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# TOWARDS A PAN-EUROPEAN PRIVATE LAW: THE ROADS AHEAD

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**1 - APPROXIMATION OF LAWS IN EUROPE - CREATION OF A PAN-EUROPEAN PRIVATE LAW.**
**ULRICH MAGNUS,** pointing out the political-economic need for homogeneous European law and the method and tools to achieve this, writes:

> "Those in Europe who are engaged in the comparison of laws will find there is a dynamic process under way for the creation, in part re-invention, of an uniform European law. The integration of the West, Middle and East of Europe within the European Union entails the harmonisation of practically each branches of the formerly so different domestic laws. The European Community has at all times regarded itself as a community created on grounds of law, working through law, creating its own law and maintaining the community on grounds of law rules constituting a clearly defined body of law. An all-important task of the Community is, therefore, to dismantle the legal barriers of creating and operating a common market by approximating national laws of member states. To achieve this, comparison of laws is indispensable: differences in law must be identified first, then, a uniform law must be prepared and made. The ultimate means of this are directives which, although legislation in accordance with them is mandatory for member states, give them more elbow-room in terms of the mode of implementation."[1]

As **MAGNUS** also writes, creating homogeneous law in Europe (i.e. the 'europeanisation of law') and other uniform international law, primarily the Vienna Purchasing Convention, facilitate the approximation of national jurisdictions and ultimately, legal uniformity.[2]

Differences of national jurisdictions, however, seem not easy to remove. **OLE LANDO** enumerates the national particularities working against unification.

> "Can the 15 or more States agree on a unified contract law? European lawyers are divided by different legal methods and rules and by different legal languages. The greatest divergence is between the legal method and language of the civil law countries of the European Continent and the common law countries of the British Isles. The private law of the continental countries is mainly to be found in the Civil Codes, in the Nordic countries, which have no codes, in statutes. Most legal terms and classifications and many rules have their origin in Roman law, and here there is some uniformity. In each country the law courts have developed and supplemented the codes and statutes in a dialogue with the writers who have established system and method.. However, also on the continent we find considerable differences in institutions and rules. On the British isles the laws have been established by the law courts. Roman law never reigned in England as it did in most parts of the Continent. It was the courts that established the institutions and many of the peculiar terms of the common law" .[3]

**LANDO,** on the other hand, argues there is a way to align these laws, in spite of long-established historical differences. They have a 'common core' like judges (*homo iudicus*) or legal scientists have a 'common ideology', which is underlain by the same or similar matters to be resolved, societies and social goals as well as the ultimate identity of member states' social structures that poses the same questions on law whatever the country.

**MAGNUS** states, approximation of national laws is a slow process that, however, might yield a new 'hybrid' legal system in the long run, which (jointly created with the participation of current member states) comes ready-made to states accessing the union at later stages of integration. European law will become independent of national legislation of member states just like American law was detached from the common law of England long ago.[4]

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[1] *Harald Koch - Ulrich Magnus - Peter Winkler von Mohrenfels:* IPR und Rechtsvergleichung, 2. Auflage, C.H. Beck'sche Verlagsbuchhandlung, München, 1996. p.241

[2] *Koch-Magnus-von Mohrenfels,* Op. cit .p.242

[3] *Ole Lando*: Some Features of the Law of Contract in the Third Millennium, 2000, Manuscript, p. 355 (in print: 40 Scandinavian Studies in Law, 2000, pp. 343-402).

[4] *Koch-Magnus-von Mohrenfels,* Op. cit, p. 243

**HEIN KÖTZ** states in the preface of the first volume of a seminal monograph published with co-author **AXEL FLESSNER** on European law of contract:

> "It is beyond dispute that Europe has to have a private law uniform to some extent if European countries are to form a single economic area with an internal market with no boundaries. Such a common private law already exists: in regulations of the European Union and in national legislation whereby national legislative bodies integrated Union directives into national law or ratified international (interstate) treaties on legal harmonisation - e.g. international sales law or supply law - for these to have a force of law within domestic laws. The importance of European legal uniformity as a target too important to be accorded to the sole discretion of legislative bodies is increasingly recognised".[5]

**KÖTZ** also agrees that in the future, endeavours to legislate in a homogeneous manner on various issues will have good grounds, the europeanisation of law, however, will have to be preceded by the europeanisation of the science, literature and teaching of law so that we can make further progress towards a pan-European private law. There is no need for path-breaking nor can *ius commune* prevailing in the 18th century be the answer in itself.

Following this path, our task is not less than bridging the gap between continental Roman and German law, and common law, a gap that, revealed by historical studies, has never been so wide and deep, **KÖTZ** writes. Thought itself has to take a new shape and become 'international and European' that is in line with economic-social changes.

Today, there is no European private law *per se* except for rules of law passed by legislative bodies. Creating and identifying it so is still ahead, to be done by all means relying on theoretic-scientific work and studying of legal literature.

The work by the two prominent German authors mean to serve this purpose, naturally from a comparative perspective, at the same time, in a way reaching beyond that.

> "So far, if not merely done to satisfy one's scientific curiosity, comparison of law has been driven by the need for a better understanding and improvement of a particular national law. In the future, Europe will have to strive for surpassing national laws with the purpose of elaborating well-defined common bodies of law as well as to demonstrate whether generally accepted rules can be made in these fields and whether these converge or diverge."[6]

The idea of a common European private law as a prerequisite for European internal market in Europe is already deeply rooted in Western European thought.[7] In his referred monograph, **OLE LANDO** weighs further the aspects of European contract law harmonisation.

> "Why should contract law be unified and why should it be Europeanised? To Europeanise means to unify or harmonise European law. The term Europe covers those countries which are or will become members of the European Union. Many of the reasons for and against a unification of contract law are valid both for Europe and for the world. However, the Europeanisation is in some respects to be treated separately because the Union has brought its members close together and now has the institutions and the tools for bringing about a unification by way of legislation. The Union of today is an economic community. Its purpose is the free flow of goods, persons, services and capital. The idea is that the more freely and

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[5] *Hein Kötz - Axel Flessner:* Europäisches Vertragsrecht, Band I, Abschluß, Gültigkeit und Inhalt des Vertrages - Die Beteiligung Dritter am Vertrag, J.C.B. Mohr, Tübingen, 1996, p.V.

[6] *Kötz-Flessner*, Op. cit., p.XI.

[7] *Cf. Peter-Christian Müller-Graf (Hrsg.):* Gemeinsames Privatrecht in der Europäischen Gemeinschaft, Nomos, Baden-Baden, 1999, pp. 159-160, and *Fritz Rittner:* Európai magánjog, avagy magánjog, mint az Európai Unió alapjai [European Private Law, or the Private Law as Basement of the European Union], 9 *Jogtudományi Közlöny*, 1995, pp. 405-410.

abundantly these can move across the frontiers the wealthier and happier we will get. It should therefore be made easier to conclude contracts and to calculate contract risks".[8]

It is widely agreed that the fundamental question is not whether there is a need for a uniform private law (which goes evident) but the manner of creating European private law.[9]

On the other hand, Professor **MARTIN FRANZEN**, approaching European legal harmonisation from the aspect of a uniform law of the European Union points out in a comprehensive and seminal monograph, which he compiled as an inaugural work, that no European common law can emerge except on grounds of national law. He writes, there is no zero point of time for any supranational private law. National private law conventions as well as the need for systematisation as inter-linked factors create the conditions for legislative and judicial harmonisation to react to and, to the extent possible, build on, the current status and convergence of member states' private laws.[10]

Supposedly, there exists some coherence and convergence between national private laws (besides the common roots identifiable by the comparison of laws).

Peculiarly enough, it was a French-Canadian comparative jurist, **PIERRE LEGRAND,** who first dared to question the validity of the prevailing doctrine of convergence and pointed out the irreconcilable fundamental differences between various *jurisdictions*. He stipulated that legal harmonisation makes sense only in terms of sufficiently homogeneous laws. The gap between continental 'civil law' and the British 'common law', on the other hand, is so wide that attempts for their approximation can be but abortive.[11]

Nevertheless, **LEGRAND'S** and **KÖTZ'S** views do not entirely contradict: supposing real convergence is only possible on grounds of approximating national laws and demonstrating this *in vivo* in the field of private law, there is a chance for us to gain an insight into future trends of the science of civil law working towards homogeneous law.

**2 - PLACING EUROPEAN PRIVATE LAW IN EU LEGAL SYSTEM.** European private law as a phrase, as **ALAIN WIJFFELS** points out in an essay on the historic-economic aspects of European private law in the light of the conceptual evolution of *ius commune*, has long existed although it has only recently been adopted as a legal *terminus technicus*.[12] **WIJFFELS** writes, European private law as an idea gained ground as late as in the 1990s, coinciding with European integration's (internal market, Maastricht, introduction of Euro) gaining of an impetus, not by chance. Codification tasks related to the harmonisation of European private law have never been prioritised by the community, not even in legal agendas going farthest in terms of 'europeanisation'. Delineating the concept and identifying the historical antecedents of European private law is hard[13] just like finding a place for it in the (positive) institutional body of Euro-law[14].

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[8] *Lando:* Third Millennium, p. 345

[9] *Jan Smits:* A European Private Law as a Mixed Legal System, 5 *Maastricht Journal of European and Comparative Law* (1998), p. 328

[10] *Martin Franzen:* Privatrechtsangleichung durch die Europäische Gemeinschaft, Walter de Gruyter, Berlin-New York, 1999, p.7

[11] *Cf. Jan Smits:* European Private Law as a Mixed Legal System, pp. 330-336

[12] *Alain Wijffels:* A New Software Package for an Outdated Operating System? *In.: Mark Van Hoecke - François Ost:* The Harmonisation of European Private Law, Hart Publishing, Oxford-Portland, 2000, p. 102

[13] *Cf. Zoltán, Ödön:* A nemzeti magánjogokról és az európai közös magánjogról [About National Private Laws and Common European Private Law], 10 *Magyar Jog*, 1998, pp. 577-584, *Szalma József:* Az összehasonlító polgári jogról, Tézisek a polgári jog harmonizációs, konvergenciális, divergenciális és az ún.

According to **JÁNOS MARTONYI,**

> "Community law is obviously not international law because its goals, functions, content and subject groups are different from those of any international law. How the system of community law can be aligned with member states' constitutions and embedded in member states' law is a matter of heat debates. Member states have more of less successfully established practices for integrating the concepts of community law supremacy and direct applicability into their domestic law. The fact that the emergence of community law as well as communication, co-operation and, sometimes, confrontation between the European Court and national constitutional courts are the result of four decades' development should not be disregarded. Anticipating or even repeating this in a few years is close to impossible".[15]

This complex legal system, identified by the historic evolution specific to it is, as **CAIRNS** writes, neither national nor federal law but a system which mirrors the very specific relationship between national law and the law developed under the founding treaties which is specific to the EU.[16]

As **LÁSZLÓ KECSKÉS** concludes, the law of the European Community reflects a liberal economic philosophy.

> "It is basically a set of law rules bearing properties of economic public law that acts against economic planning, a complex, interrelated and centripetal set of rules that, if a branch of law, can be regarded as a mutation of domestic economic-commercial rules. However, community law does not yet extensively rely on institutions of private law. It is centred around creating an environment for the free movement of labour, goods, services and capital. The law of European Community is built on the rules related to the creation and maintenance of the common market and, parallel with it from 1987, the single internal market. In lockstep with the integration process, formerly distinct national markets are being replaced by the common market and the single internal market whereby a single internal market of community member states will emerge. Then, differences between international law and internal law as well as those between international law and national laws, if in respect of Community member states, disappear. From the point of view of the common internal market, all these legal relations will become internalised while the set of law rules governing them becomes an internal law common to the member states".[17]

This community law is not a dual system of public law and private law but shall fundamentally consist of a common organisational-institutional-procedural law (public law) and substantive law (economical law). In **AKOS G. TOTH'S** interpretation, the latter term covers the set of rules that govern the operation of the Communities, the matters in their competence and the authorities vested in them by member states to settle these issues.[18]

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univerzális tendenciáiról [On Comparative Civil Law - Theses About the Harmonical, Convergential, Divergential and Universal Tendences of the Civil Law], 6 *Jogtudományi Közlöny*, 1999, pp. 245-252, esp. p. 247.

[14] *Cf. Wilhelm Brauneder:* Europäisches Privatrecht - aber was ist es? (Anmerkungen zu Coing und Zimmermann), 15 *Zeitschrift für neuere Rechtsgeschichte*, 1993, pp. 225-235.

[15] *Kiss Barnabás:* Az európai jog, a nemzetközi jog és a nemzetközi jogrendszerek egymáshoz való viszonya [European Law, Public International Law and International Legal System in their Mutual Relationship] (Tudományos tanácskozás, Szeged, 1997.december 5.), 3 *Jogtudományi Közlöny*, 1997, pp. 103-106, quoted: p. 104.

[16] *Walter Cairns:* Introduction to European Law/Bevezetés az Európai Unió jogrendszerébe, Bilingual Edition, Co-Nex Könyvkiadó Kft., Budapest, 1999, p.17.

[17] *Kecskés, László:* Tézisek az Európai Közösség jogáról és a jogharmonizációról - már magyar szemmel is [Theses on the European Community Law and the Legal Harmonization - As Soon Visible with the Eyes of a Hungarian Too] 4 *Jogtudományi Közlöny*, 1997. pp. 181-194, quoted: p. 182.

[18] *Akos G. Toth:* Közösségi anyagi jog [Community Substantial Law], *in.: Kende Tamás (szerk.):* Európai közjog és politika [European Public Law and Politics], Osiris, 1998, p. 368.

*Acquis communautaire* is best integrated into a system in the light of political goals: it can be analysed in the context of the four fundamental freedoms governing the internal market (free movement of goods, labour, services and capital)[19] with an eye on integration policies. How these policies are grouped also depends on whether community policies are looked at as a whole or focus is limited to those of the European Union.

Policies can be divided as fundamental policies of the communities, policies formulated in the founding treaties, further policies facilitating a higher degree of integration or policies related to the law of the Union[20] or, as horizontal (commercial, regional, social, monetary, financial, taxation, consumer protection and environmental policies), sectorial (agriculture, transport, telecommunication, research, audio-visual and training policies) or competition policies (and state aids, public utilities and public procurement).[21]

Law in the 'classical' European sense is a means of implementing policies.[22] In fact, there is much more to it. As **HELEN WALLACE** writes about the relation between community policies and law:

> "Community law shortly turned out to be a new phenomenon with distinctive features, remarkable durability and a mysterious ability to define and re-define the grounds on which political decision-makers negotiate, 'users' of policies apply these and enterprises do business. The statement that law itself as construed by both national courts and the European Court was by far the most important driving force of integration, much more so than economic logic or political election has by now become a commonplace".[23]

Analysis of community policies, policy-making forces and how the institutional structure works (which is greatly influenced by law itself as seen above) is indispensable for the examination of law. **TAMÁS SZŰCS,** on the other hand, warns that the European Union never ceases to develop, therefore, it can be better understood if looked at as a process rather than as a 'giant state'. Instead of making a conventional centralistic approach, it is better to describe the system as a dynamic and multi-dimensional one, which is more appropriate to describe the efforts of European integration to gradually intensify the market and the creation of community and union policies.[24] Nor can *acquis communitaire*, the set of community law rules, be interpreted by conventional categories of national or international law. Sometimes, the true legal nature of a community source of law can only be revealed when it is implemented on national level.

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[19] *Cf. Berke Barna - Burján László - Boytha György - Dienes-Oehm Egon - Király Miklós (szerk.) - Martonyi János - Mádl Ferenc*: Az Európai Közösség kereskedelmi joga [The Commercial Law of the European Communities], Közgazdasági és Jogi Könyvkiadó, 1999, pp. 59-102.

[20] *Cf. Berke Barna - Burján László - Boytha György - Dienes-Oehm Egon - Király Miklós (szerk.) - Martonyi János - Mádl Ferenc*, Op. cit, pp. 109-110.

[21] Same categorisation in *Kende Tamás - Szűcs Tamás (szerk.):* Az Európai Unió politikái [Policies of the European Union], Osiris, Budapest, 2000.

[22] *Cf. Kende Tamás - Szűcs Tamás*, Op. cit., p. 10.

[23] *Helen Wallace:* Politika és szakpolitika az Európai Unióban: a kormányzat kihívása [Policy and Structural Policies in the European Union: a Challange for the Governments], *in.: Helen Wallace - William Wallace:* Politikák születése az Európai Unióban [Policy-Making in the European Union], I. Studia Europea, Pécs, 1999, pp. 34-35.

[24] *Kende Tamás - Szűcs Tamás*, Op. cit, p. 11-12

**3 - TOWARDS THE CONCEPT OF EUROPEAN PRIVATE LAW.** If we rule out the European public law-private law distinction, what is then 'European private law'? How can we make sense of it and what 'European' means in this context?

As **MARTIN GEBAUER** points out,

> "Müller-Graff discovered a tendency of the adjective 'European' making a remarkable career in certain fields of law. To identify and describe current and future elements of private law in Europe in rules of law and jurisprudence, the concept of *ius commune* is also applied. In fact, it is not sensible, if abortive, to approach the concept of European private law as a finished whole. Certain fields of law, i.e. private law based on conventions and community private law, can simply be labelled as 'European private law', European private law, however, is not limited to these".[25]

An alternative to look at the concept is in the light of national law, determining to what extent a law is 'europeanised' and how successfully community private law based on conventions has been integrated into national law. Still an other approach is that of Pan-European of common European private law which, on grounds of comparison of laws or historic evidence, categorises certain solutions as 'European' (typical to the region, the best practice or guideline), or the opposite, it reveals an impact of a national law on other laws.

**GEBAUER** concludes that European private law can not be defined as a whole but its modes of manifestation and sources can be identified.

He uses the typology of **MÜLLER-GRAFF** to identify three modes of manifestation in the first step: pan-European private law, private law based on international treaties and conventions and community private law, adding two further types: domestic (national) legislation in the wake of legal harmonisation and the decision making practice of the European Court of Justice.[26]

Pan-European private law or a common European private law is made up of the similarities of systems of European private law based on the conventions of historic *ius commune* or can be distilled from several contemporary European jurisdictions by means of a comparison of laws.[27] The key to pan-European private law, gaining ground in legal thought and research in the eighties, is by all means the law comparison method, the two paths of which were followed by two outstanding scientific ventures. One is a thematic, comprehensive and scientific analysis of the various fields, the other, the work of the Lando Commission elaborating the Principles of European Contract Law.

As to the implications *not specifically related to the history of law* of the first[28], there have been two outstanding publications to date in European literature, both by German authors: the

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[25] *Martin Gebauer:* Grundfragen der Europäisierung des Privatrecht - eine Untersuchung nationaler Ansätze unter Berücksichtigung des italienischen und des deutschen Rechts, Universitätsverlag C. Winter, Heidelberg, 1998, p. 59

[26] *Gebauer*, Op. cit., p. 60-61

[27] *Gebauer*, Op. cit., p. 62

[28] *On the history of European private law see: Helmut Coing:* Europäisches Privatrecht, Band: 1, Älteres Gemeines Recht (1500 bis 1800), C.H. Beck'sche Verlagsbuchhandlung, München 1985, *Helmut Coing:* Europäisches Privatrecht, Band: 2, 19. Jahrhundert, Überblick über die Entwicklung des Privatrechts in den ehemals gemeinrechtlichen Ländern, C.H. Beck'sche Verlagsbuchhandlung, München 1989, *R. C. van Caengem*: An Historical Introduction to Private Law, Cambridge University Press, Cambridge-New York-Port Chester-Melbourne-Sydney, 1992, *Manlio Bellomo:* The Common Legal Past of Europe - 1000-1800, The Catholic University of America Press, Washington D.C., 1995, *António Manuel Hespanha:* Introduzione alla storia del diritto europeo, Societreditrice il Mulino, Bologna, 1999, Hans Svlosser: Grundzüge der Neueren Privatsrechtsgeschichte - Rechtsentwicklungen im europäischen Kontext, 9. Auflage, C.F. Müller Verlag,

referred survey of contract law by **KÖTZ** and **FLESSNER,** and the work of **CHRISTIAN VON BAR**[29] on tort law.

The weakness of 'pan-European private law', **GEBAUER** points out, is that in itself, it is incapable of answering current questions and solving current problems. It is not as abstract as it should be and, although it fulfils the 'minimum requirement' typical of all jurisdictions, it surpasses that in a bid to find even better solutions. The author writes, only the actualisation and assessment of the set of law rules within pan-European private law (same as what comparative law does when it approaches general principles of law from an individualised point of view) will make it a source of law.[30] Its strengths lie in sophistication and thoroughness itself: in the manner it presents and explains differences in order to find out what the various systems have in common.

Another source of European private law is international treaties and conventions and a uniform international law reflected in national laws. These are adopted by Union member states jointly with other countries or within the framework of bilateral relations and fall outside the liabilities imposed by community law.[31]

The third is 'community private law'[32], i.e. the set of community law regulations that affect private law relations in the most general sense. These regulations are mandatory in this field.

**GEBAUER'S** typology is remarkable and new inasmuch as it recognises internal harmonisation as a source of European private law. Internal legal harmonisation has two implications: a 'vertical' (when community or uniform law becomes part of the national law by enacting a law, a decree or adopting an international treaty) and a 'horizontal' implication or internal legal harmonisation (when existing internal law is harmonised or uniformised by the new institution of (uniform) law).[33]

Finally, the practice of the European Court as a source of law is discussed. Whether the court interprets (applies) or itself makes law is a question to which there is no unambiguous answer. It is beyond dispute that the decision making practice of the European Court has a considerable impact on national laws and the decision making of national courts hence it may aptly claim recognition as a driving force of law making without putting an end to theoretical debates.[34]

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Heidelberg, 2001, *Reinhard Zimmermann:* Roman Law, Contemporary Law, European Law - The Civilian Tradition Today, Oxford University Press, Oxford-New York, 2001, *Ruszoly József:* Európai jogtörténet [Legal History of Europe], Püski Kiadó, Budapest, 2001.

[29] *Christian von Bar:* Gemeineuropäisches Deliktsrecht - Erster Band, Die Kernbereiche des Deliktsrecht, seine Angleichung in Europa und seine Einbettung in die Gesmatrechtsordungen, C.H. Beck'sche Verlagsbuchhandlung, München, 1996, *Christian von Bar:* Gemeineuropäisches Deliktsrecht - Zweiter Band, Schaden und Schadenersatz, Haftung für und ohne eigenes Fehlverhalten, Kausalitäat und Verteidigungsgründe, C.H. Beck'sche Verlagsbuchhandlung, München, 1999. These works were translated into English soon after publication in German (*Hein Kötz - Tony Weir (transl.):* European Contract Law, Vol 1: Formation, Validity and Content of Contract: Contract and Third Parties, Clarendon Press, Oxford, 1998, *Christian von Bar - Lord Goff of Chieveley:* The Common European Law of Torts, I, Clarendon Press, Oxford, 1998, *Christian von Bar:* The Common European Law of Torts, II, Oxford University Press, US, 2000.

[30] *Gebauer,* Op. cit., p. 71.

[31] *Gebauer,* Op. cit., pp. 73-77.

[32] The term has been in use since 1975. In 1987, **MÜLLER-GRAFF** defined it as 'the force of community law relating to rules of law of each Member State or mandatory to each Member State' (see *Gebauer,* Op. cit., p. 77).

[33] *Gebauer,* Op. cit., pp. 201-207.

[34] *Gebauer, im.* pp. 222-237.

The science of law, therefore, gives us no exact definition, on the other hand, it builds up a system of sources of law while itself becoming an important source of law in pan-European private law.

**4 - SYSTEMATISATION. REINHARD ZIMMERMANN** argues the law of the European Communities for long being unable to go beyond the level of regulating the production and distribution of industrial products used by the agricultural and agribusiness sectors ("how many seats a tractor can have or how big is a 'European' cucumber?") or creating the competition law of beer and pastry products had an inevitable impact: community law became a rigid structure generally studied and analysed by public law. Private law specialists have only recently discovered the law of the European Communities as a system that can be scientifically examined in depth when the tool of comparative law was at their disposal.[35]

**PETER HOMMELHOFF** and **ERIK JAYME** follow a path similar to that of tracing back 'European law' in history to come to the conclusion that while it comprised regulations of the fundamental freedoms mostly stemming from the founding treaties of the European Economic Community, agriculture and tariffs as well as the set of rules on the procedures and institutions of the Community, this 'community law' became an integral part of member states' national laws by stealth, which was on the whole left unchanged when the Commission and the Council of Ministers proposed uniformisation and directives in the fields of labour law, company law, bank law and commercial law. The breakthrough came when, primarily in the wake of adopting community directives for consumer protection, fields of law within the very essence of private law affecting people's lives in various aspects began to change.[36]

It was by the first third of the nineties[37] that the set of laws that can be regarded as the beginnings of 'community private law'[38] emerged.

When **HOMMELHOFF** and **JAYME** compiled the book of 'European private law' on grounds of what was known in 1993, they used a methodology customary in university education, which has proven the best alternative both in pragmatic and theoretic terms: the authors aimed at showing *how national laws are rooted in community law*, primarily through the German example then through national law unified in each member state.

In line with this, after the 'basics' (the treaty establishing the European Community, the Treaty on European Union), the authors proceed to extend the concept of community law towards public law and to divide it into *general civil law, company law, competition law and law of mergers, labour law, capital market law* (including the law of control and private law) and *industrial protection law* dedicating a separate chapter to *international private law*. Compared to the entirety of community law, the set of sources of law, twenty and some in 1993, was negligible in terms of amount and has remained so in the past seven years, as looking at the development of law and making the comparison again would most probably reveal.

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[35] *Reinhard Zimmermann:* Roman Law and Comparative Law: The European Perspective, 16 *Journal of Legal History,*1995, 21, 24.

[36] *Peter Hommelhoff - Erik Jayme:* Europäisches Privatrecht, C.H. Beck'sche Verlagsbuchhanglung, München, 1993, p. XI-XII.

[37] *Winfried Tilmann:* Towards a European Civil Code, 5 *Zeitschrift für Europäisches Privatrecht,* 1997, pp. 595.

[38] The authors add, 'although a 'European Civil Code' seems a long way away.' (*Hommelhoff - Jayme,* Op. cit., XII).

In their textbook, **HOMMELHOFF** and **JAYME** include community directives, draft directives and conventions related to *contract law*, *liability law*, *property law* and *family law* under the umbrella term 'general civil law'. Each directive discussed within contract law has certain consumer protection implications.[39] The survey reveals that 'Europe law' has had little success in liability law (apart from the attempt to align fundamental regulations for liability for defective products)[40] and practically none in property law or family law.

In a recent textbook[41] by **REINER SCHULZE** and **REINHARD ZIMMERMANN** published in 2000 (and a second, enlarged edition in 2002), hence supposedly containing recent information, the concept of European private law is used in both the narrow and wide senses. In the narrow sense, the discussed set of laws is limited to 'classical' private law, i.e. to the fields that, as the authors say, conventionally form part of the first three volumes of a traditional civil code[42], whereby not only company law, labour law, copyright law and competition law but also family law and the law of succession fall outside the concept.

What is left is substantially the civil law of individuals, property and contractual obligations or rather, some elements of these.[43] On the other hand, the concept of 'European private law' is extended to include conventions, covenants and records stemming from

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[39] Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, *Official Journal L 372 , 31/12/1985 p. 0031 - 0033*, Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, *Official Journal L 042 , 12/02/1987 p. 0048 - 0053*, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *Official Journal L 095 , 21/04/1993 p. 0029 - 0034.*

[40] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, *as originally published in* OJ L 210 07.08.1985, p.29, *recently* OJ L 001 03.01.94 p. 263.

[41] *Reiner Schulze - Reinhard Zimmermann*: *(Hrsg.):* Basistexte zum Europäischen Privatrecht, Textsammlung, Nomos Verlagsgesellschaft, Baden-Baden, 2000.

[42] *Schulze - Zimmermann*, Op. cit., p. 6.

[43] Besides the set of laws also discussed by JAYME and HOMMELHOFF, the following directives are presented: Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, *Official Journal L 039 , 14/02/1976 p. 0040 - 0042*, Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, *Official Journal L 158 , 23/06/1990 p. 0059 - 0064*, Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses as has been substantially amended by Council Directive Council Directive 77/187/EEC (OJ L 61, 5.3.1977, p. 26), repealed soon by Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, *Official Journal L 082 , 22/03/2001 P. 0016 - 0020*, Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, *Official Journal L 382 , 31/12/1986 p. 0017 - 0021*, Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers, *Official Journal NO. L 043, 14/02/1997 P. 0025 - 0031*,Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts - Statement by the Council and the Parliament re Article 6 (1) - Statement by the Commission re Article 3 (1), first indent, *Official Journal L 144 , 04/06/1997 p. 0019 - 0027*, Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *Official Journal L 171 , 07/07/1999 p. 0012 - 0016*, Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, Official Journal, L 074 27.03.1993 p.74, Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector, *Official Journal L 024 , 30/01/1998 p. 0001 - 0008*.

international legal approximative processes as well as 'common principles' (among the latter, the European Principles of Contract Law in the first place).

The impact of 'uniform' ('community') European private law on national laws, though demonstrable, is by no means significant: **OLIVER REMIEN** says it is no more than just bricks here and there laid by Brussels in the building of national private laws.[44] This 'pointillist'[45] (termed by **HEIN KÖTZ**) intervention into national laws by imposing obligations on them, as a number of legal scientists dealing with the science of European private law argue, has a dual impact on them: it renews and destroys, helps and counteracts integration.[46]

**5 - UNIFORMISATION OF LAW: BY DIRECTIVES AND MORE.** The concept of a 'uniform European private law' should not be stripped to community directives, though: as **GEBAUER** as well as **SCHULZE** and **ZIMMERMANN** point out, international legal harmonisation does not leave member states of the Community unaffected. The process has a dual impact: on the one hand, a uniform law effective in Europe emerges, on the other, attention is directed towards the strong interrelations and interdependence of international and regional approximation of laws.[47]

It is here that law is cleft into functional and conceptual aspects, europeanisation and communitarisation, from the practical-pragmatic perspective - as envisaged by **WALTER VAN GERVEN** as early as in 1995. In his essay, the author confronts communitarisation of national laws (the harmonising effect of community law on national laws) with europeanisation, the process facilitating the uniformisation of national laws, where he also includes conventions on international law and 'the effect of the science of law in general'.[48]

The 'new element' appearing in the private law of Europe in the mid 1990s is not any more about the Community, the Union's supranational-regional law making, the conclusions implied by scientific analyses of the pan-European private law or harmonisation efforts made by international bodies affecting the states of the region: it is about grassroots initiatives underlain by the persuasive authority of science instead of some legislative power, whether direct or vested. Regulations become effective in legal relations (promulgation of an international treaty or national legislation in line with the Directive) by the parties' choice not by some power of the state.[49] Outcomes of initiatives of European science of law have become 'direct driving forces', unique sources of law that we already can, and must, count on.

**6 - WHAT FUTURE BRINGS.** As **MARK VAN HOECKE** writes about the recent trends in the content of European legal publications

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[44] *Oliver Remien:* Über den Stil des Europäischen Privatrecht, 60 *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 1996, 8.

[45] *Hein Kötz:* Gemeineuropäisches Privatrecht, *in.:* Festschrift Konrad Zweigert, P.C.Mohr, Tübingen, 1981, p. 483.

[46] *Peter Hommelhoff:* Zivilrecht unter dem Einfluß europäischer Rechtsangleichung 192 *Archiv für die zivilistische Praxis*, 1992, 71.

[47] *Schulze - Zimmermann, Op. cit., pp. 6-7* The authors, not surprisingly, illustrate the idea by the interrelation of UNIDROIT and European Contract Law Commission as well as UNIDROIT Principles and PECL.

[48] *Walter van Gerven:* Bridging the Gap between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies? 32 *Common Market Law Review*, 1995, 679, 698.

[49] *Schulze - Zimmermann*, Op. cit., p. 7.

> "The unification, harmonisation or convergence of private law in Europe is a typical topic of the nineties. There were almost no publications on this topic until the end of the eighties, but over the last decade there has been a constantly increasing number of publications, including several new journals, which have been created partly, or even mainly, for this purpose. They include: *Zeitschrift für Europäisches Privatrecht* (1993), *European Review of Private Law* (1993), *Maastricht Journal of European and Comparative Law* (1994). Today, in many journals on comparative law, and even in some more traditional law journals, there is hardly any volume in which the topic is not discussed, directly or indirectly".[50]

**VAN HOECKE** regards the 1989 call of the European Parliament for the making of a European Private Law Code as the symbolic outset. The significance of the initiative is only understood in the context of those times of overwhelming enthusiasm. That was the moment in the development of the Communities when EC felt it is time for going beyond a merely economic level towards a political, social and, perhaps military, union. The question was not whether European legal homogeneity or harmonisation is desirable or feasible but how it should be achieved and what possible barriers are there to be dismantled from the way of a short legal harmonisation process. Elaborating a draft Code of private law is merely one possible way - **VAN HOECKE** lists another five.

The first is the creation of a 'private code' of private law and the publication of it - not by European authorities. This 'private code' is made jointly by the jurists of each Union member state or most of member states with the aim of laying down the regulations that can be referred in international contracts by parties if they wish to do so.[51] The second is the issue of case books that aim at identifying particular decisions made in different jurisdictions on individual cases and analysing them by the law comparison method. The third way leads through the issue of text books: these strive for an all-European perspective in the survey of various fields of civil law, also by means of comparison.[52] The fourth is related to learning and education: to combined programmes where law students spend some time studying in a different country. Finally, the creation of a European legal doctrine on a joint and conceptual basis that affects each and every field of national civil law: in **GEOFFREY SAMUEL'S** words, 'the epistemology of law'.[53] These are paths that meet or overlap from time to time. They are not separable, especially not in the field of contract law, from the work towards a new *lex mercatoria*, the other major initiative for unification.[54]

Efforts to dismantle the barriers from the way of international commerce stemming from the "Babel-like disparties of national laws" as **LAJOS VÉKÁS** puts it[55] are not recent. The idea

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[50] *Mark Van Hoecke:* The Harmonisation of Private Law in Europe: Some Misunderstandings *in.: Mark Van Hoecke - François Ost*, Op. cit, pp. 1-20, quoted p. 1.

[51] The Principles of European Contract Law are mentioned as the best-known examples.

[52] The author illustrates his points with the book by **KÖTZ** and **FLESSNER** on European contract law, which is also referred in this work.

[53] The work referred by **VAN HOECKE:** *Geoffrey Samuel:* Comparative Law and Jurisprudence, 47 *International Comparative Law Quarterly*, 1998, 817-836.

[54] *Cf. Christian Joerges - Gert Brüggheimer:* Europäisierung des Vertrags- und Haftungsrecht, *in.: Peter-Christian Müller-Graff (Hrsg.)*: Gemeinsames Privatrecht in der Europäischen Gemeinschaft, 2. Aufl. Nomos, Baden-Baden, 1999.

[55] *Ferenc Mádl - Lajos Vékás*: The Law of Conflicts and of International Economic Relations, Akadémiai Kiadó, Budapest, 1998, p. 315, in the original Hungarian edition (*Mádl Ferenc - Vékás Lajos:* Nemzetközi magánjog és nemzetközi gazdasági kapcsolatok joga, Nemzeti Tankönyvkiadó, Budapest, 1997), p. 317.

has been in the public mind of continental European science of law for over a century[56] that legal uniformisation is desirable and useful and therefore should be promoted.[57]

Early initiatives enjoying the enthusiastic support of the most prominent specialists of 'the science of theoretic law' as well as bodies of international scientific co-operation were centred around creating European private law 'as such', however, it soon became clear that this is not an easy goal. Uniformisation attempts focused on fields of civil law, on 'peripheral aspects' as **BÁNRÉVY** put it[58], while the approximation of purchasing regulations was lagging behind - eventually, it became a considerable success.[59]

It was at this point that uniformisation efforts on grounds of legal science were aligned with a real need of economy and business for the specific regulation of international law not necessarily in a normative manner rather relying on conventions.[60] The outcome was a renaissance of medieval *lex mercatoria*. The standpoint of legal science on the new *lex mercatoria* is not uniform[61], the impact it made on the development of European private law by integration into the body of international private law, however, is beyond dispute.[62]

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[56] *Zweigert - Kötz,* Op. cit, p. 23.

[57] *See Hein Kötz:* Rechtsvereinheitlichung - Nutzen, Kosten, Methode, Ziele *50 Rabels Zeitschrift für ausländisches und internationales Privatrecht,* 1986, *J.S. Hobhouse:* International Conventions and Commercial Law: The Pursuit of Uniformity 106 *The Law Quarterly Review,* 1990, 531, *Malcolm D. Evans:* Uniform Law: A Bridge too Far? 3 *Tulane Journal of International & Comparative Law,* 1994, 146.

[58] *Bánrévy Gábor:* A nemzetközi gazdasági kapcsolatok joga [Law of International Economic Relations], Szent István Társulat, Budapest, 1998, p. 23.

[59] *See Otto Remien:* Illusion und Realität eines Europäischen Privatrecht, *Juristenzeitung,* 1992, pp. 277-284, *Rainer Schulze:* Le droit privé commun européen, 47 *Revue Internationale de Droit Comparé,* 1995, p.7-31, *Reinhard Zimmermann:* Savigny's Legacy - Legal History, Comparative Law and the Emergence of a European Science, 112 *The Law Quarterly Review*, 1996, pp. 576-605.

[60] *See: Berthold Goldman:* Frontiérs du droit et du "lex mercatoria", 9 *Archives de Philosophie du Droit* 1964, 177 *Clive M. Schmitthoff:* Das neue Recht des Welthandels, 28 *Rabels Zeitschrift für ausländisches und internationales Privatrecht,* 1964, 47 *Aleksander Goldstajn:* The New Law Merchant, 12 *Journal of Business Law,* 1961.

[61] **LANDO** and **GOLDSTAJN** are of the opinion that it not only includes internationally accepted contract standards, general commercial practice, merchants' customs, common law, ethical codes, rules of international organisations and the generally accepted principles of law but also international conventions and uniform law while **GOLDMAN** limits the term to non-legal norms of commercial behaviour. *Cf.: Lando:* The Lex Mercatoria and International Commercial Arbitration 34 *International Comparative Law Quarterly,* 1985, 747, 748, *Goldstajn, Op. cit.,* p. 12 and *B. Goldman:* The Applicable Law: General Principles of Law - the *lex mercatoria, in.: Thomas E. Carbonneau (ed):* Lex Mercatoria and Arbitration, Juris Pub Inc, Huntington, N.Y, 1990, pp. 113-114.

[62] *Cf.: Kurt Zweigert - Ulrich Drobning:* Einheitliches Kaufgesetz und internationales Privatrecht, 29 *Rabels Zeitschrift für ausländisches und internationales Privatrecht,,* 1965, p. 146, *Gerhard Kegel:* Internationales Privatrecht, 7. Aufl. Beck'sche Verlagsbuchhandlung, München, 1995, pp. 4-5, *Ernst von Caemmerer:* Internationale Vereinheitlichung des Kaufrechts, 77 *Schweizerische Juristen Zeitung,* 1981, p. 25.