure of private law in Europe today. The relationship between private law and public law, and between commercial law, civil law and consumer law, the developments towards a multi-level system of governance, today's scepticism with regard to the law's integrity, the appropriate mix of mandatory and default rules, the ideological pillars of the new European private law, and the power of abstraction, are merely some of the factors which should be taken into account. Such reflection and debate may very well lead to the conclusion that a comprehensive Civil Code in a classical sense is not the appropriate way to deal with private law today. The challenge is to develop better alternatives. In this paper I have made some preliminary suggestions.

54. It has taken the legislator of a small European country like the Netherlands more than 50 years to enact its new civil code, and the work has still not been completed. See E.O.H.P. Florijn, *Ontstaan en ontwikkeling van het nieuwe Burgerlijk Wetboek*, Maastricht 1995, T.J. Veen, *En voor berisping is hier ruime stof*, *Over codificatie van het burgerlijk recht, legistische rechtsbeschouwing en herziening van het Nederlands privaatrecht in de 19^{de} en 20^{ste} eeuw*, Amsterdam 2001, and Hesselink my *Il codice civile olandese del 1992 - un esempio per un codice civile Europeo?*, in Guido Alpa (ed.), *Il codice civile europeo; Materiali dei seminari 2000-2001*, Milan 2002 (forthcoming).