



THE CONTRIBUTION OF COMPARATIVE LAW TO THE HARMONISATION OF EUROPEAN PRIVATE LAW

STATHIS BANAKAS,
UNIVERSITY OF EAST ANGLIA, NORWICH

CONTENTS: 1. Looking for a role for Comparative law in European Legal Harmonisation – 2. What is Legal Culture? – 3. Legal Culture and the harmonisation process – 4. Taking Harmonisation seriously: a review of some basic issues.

1. The harmonisation of European private law is an unstoppable process, its momentum increasing, it seems, in reverse proportion to the objections and criticisms it provokes. Politicians, academics, pressure groups and the media are all, for different reasons, attracted by it, and involved in increasing its momentum. Academic objections, in particular, from those among us that are concerned about the degrading effect of piecemeal harmonisation on national private law theory built on centuries of painstaking labour of scholars and practitioners seem more and more futile. The Alhambras of national legal art are falling as Europe is hurrying on to greater integration. The question now is what will emerge in their place, and it is in this connection that Comparative law may be of some help. First, however, Comparative law needs to be tuned into shape. Whether it is a science or not¹, it is certainly a discipline today submerged in a self-analysis of its own aims and methods. A reason for this is, perhaps, not so much the state of the health of its methodology, but, rather, the 'boundless freedom that it offers', described by Professor Kokkini-Iatridou as 'the great attraction of comparative law'. This freedom, is, indeed, dangerous, and one should heed to the warning of Ludwig Wittgenstein, that most cautious, among modern thinkers, when defining the premises of communicating knowledge through the unique instrument of language. Talking about comparison in general, he pointed out the great risk of confusing the prototype with the object of comparison, which we are viewing in its light². I do not propose to enter here the controversy about whether comparative law is a science or, less pretentiously, only a method or, finally, only a humble craft, acquired through experience and intuition. If it is a method, it is better based on empirical premises. As Maurice Merleau-Ponty, the French philosopher, put it '[I]he perceived world is the

¹ A passionate argument in favour of a 'science' of Comparative law is presented in vol. III., of Constantinesco's *Traite de Droit Compare*, Paris 1983, published posthumously.

² Ludwig Wittgenstein *Culture and Value*, translated by Peter Winch, Oxford 1980, p. 14e



always presupposed foundation of all rationality, all value, all existence". Law is understood as perceived; and its origin is perceived as rooted in, chiefly political, power relations³ (3). But the phenomenon of law is, also, a cultural phenomenon; it is, therefore, important to explore this, and the phenomenon of legal culture itself, as a methodological basis, a prototype in Wittgenstein's words, of comparative law. Understanding the political process and the dynamics of legal culture are important skills for doing Comparative law. They are equally important for easing the pain of European harmonisation.

The political process of European legal harmonisation involves three major Community players, ie the Commission, the European Parliament and the Economic and Social Committee⁴. Of course, the major instruments of harmonisation, ie Directives, are agreed by the Council of ministers, but the importance of Regulations issued by the Commission, under powers delegated by the Council, for the harmonisation of private law, should not be underestimated. Such Regulations are issued in great number every year, as a quick search of any legal data base will show. A new area of harmonisation can be proposed by any of the above Community bodies to the Commission, or decided directly by the Council. The Commission will draft the Directive (or Regulation) with the help of legal experts. At this point, Comparative lawyers can offer important knowledge and skill. Knowledge of the actual state of theory and practice in national legal systems of member states is obviously important; but beyond that, skill in understanding of the national legal cultures is even more so. It is legal culture that will in fact determine the degree to which harmonisation will be effective. Knowledge of theory and practice of other systems can prevent embarrassing initiatives from coming into existence. It is still the case that among European lawyers, even legal scholars, there is ignorant hostility of institutions and practices in other countries. The Regulations on Unfair Terms in Contracts provoked great concern among scholars in this country, unfamiliar to the German theory of Good faith; and a new initiative of the European Parliament to propose a draft directive on harmonising the mode of assessment of personal injury damages has surprised French lawyers, who saw in it the adoption of their own system of invalidity scales (IPP), which they despise and want to reform, probably because alternative methods, such as the English >tariff=>system, are widely unknown or misunderstood among lawyers in other European countries. For the same reasons, after the harmonising instrument is put into force, comparative lawyers have a further important role to play. They can be advocates for either side: for the Commission, when it monitors the implementation of the harmonising instrument as it is its duty. Or for a member state, resisting such implementation on the ground that the national legal system provides already answers of sufficient proximity to the Community model. Successful defence of the national system's existing provision should be no small matter for those concerned with preserving national systematic purity. A good example is France's lost battle to resist enacting a new

³ See William S. Hamrick, *An Existential Phenomenology of Law: Maurice Merleau-Ponty*, Dordrecht/Boston/Lancaster 1987, p.116; translations of Merleau-Ponty's French writings are borrowed from this book.

⁴ EC Treaty, (new) article 94



legal instrument to implement the Product Liability Directive of 1985⁵. French lawyers failed to win the argument that such implementation was unnecessary, in the light of the jurisprudential development, in celebrated decisions of the Cour de Cassation, of article 1384 of the Code Civil (responsabilite du fait des choses). As a result, the once elegant Tort law section of the Code 4 EC Treaty, (new) article 94 5 EC Directive 85/374 Civil has now been marred by a long list of new articles reproducing verbatim the articles of the directive, in a style and language alien to the honoured Napoleonic original.

While all of this is obvious for anyone to see, more needs to be said about the importance of legal culture for the harmonisation process. Even more so in view of the fact that the nature and function of legal culture is often overlooked by comparative lawyers themselves. Merleau-Ponty made the important point that culture in general, and, one should also add, legal culture, in particular, cannot be wholly deduced from the perceived world, that only contains the foundation of that which is cultural⁶. Legal culture is not only an empirical reality, but, also, a basis of meaning, i.e. of talking about the law. As pointed out by the American pragmatist philosopher Dewey, all description of social and cultural phenomena by language is, itself, purposeful: for, as he put it, social and cultural phenomena are never 'over and done with', but remain always open, are 'goings-on'. Law, itself a social and cultural phenomenon, is also a 'going-on' phenomenon, that can only be perceived to be what it functions as in the social and cultural context. The great German anthropologist Richard Thurnwald, argued for the law to be perceived and understood 'functionally out of the cultural system'.

2. The great legal anthropologist, Bronislaw Malinowski, has described all culture as 'normative'. This important aspect of all culture, especially, of legal culture, implies that a group's or a community's conformity to aspired aims and goals, serves the function of providing answers to normative problems. A basic distinction is the one between > lay = and internal legal culture. Lay legal culture, far from being uniform, can exist on several different levels: one can speak, for example, about the lay legal culture of a whole country or nation, or that of a social class, or of a regional or local or other (for example, religious) group of people. It is pointed out that in most of the world's contemporary states there are more than one social classes or culture groups in one or more of these senses, and, therefore, also several legal cultures (cultural pluralism). 'Internal' legal culture is the process of lawmaking and law-finding, the methods of legal reasoning of judges, the structure of the legal system and the administration of justice in a given jurisdiction, and the training and organisation of the legal profession⁷. Comparative legal historians, and mainstream legal

⁵ EC Directive 85/374

⁶ Hamrick, *op. cit.*, p. 3 f

⁷ Lawrence M. Friedman, *Law and Society*, Prentice-Hall Inc., Englewood Cliffs, New Jersey, 1977, at p. 76



comparativists, with a primarily legal training, use concepts such as 'legal tradition', or 'style of legal systems', in much the same way as sociologists use the concept of legal culture. Merryman's definition of 'legal tradition' includes 'historically conditioned attitudes about the nature of the law, about the role of law in the society and the polity, about the proper organisation and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught'.

A comparativist who likes to use the concept of legal culture more than anything else to understand differences in legal systems is Alan Watson. Watson argues that legal culture is a powerful and autonomous factor of legal change, or, for that matter, of legal inertia in the face of changing social and political conditions. For him, legal culture must be distinguished into that of lay people, lawyers, and lawmakers⁸. Watson argues that social or economic pressure for legal change starting with lawmakers operates only within their own culture, whereas if such pressure 'starts with the lawyers, their own culture is involved and the pressure must be directed against the culture of the lawmakers'. For Watson, the existence of a distinct culture of lawmakers explains, firstly, the historical phenomenon of legal orders borrowing socially and economically 'dysfunctional' Legal Transplants. For he believes that '[T]o a considerable degree, the lawmakers of one society share the same legal culture with lawmakers of other societies'. Secondly, the separate legal culture of lawmakers is for Watson responsible for what he considers to be the 'positive disinclination' of lawmakers to change formally the rules, institutions, and, especially, the sources of law, when the law is out of date. The question is whether culture in general, and legal culture in particular, are significantly autonomous, from the aims and goals of the socio-political and economic model, in which the law also operates.

This question is particularly important in relation to the role that legal culture can play in the process of harmonisation of European private law. Furthermore, it has rightly been pointed out that: '[A]lthough the careful study of a single legal culture can yield valuable insights, only the analysis of a variety of legal cultures will recognise what is accidental rather than necessary, what is permanent rather than changeable in legal norms and legal agencies, and what characterises the beliefs underlying both'. As everything else perceived and understood, law and legal culture is perceived and understood comparatively. But comparison presupposes a separate identity: a thing cannot be compared to itself. How culturally specific is law? A leading legal sociologist of our time has observed that '[T]he modern world makes a strong case against cultural specificity'. A quick look at the World's modern societies shows that diverse, or similar, social structures and economies, rather than 'cultures' in the sense of values and attitudes of lawyers and lay-persons, account for diversity, or convergence, in their laws. But, as with many other things in life, the truth about what gives to law, and to a legal system, its specific characteristics, probably lies in the via media between Montesquieu's view of law as a product of national and cultural forces,

⁸ A. Watson, 'Legal Change: Sources of Law and Legal Culture', (1983) 131 *Univ. of Pennsylvania Law Review* 1121, 1152 f.



and the views of more modern Comparativists⁹, underlining the importance of the social and political environment.

Indeed, it appears that the more societies advance in their political, economic and social structures, the more powerful these structures themselves become over cultural specificity in shaping the law's real identity, behind its symbolic or ritual image. Elsewhere I have argued that because cultural roots and historical choices are an integral part of any description, or explanation, of law at a particular place and time over a particular community, comparative law must be alert to the need of a *tertium comparationis* that, in taking into account cultural specificity, does not have a Procrustean effect on the proper understanding of foreign legal systems¹⁰.

3. The pace of Europeanisation of legal life in the last few years in the European Community must weigh heavily in answering the question of how culture-specific national legal systems still are. From Universities to Law firms the European mix increases, and the European Courts in Luxembourg grow every day in confidence in laying foundations for common principles of European private law¹¹. Law students already have a European Casebook on Tort Law¹², and judges and practitioners a European textbook on Contract Law¹³. Several groups of European academics are at work developing common principles and rules for Contract law (Lando group), Tort (Vienna group), or, casting a wider net, a European Civil Code and the Common Core of European Civil Law (the Trento project). The European Academy in Trier is only one of many academic institutions offering a relentless programme of seminars in European private law, attended by practitioners of member states as part of their continuous education programme. What is the effect of all this on national legal cultures? An enormous question, of an enormous significance, which Comparative lawyers in Europe must see as a big challenge.

The answer to that question will enlighten the debate of whether legal harmonisation is a good or a bad thing for Europe, and whether it proceeds on the right path. For, whatever the political power of the market may be (and effecting the common market is the unique basis of harmonisation of private law in the European Union at the present moment), the market, as the American experience shows, is only concerned with economic efficiency, and will not provide answers to wider questions of validity and value of legal rules and practices.

⁹ E. g., Kahn-Freund, 'On Uses and Misuses of Comparative Law', (1974) 37 *Modern Law Review* 1; Seidman, 'Administrative Law and legitimacy in Anglophonic Africa: A Problem in the Reception of Foreign Law', (1970) 5 *Law and Society Review*, 161.

¹⁰ E. K. Banakas, 'Some Thoughts on the Method of Comparative Law: The Concept of Law Revisited', (1981) LXVII *Archiv für Rechts- und Sozialphilosophie*, 289, 292 f.

¹¹ A good example is the effect of the case of *Brasserie du Pecheur* [1996] CMLR 889 (joined cases C-46/93 & C-48/93) on English law: cf *Factorama* [1999] 4 All ER 906 (HL)

¹² Van Gerven, Lever, Larouche, *Tort Law*, Hart Publishing, 2000

¹³ Koetz, *Europäisches Vertragsrecht*, J C B Mohr, Tuebingen, 1996



It is difficult to foresee how far national legal cultures will be defended by national communities against the onslaught of continuing European integration. There may be objectively little to regret, in terms of moral, artistic or other value, in the disappearance of national legal cultures in Europe. But there is evidence that in some member states other, parallel to the legal, national cultures, such as religion or literature, are emerging as political flagships of resistance in support of national identity. And there is also evidence that certain benchmark principles of national private law are now being defended as part of the Constitutional fabric of member states, in anticipation of a further advance in harmonisation, such as the French principle of *faute* or the English doctrine of public authority immunity in exercising discretion. More importantly, perhaps, judges and practising lawyers in member states are increasingly unhappy with the scholarly rush to create a uniform theoretical basis of European private law. Private law is more than competition in the market or corporate and commercial transactions. It is also about intimate, very important aspects of personal life, that judges are convinced are better dealt with in the environment of the local culture and tradition. There is evidence that in some member states judges and practising lawyers are already looking to their national governments for support in their defence of national legal culture against new Brussels initiatives. Could this be the beginning of the unfolding of the great process of harmonisation of European private law?

4. 1 *The Obstacles*

Whatever might have been the reality of the *jus commune* of Europe in the middle ages, supported at that time by common feudal structures, in the national legal cultures of modern Europe, emerging one by one after the watershed of the French Revolution, private law has been seen as a matter of national pride and prestige. Only as recently as eight years ago, and in the midst of hectic negotiations to move European integration forward afield in areas hitherto not envisaged by the original treaties, the Dutch, who spearheaded these negotiations, brought into force their new Civil Code. In the two centuries since the first European Civil Code, the Code Napoleon, marked the new era of national legal pride in Europe, the other countries that presently form the European Union, with the exception of United Kingdom, Ireland, Belgium, Luxembourg and the Scandinavian countries, created, one by one, their own, proud codifications. Belgium and Luxembourg are still using the Code Napoleon. The United Kingdom resisted the introduction of Civil Law-style codifications as alien to the culture of law-makers in this country, and so did Ireland, where, however, there is now, at this advanced stage of European integration, talk of an Irish Civil Code. As for the Scandinavian countries, they have consolidated centuries of judge-made rules of civil liability in fairly recent legislation, preserving the individuality of their solutions, even as they were entering the European Union. Civil Codes in Europe have always been seen as important declarations of national legal identity, and the law of civil



liability, the most dynamic part of Civil law, has been the focus of efforts for distinctive national styles. Thus in the two common law countries, United Kingdom and Ireland, the law of Torts is jealously guarded as an idiosyncratic, judge-made branch of civil law with a practical and systematic importance unknown to Continental legal systems. The German Civil Code openly chose to differ from the Code Napoleon in its design of Liability for Unlawful Acts, after rejecting the idea of general clauses of liability similar to those of articles 1382 et seq. CC, originally put forward in the first draft of the German Code produced by the first Commission. Germanic ideas of unlawfulness as an additional condition of delictual liability influenced, in different ways, the Spanish and Italian law of Civil Liability, both originally closer to the French, leading to separate development of the law by the courts in these two countries. The Greek and the Portuguese Civil Codes chose also their own ways of styling Civil Liability as important expressions of national legal culture, and the newest Dutch Civil Code ambitiously combined elements of all traditions. Extra-contractual liability, and its relation to other sources of civil liability such as breach of Contract, has, in short, always been seen in the European legal systems as an issue of great intellectual, social and cultural importance, close to the definition of citizens' basic rights, reflecting the individual sensitivities of law and policy makers in different legal systems. Despite the cultural resistance, it is true that a limited, piecemeal harmonisation, of specific private law regimes, in areas that directly affect the operation of the common market or the free movement of persons and goods, has been agreed by Governments and attempted through Directives and Regulations. There have been a number of Directives and Draft Directives in diverse areas, such as: Product Liability for Defective Products¹⁴, Consumer Protection¹⁵, Consumer Credit¹⁶, Package Travel, Package Holidays and Package Tours¹⁷, Unfair terms in Contracts¹⁸, Proposal for a Directive on the Liability of Suppliers of Services¹⁹, Proposal for a Directive on Liability for Injury caused by Waste²⁰. But such areas apart, it is not immediately obvious whether there is the will, or, indeed, the need, for a systematic harmonisation of private law in Europe, and the creation of a common European law. The question applies also to the broader issue of creating a European Civil Code, very much discussed among European politicians and academics recently. If there is a need, the will must be found. But present discussions and concerted efforts by various academic groups to formulate proposals for a European Civil liability law or Civil Code, seem to put the cart before the horse in so much as they concentrate their efforts on how

¹⁴ Council Directive 85/374/EEC of 25 July 1985, now fully implemented by all EU member states.

¹⁵ Council Directive 85/557/EEC of 20 December 1985 on Consumer Protection in Contracts negotiated away from business premises

¹⁶ Council Directive 87/102/EEC

¹⁷ Council Directive 90/314/EEC

¹⁸ Council Directive 93/13/EEC of 1993

¹⁹ 91/C12/11 revised in 1992

²⁰ 89/C251/04



best to achieve harmonisation, and much less on why such harmonisation is needed. Are there any compelling reasons for harmonising private law in Europe?

Such reasons, if they exist, must be weighed against the following considerations:

1) Whether or not there is a legal basis, there is definitely no legal obligation, arising out of the European Treaty, of member states to proceed to wholesale harmonisation of private law by Community legislation. This has been confirmed recently by the ECJ in the tobacco advertising ban case²¹, where the Court pointed out that the European Treaty does not confer in the (new) art. 95 (1) a general power on Community legislature to regulate the internal market²².

2) Civil Liability for damage caused by competition distortions, business practices in banking, corporate or insurance matters or failures to implement Community rules has already been harmonised by the Treaties themselves, and several Directives and Regulations.

3) Specific areas in which there is a need for uniform protection of European citizens in their exercise of their right of free movement can and should be singled out for individual harmonisation, such as liability for traffic accidents, currently under consideration by the European Parliament working group led by Professor Busnelli of the University of Pisa.

2 The arguments for a Common European Private Law

1) A political ground for the harmonisation of European private law can be found in the quest for a common European citizen's identity, a task that seems to be on its way to be confirmed as a political goal of the Union in the Charter of Human Rights, agreed in the European summit in Nice in December 2000. Uniform Human Rights can be seen as inevitably leading to uniform civil rights. If this is accepted, it will be a powerful argument for the harmonisation of the law of Civil Liability in Europe. However, a number of Governments take a narrower view of the Charter, as addressing only the question of the protection of Human rights internally in the Union, before Union organs and institutions, whereas others look at it as the first step of a Constitutional restructuring of Europe, and an element of a common European identity to be projected also externally to the rest of the world.

2) To the extent that private law rules are more generous in their remedies in some countries than others, the equal treatment of all European nationals in the geographical area of the Union necessitates harmonisation of national systems. Privacy is better protected at

²¹ ECJ, Nov 5, 2000, C-376/98

²² See also (new) art 5 EC



the present moment in Germany than in the United Kingdom²³; defamation is a more lucrative tort for a claimant in the United Kingdom than almost anywhere else. And citizens are compensated for disproportionate financial burdens imposed by *lawful* administrative action only in France.

3) Not to be underestimated is the excitement of academicians and some other lawyers caused by the unique opportunity, and challenge, of redrafting Civil law on a global European basis. Ideas have a power of their own.

4) It is a well-known mantra that European unity must constantly evolve or perish. Some nations, and politicians, are driving hard towards a common public and private law structure²⁴. The European Parliament has long ago (1989) asked for a European Civil Code to be put on the agenda of the Commission and the Council²⁵, and will routinely support all initiatives for harmonisation, undeterred by Governments or decision of the European court.

This is significant, as the Parliament, for all its defects and shortcomings, may be seen as representing the people of Europe better than any other European institution. Academics are drafted to the political task, and some will pull all the stops to sell projects such as the European Civil Code or a Uniform Law of Civil Liability to the weary local legal communities of member States. In a recent Conference on 'the European Civil Code' organised by the European Law Academy at Trier, we were presented by Professor Christian von Bar from Osnabrueck with a draft of Uniform European law entitled 'Part X: Tort Law', without been told what this Tort law was Part of! Presumably, it was part of a draft of European Civil Code. We were also told by Professor von Bar that there is no reason why the new European Civil Code could not be used in member States *together* with national Civil Codes, which would not necessarily have to be abolished. A proposal that could be seen as a Trojan horse in some countries or as discriminatory in others, such as the United Kingdom, with no national Civil Code to hold on to!

Admittedly, complete political Union in Europe cannot be achieved without a uniform private law. Looking to the United States, the success of the Union there is due to four important common elements: common market, common currency, common language and common law. The common language is almost impossible, perhaps, to achieve in Europe, but the common law?

²³ Although there is change in the air, following the introduction of the Human Rights Act 1998: see *Douglas and Others v Hello! Ltd* (Court of Appeal 23 November 2000, Reasons given 21 December 2000, *The Times Law Report*, 22 December 2000)

²⁴ Joschka Fischer, the German Foreign Minister, in a controversial lecture in May 2000 at Humboldt University in Berlin spoke of a 'constitutional re-establishment of Europe' that should include the 'firm establishment' of not only 'human' but, also, 'civil' common European rights.

²⁵ Official Journal of EC 1989, No. C 158/400



5) Those pulling political weight behind the unification of Civil law in Europe may, however, be rendering the cause a very bad service. Left outside politics, such unification might have been more palatable, indeed almost natural. Private law, unlike Criminal or Public law, does not need to be political or bound with particular State interests. The citizens of Europe will probably be happy with a change in their private law to the better, and their lawmakers should aspire to give them such change, which could take the form of a Uniform system encompassing what is best in the rich European national legal systems. Unfortunately, such projects as we are offered so far by the various working groups, are plans to iron out through conceptual compromises existing differences of black letter law between member states, seeking, so to speak, the lowest conceptual common denominator, with no creative aspiration to move the Droit Civil of Europe to a new era. Thus, they expose themselves not only to political but, also, and quite rightly so, to scientific attacks, mainly for their uninspiring and degrading vision of European private law. These are products that the consumer can, and must, easily resist. A new European private law, with forward looking principles based on some of the best ideas of national legal systems, might have been a much harder job to do, but, perhaps, also harder to resist, and a true service to European unity.

3 Method of Production

Common principles of European private law will be a sizeable transplant for all EU member states. As with all legal transplants, their introduction, survival and success depends on their reception in each country, first, by lawmakers (including judges) and other lawyers, practitioners and academics, and, second, by business interests, the insurance industry and the wider community. The experience from working with a group preparing a draft directive on the important issue of assessment of personal injury losses from car accidents has taught me that it is the reaction of the former group rather than the latter that is crucial²⁶.

1) A European Law Institute?

In the light of the thesis advanced in this paper that a common European private law must be forward looking, based on new principles, and not a conceptual legal syncretism of existing, and often outdated, national styles, it is important to educate and persuade national lawmakers and lawyers. The American experience of the democratic adoption of the Restatements is very useful in this connection. We need in Europe an institution, independent from Community and State authorities, such as the American Law Institute. The American Law Institute was organised in 1923, following a study conducted by a group of prominent American judges, lawyers, and teachers known as “The Committee on the Establishment of a Permanent Organisation for the Improvement of the Law.” The

²⁶ See on this my paper, ‘The Method of Comparative Law and the Question of Legal Culture Today’, 3 *Tilburg Foreign Law Review*, 1994, 113-153, esp p. 123 f.



Committee had reported that the two chief defects in American law, its uncertainty and its complexity, had produced a “general dissatisfaction with the administration of justice.” According to the Committee, part of the uncertainty of the law, as it then existed, was due to the lack of agreement among members of the profession on the fundamental principles of the common law. Other causes of uncertainty were reported as “lack of precision in the use of legal terms,” “conflicting and badly drawn statutory provisions,” “the great volume of recorded decisions,” and “the number and nature of novel legal questions.” The law’s complexity, on the other hand, was attributed in significant part to its “lack of systematic development” and to its numerous variations within the different jurisdictions of the United States. Clearly, Europe would benefit from an Institution like this, not only in making Harmonisation of private law possible, but, also, in preserving the uniformity of the development of the common European law after its harmonisation. The new law will have to be applied uniformly in all member states, and, in the light of the variety of judicial style and culture in the member states, will only survive with the discipline of a moderate rule of *stare decisis*. The European Law Institute should be a private law organisation encompassing all sections of the legal profession and others closely related with the law-making process. Following the example of the American Law Institute, its membership should be elected and consist of judges, lawyers, and law teachers from all member States as well as some other countries, selected on the basis of professional achievement and demonstrated interest in the improvement of the law. Ex officio members should include the Judges of the European Court of Justice and those of the highest court of each member state, law school Deans, and the Presidents of the Bar Associations, of each state other prominent legal organisations.

2) Restating European Law

The American experience of Restatements provides a successful model of how to achieve democratically the consensus of the legal world in Europe, vital for the success of any large scale harmonisation project. In the American law Institute a project is undertaken by the consideration and prior approval of its Officers and Council. When a project has been authorised, an expert in the field of law to be considered, usually a legal scholar, is designated as Reporter. With the help of assistants, the Reporter does the basic research and prepares the initial draft of the material. This initial draft is submitted for suggestions and revisions to a small group of Advisers X judges, lawyers, and law teachers X with special knowledge of the subject. In most projects the draft is also reviewed by a Members Consultative Group consisting of members of the Institute with particular interest in the subject. The revised draft is next submitted for further analysis and consideration to the Council of the Institute, a group consisting of some sixty prominent judges, practising lawyers, and law teachers. The draft can then be referred either to the Reporter and the Advisers for further consideration or to the Annual Meeting for review by the membership. When approved by the Council, the draft as further revised is presented as a Tentative Draft to an Annual Meeting of the entire membership for debate and discussion and is then



made available for public distribution. In any Restatement or codification project, a series of Tentative Drafts is produced in this manner over a period of years. When the treatment of a subject has thus been completed, a Proposed Final Draft, consisting of all prior Tentative Drafts and reflecting membership action, may be submitted to the Council and the membership. When the project has been approved by both, the official text of The American Law Institute is prepared for publication.

The final product, the work of highly competent group scholarship, thus reflects the searching review and criticism of learned and experienced members of the Bench and Bar. There is no reason why a similar process cannot be instituted in Europe, provided, of course, there is the political will for it. But, then, introducing in Europe a common private law requires the greatest and strongest political will for political and legal unity. Is there such a will in Europe today? This remains to be seen. The last successful major Codification in Europe, the Dutch Civil Code, was only made possible because the political will created a harmonious collaboration of politicians lawyers and the community at large, in the process of which the enormity of technical detail that needed to be agreed upon was trustingly left to the experts, who were allowed to proceed on basis of agreed principles. This is the climate that needs to be created, before a new European private law can become a reality.