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Tying the Knot in European Private Law

IVAN SAMMUT*

Abstract: This article attempts to contribute to the debate of how the legal families are to be reconcilable, if need be, to achieve a European private law. The debate kicks off through an analysis of comparative law. Nowadays, comparative law plays a very important role in bridging differences between different legal systems and academics, practitioners and judges alike are becoming increasingly aware of how their colleagues in other Member States tackle similar legal issues. Having established the role of comparative law, the article then moves on to list, describe, and discuss the possible tools that can be used to achieve Europeanized private law. Achieving Europeanization is one thing, moving on to codification is another issue. The article concludes with a discussion on the role of codification in the process of Europeanizing private law and if it would be desirable to have eventually a European civil code.

Résumé: Le fait que l'UE puisse éventuellement avoir un code civil, en associant les systèmes légaux et en revenant à l'époque à laquelle il y avait un « ius commune », est discutable. Ce document ne cherche pas à prendre position sur le fait de savoir si cette réalisation est souhaitable ou possible, mais il cherche à identifier et analyser les outils qui peuvent être utilisés pour parvenir à une telle éventualité. Peu importe qu'un code soit réalisé ou non, c'est une réalité quotidienne que les mesures de l'UE, en particulier dans le domaine de la coopération judiciaire en matière civile, contribuent à la réalisation d'une forme de droit privé européanisé à travers l'Union, même si la réalisation d'un code civil semble compliquée. Dans ce document, par européanisation, on entend le processus par lequel les initiatives législatives sont prises au niveau de l'UE pour parvenir à un droit privé unifié ou harmonisé. Dans ce contexte, il faut se rendre compte que la plupart des systèmes juridiques européens appartiennent à l'une des deux grandes familles juridiques, le droit civil continental et le « common law » anglo-saxon. Si l'européanisation veut être une réussite, elle doit aborder la question des différences entre systèmes judiciaires. Comment? Ce document tente précisément de contribuer au débat sur la manière dont ils sont conciliables, s'il y a besoin. Le débat débute par une analyse comparative des droits et par la suite, décrit et examine les outils possibles qui peuvent être utilisés. Il se conclut par une discussion sur le rôle de la codification et sur le fait de savoir s'il serait souhaitable d'éventuellement avoir un code civil européen.

Zusammenfassung: Die Einführung eines einheitlichen Zivilrechts in Europa durch Vereinheitlichung von Rechtssystemen und damit zurück zum Zeitalter des *ius commune* (gemeinsamen Rechts) ist umstritten. Diese Arbeit entzieht sich jeglicher Stellungnahme auf die notwendige oder mögliche Umsetzung, möchte jedoch deren Methoden und Instrumente zur Erreichung einer Vereinheitlichung identifizieren und analysieren. Angesichts der Tatsache, dass ein gemeinsames Recht möglicherweise nicht realisiert werden kann, zeigt Europa, dass es durch sein tägliches politisches Handeln ein Wegbereiter der von ihnen erstrebten Form der Europäisierung ist. Solches Bestreben zeigt sich besonders in der Zusammenarbeit der nationalen Gerichte. Diese Arbeit versteht Europäisierung als

* Lecturer in European law, Faculty of Laws, University of Malta.

einen Prozess, der mit Hilfe legislativer Initiativen Privatrechtssysteme auf Europäische Union (EU) Ebene vereinheitlicht und harmonisiert. Dabei gehören bereits viele europäische Rechtssysteme zu den zwei gebräuchlichsten Rechtsfamilien: „*Common Law*" (Zivilrecht) und „*Anglo-Saxon Common Law*" (angelsächsisches Zivilrecht). Zur erfolgreichen Umsetzung einer Europäisierung, ist es jedoch wichtig auf die Unterschiede der Rechtssysteme einzugehen. Wie soll dies geschehen? Diese Arbeit unternimmt den Versuch, der Diskussion über die Art und Weise der Rechtsvereinheitlichung beizutragen. Der erste Teil befasst sich mit dem Vergleich verschiedener Rechtssysteme. Im Anschluss daran werden mögliche Methoden und Instrumente aufgezählt, beschrieben, und diskutiert. Abschließend wird die Rolle des Rechtssystems sowie die Notwendigkeit der Umsetzung eines europäischen Zivilrechts diskutiert.

1. Introduction

It is generally acknowledged that comparative law plays a decisive role in the construction of European private law, particularly through the harmonization of contract law. Klaus Peter Berger, referring to Dölle, says that the economic and political integration of Europe must be supported and accompanied by a gradual approximation and finally unification of the domestic legal systems in Europe.[1] Comparative law and a profound connoisseur of foreign law are very important to assist in the bridging of different legal orders through a sound and sensible combination of existing domestic differences instead of a soulless and authoritarian uniform solution. The rise of comparative law from a new and allegedly impractical branch of legal methodology at the beginning of last century, to a catalyst for the development of European private law at the outset of this century, is reflected in the practice of various international tribunals, the courts of EU Member States as well as the law making of domestic legislators in the EU as the driving forces of European integration. International arbitral tribunals, by their very nature, have always adopted a comparative and intercultural approach to decision making. This has been aided by the publication of the International Institute for the Unification of Private Law (UNIDROIT) principles[2] and the Lando principles (Principles of European Contract Law (PECL)).[3] The practice of domestic courts in Europe in the past years also reveals a change of attitude towards the concept of comparative law as the traditional resentments of domestic judges vis-à-vis the comparative methodology are beginning to disappear. This is a natural development, and a study of the possible tools that can be used to bridge the different legal orders including harmonization or unification owes its beginning to the effect comparative law has on domestic law.

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[1] K.P. Berger, 'Harmonisation of European Contract Law – The Influence of Comparative Law', *International and Comparative Law Quarterly* 50 (2001): 877–900, at 877.

[2] UNIDROIT (ed.), *UNIDROIT Principles for International Commercial Contracts* (Rome: International Institute for the Unification of Private Law, 1994).

[3] PECL, see O. Lando & H. Beale (eds), *Principles of European Contract Law, Parts I and II* (The Hague: Kluwer Law International, 2000), at 1 ff.

2. Comparative Law and European Legal Integration

2.1 International Useful Construction of Domestic Law

A practical example of bridging different legal orders to one's own is through the application of comparative law by the notion of the 'internationally useful construction of domestic law'.[4] This involves having a local judge or a local legislator dealing with domestic law, referring to a foreign law either to aid in interpretation or to help construct new law. This inevitably involves a comparative exercise between the foreign law seeking to be integrated and the local law to which the new foreign concept is going to be added. The end result would be that the domestic law would be closer to the foreign law concept adopted. Soft law initiatives such as the PECL will aid this further. The choice of the 'correct' method of interpretation in an individual case is always based on a teleological evaluation of the possible results with a view to ensuring the acceptability of the solution within a given legal order. The domestic judge or international arbitrator who applies a certain domestic law may therefore use his discretion to strive towards an internationally useful interpretation of the law.

The above shows that the first attempts towards the Europeanization of private law occur at the grass root level of a legal system. It takes place voluntarily and very often due to economic reasons. The Europeanization itself may not necessarily be a goal in itself. The success or otherwise of this informal methodology depends on how much receptive is the particular legal system. The probability is that this is more likely to happen in mixed systems. If such a process is further aided by international soft law measures or Restatements, this proves that ready-made comparative reference points for an internationally useful construction of domestic law are indeed steps that contribute towards the bridging of different legal orders. Their use as a standard reference point and their time-saving effect as a means to substitute profound comparative analysis depend on the comparative persuasiveness of every single rule or principle contained in the Restatement. This aspect is even more relevant where the drafters of these Restatements have not merely selected the best solution from the legal system to which comparison has been made but have 'invented' new rules.[5]

2.2 A Possible European Doctrine of Precedents

Another example for the influence of comparative law on the possible tools that can be used in bridging different legal orders involves the courts of the EU Member States and whether they could develop a European doctrine of precedents. A possible justification for developing such a system lies in the growing convergence of the effects and nature of precedents in civil and in common law, particularly in the area of contract law. The traditional distinction between civil law jurisdictions, where

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[4] See for this concept, Berger, *The Creeping Codification of the Lex Mercatoria* (The Hague: Kluwer Law International, 1999), at 83.

[5] Berger, ICLQ 50 (2001): 882.

court decisions are regarded as mere tools for the understanding of statutory law, and common law jurisdictions, where precedents are regarded as formal sources of law, has its origin in the high time of positivism which has started to disappear.[6] It is becoming clearer that judges' task from both legal traditions involves more than the logical deduction of rules and principles by way of a 'mechanical jurisprudence'. Deviation does not occur unless there are strong justifications. MacCormick and Summers argue that the normative effect of precedents is acknowledged in civil law jurisdictions in those areas where there is a long line of case law of the highest court, or a long-standing court practice that has not been attacked by legal doctrine.[7] This tendency of converging case law methods in civil and in common law, and the necessity of a European methodology, provide the background for a Europeanization of the doctrine of precedents that could develop into a cross-border effect of court precedents based on a methodology that applies throughout the EU.[8]

Judges from both jurisdictions have provided indications for their willingness to cooperate in the development of a European case law method. For example, Walter Odersky[9] argued that while a judge is bound to apply his own law and to evaluate all aspects which set limits to the construction of statutes and the development of the law, the judge may also consider the argument that a certain solution found in another legal system fosters the harmonization of European law. He continues that as a result of the comprehensive evaluation of all relevant facts and circumstances of the case, a judge may adopt the solution found in a foreign legal system. This perspective will contribute towards the integration of European private law. As a practical example, the German Federal Supreme Court has rendered decisions in which it has referred to statutes and precedents of other European jurisdictions to establish an international standard with an almost normative effect on the construction of German law.[10]

This openness towards comparative law methodology is also reflected in a series of English court judgments.[11] The case law of the European Court of Justice (ECJ) also provides strong input for the development of a European system of precedents. In practice, the ECJ's judgments are prepared by comprehensive comparative studies and deviations from previous case law must be revealed and justified. This openness encourages lawyers to recognize comparative law as an independent legal science and makes it increasingly difficult for them to limit their reasoning to their domestic legal

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6 See N. MacCormick & R. Summers (eds), *Interpreting Precedents – A Comparative Study* (Boston, MA: (Aldelshot, Ashgate & Dartmouth, 1997), 531, 532.

7 *Ibid.*, 538.

8 *Ibid.*, 542.

9 Former President of the German Federal Supreme Court (Bundesgerichtshof). See Berger, ICLQ 50 (2001): 885.

10 Berger, ICLQ 50 (2001): 886.

11 See *Woolwich Building Society v. Inland Revenue Commissioners* [1972] WLR 366, 393; *Hendesen v. Merett* [1994] 3 WLR 761, 779.

system. This would make the EU legal orders not characterized by domestic isolation but by the 'coexistence and combined effect of different legal systems'. The ongoing process of horizontal integration of the EU Member States is not limited to the EU institutions but is supported in this way by the domestic courts. A European doctrine of precedent would enable the courts to take account of the changing reality which they are facing today and to which they have to react in their decision making. This would also contribute to an increased quality of judicial decision making. Although on its own, this will not necessarily achieve a bridge between the different legal orders of the EU Member States, it will certainly approximate them closer together.

2.3 The Role of the Domestic Legislator

A third example for the use of comparative law in the context of bridging the different legal orders involves the third actor in this area, the domestic legislator. An important central issue in this discussion would be whether such a process could be accomplished through legislative activity. Two schools of thought dominate the scene. These are the Thibauts or the codifiers and the Savignys or the cultivators. What divides them is the question whether the law should be Europeanized by way of codification (legislation) or by patient cultivation of the people.[12] On one hand, the cultivators argue that European private law should grow organically and slowly in the people led by academics and the business community. They refer to the proud tradition of Roman law. They imagine that the writings of learned scholars and Socratic seminars under the palm trees of the *academia* would distil the *ultimate ratio* and establish a European contract law.[13] On the other hand, the other school disagrees. While acknowledging the contribution of Roman law, it does not approve of its many and contradictory sources that create insecurity. This school prefers the type of codification brought by the Napoleonic Code and would like to see a European Code on the same lines, a code that strives at simplicity.

Although the issue about which school should prevail as regards the way in which the Europeanization of private law could take place may be immaterial at this stage, it is certainly worth mentioning any possible role that could be played by the domestic legislator in this process. The 'comparative law-making technique' employed by domestic legislators was not only used in the drafting process of the major European codifications of the 'second generation' such as the German Civil Code but also employed to an increasing extent in the drafting of 'third generation codes' like the new Dutch Civil Code.[14] Complementing the comparative exercise, Restatements of international contract law also play a vital role in this regard. Thus, similar to the doctrine of precedent, national legislators do play a role in bridging

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[12] See R. Zimmermann, 'Savigny's Legacy, Legal History, Comparative Law and the Emergence of a European Legal Science', *Law Quarterly Review* 112 (1996): 576.

[13] O. Lando, Guest Editorial: 'European Contract Law after the Year 2000', CML Rev. 35 (1998): 828.

[14] Berger, ICLQ 50 (2001): 894.

the legal orders and therefore contribute by providing groundwork for possible Europeanization of private law.

2.4 How to Make Comparable Things: Legal Engineering at the Service of Comparative Law

Whatever tools one chooses to bridge the legal orders and arrive at some form of Europeanization of private law, comparative law with its multiplicity of different ways and methods plays a very important role. Using Karhu's method on the basic distinction that can be made on whether the focal area contains norms which are valid law or whether norms are evolving using the notions of *de lege lata* and *de lege ferenda*.[15] This is explained in Table 1.

De lege lata/de lege lata (1)

This is the most typical situation where two legal systems are compared in areas where the norms regulating the focal area are both valid in the systems in question. The comparison is to be founded on norms forming part of valid law in both systems.

De lege ferenda/de lege lata (2)

This situation can be used as a means for recognizing possibilities for change in one's own valid law. This could be done by looking for the *de lege ferenda* solutions for one's own systems by analysing the *lege lata* solutions of another legal system. Since one is dealing with something already in force in another legal system, the principal question on the very possibility of such a normative solution should not arise at all.

De lege lata/de lege ferenda (3)

Comparative law can be characterized with reference to possible consequentialist arguments when reasoning on the basis of one's own valid law. Integration between different legal systems can be achieved not only by common legislation but also by other similarities.

Table 1

	Legal System B: *de lege lata*	**Legal System B: *de lege ferenda***
Legal system A: *de lege lata*	*de lege lata/de lege lata* (1)	*de lege lata/de lege ferenda* (3)
Legal system A: *de lege ferenda*	*de lege ferenda/de lege lata* (2)	*de lege ferenda/de lege ferenda* (4)

[15] Kahu Juha, 'How to Make Comparable Things: Legal Engineering at the Service of Comparative Law', in *Epistemology & Methodology of Comparative Law*, ed. M. van Hoecke (Oxford: Hart Publishing, 2004), 80.

This possibility is to compare the reform plans in two countries. This can be done on the basis of the contents of the reform plans, and it would be similar to a comparison of valid laws. However, in this example, only proposed laws are subject to comparison.

As the tools using comparative law can contribute towards the Europeanization of private law, it is worth observing that a modern legal system's unity of law is changing both from within, through lobbying as an example, as well as from outside including the processes of Europeanization and globalization.[16] With the prospect of the emergence of a European methodology, it is important to emphasize this self-transformation of the nature of the state and the weakening of the paradigm of the unity of the legal system, which initially had little to do with Europe and more to do with technology and the economy. This assumption also has an impact on the methodological development. In the debate on the Europeanization of private law in Europe, reference is to be made to the need to respect the 'cultural identity' of states and their law.[17] This concept is often invoked against European law. It is said that the law's cultural ties are so strong that more far-reaching Europeanization in particular the production of civil codes, de facto has narrow limits.[18] Many authors take the opposite view, namely that there is an unwritten implicit common core of European legal culture which would allow the taking of further steps towards a pan-European positive law.[19] This assumption is based on a set of common ideas that remains hidden behind the differentiation of the legal evolution in Member States. It could be explained in a functionalist way with reference to a shared logic of economic, social, technological, and cultural transformation.

2.5 Comparative Law: Methodology and Epistemology

There are many different purposes of comparative research and there are nearly as many possible methods. Comparative law is not even the same in a small country as opposed to a big one. In the United States, comparative law is not a very popular subject probably based on its own estimation that it is one of the leading countries in the world. Such attitude is similar to that of the Romans during the Roman times. Among European countries, comparative law tends to be more popular especially

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16 K.-H. Ladeur, 'Methodology and European Law – Can Methodology Change so as to Cope with the Multiplicity of the Law?', in *Epistemology & Methodology of Comparative Law*, ed. M. van Hoecke (Oxford: Hart Publishing, 2004), 95.

17 M. van Hoecke, 'The Harmonisation of Private Law in Europe: Some Misunderstandings', in *The Harmonisation of European Private Law*, eds M. van Hoecke & F. Ost (Oxford: Hart Publishing, 2000), 1.

18 P. Legrand, 'Against a European Civil Code', *Modern Law Review* 60 (1997): 44–63.

19 G. Teubner, Legal Irritants: 'Good Faith in British Law or How Unifying Law Ends Up in New Divergences', *Modern Law Review* 61 (1998): 11–32.

among those that come from the same legal tradition.[20] Although national courts have not been great promoters of comparative law in the past, supreme courts of the EU Member States are becoming more open on this issue. Particular reference could be made to Judge Odersky of the German Supreme Court mentioned earlier on in this chapter.[21] European private law must be built on as many pillars as possible. One of them could be a 'pro-European' method of interpretation. Europe's supreme courts are in a better position nowadays to have easy access to each other's decisions and to make use of them by granting each other something similar to a 'persuasive authority'.

As far as legislators are concerned, modern comparative law in Europe has good reasons to pay more attention to the so-called 'small' or smaller legal systems. They really were the first to give some room to what is called today European private law in so far as they have tried to build bridges between different legal cultures. This provides the basis for further analysis into the Europeanization of European private law as the needs of present-day Europe go further than what has been achieved so far. Supplementing the legislators, one must not ignore the role that academic writers play in this context. European private law is not about 'comparative law'. It is about contract law, tort law, and so on. The question on which legal system(s) should be included in the analysis does not arise. It is always the whole lot, that is, the laws of all the Member States plus European Union law in a given field. European private law is not much concerned about comparison. It is concerned with collecting arguments and presenting them in one single concept or system, and if need be, a new one. In European private law, it is no longer self-evident and axiomatic that private law is national in nature. It is understood as following its own internal logic and non-State interests. It means doing what any legal system is accustomed to be doing with one exception, the idea to broaden the field of discussion and to create a pan-European intellectual network. In order to achieve this, a number of tools can be used.

3. The Tools and Definitions

3.1 Methodology and European Law

On one hand, the Europeanization of private law can be achieved through initiatives at national level by the institutions of a Member State who could work to bring their national law closer to that of the other Member States. On the other hand, it can also be achieved by European institutions or by other actors at European level who take the lead to ensure that the law in a particular sector is as uniform as possible in the Member States. For a better understanding on how such Europeanization can

[20] C. von Bar, 'Comparative Law of Obligations: Methodology and Epistemology', in *Epistemology & Methodology of Comparative Law*, ed. M. van Hoecke (Oxford: Hart Publishing, 2004), 127.

[21] Berger, ICLQ 50 (2001): 886.

be achieved, a theoretically informed work of comparative law is needed to focus on the interaction of a plurality of sources of law. However, the emergent European law need not be regarded as the law of an emerging European super-state. The Europeanization of private law can happen if and only if the Member States themselves are involved in a process of fundamental self-transformation. It is important for a European methodology to accept the challenge of legal pluralism from the outset and to search for a new paradigm that might be more open to the institutional requirements of a European multilevel system of law.[22]

Against this background, it has to be recognized that there are different dynamics in the Europeanization of law. In view of the open process of the development of European institutions, it can be asked whether a methodology of European law making ought not to drop the orientation to the unity of law. At the legislative level, there can be tendencies that constitute a challenge to the unity of national law in the sense that law making is not based on common traditions and a shared knowledge basis which could in the past be referred to the Member States. This may not be problematic in those areas where new law is developing such as, for example, telecommunications law. In this case, European law can initiate a productive process of legal reform. However, it is harder to cope with cases where national law has developed its own structural forms and unification comes about more in the interest of the internal market. The more EU law affects the general principles of Member States private law, the more urgent it is to answer the question of how far these effects should go and what specific European methods are to be developed for the development of private law. This brings more diversity and the national legal systems act more as a node in a network of cooperation that reaches through the development of a European methodology for the pluralized legal system. European law ought not to be shaped according to the pattern of classical national law, since European Federal State of classical type cannot become functional, not only because of the aforementioned processes of change, but also on account of the size of the EU.

3.2 The New European Culture

The success or otherwise of the methodology of the Europeanization of private law also depends on the new European legal culture as the context in which the above is taking place. One of the main disadvantages of any Europeanization of private law that could take place is that lawyers might be inadequately prepared to handle legal concepts that are unfamiliar. In order to address this problem and to have a successful harmonization or unification, one must have an educational process whereby Universities do not teach the law of a particular jurisdiction in a national and positivistic character but teach law students how the law as such works and

[22] See Ladeur, 100.

how to use it to find solutions.[23] This is particularly relevant if the Bologna Process is to be taken seriously in European Legal Education. A student studying law in England might end up practising law in Brussels or in Italy. If English universities were only to teach English law, then the Bologna Process would be irrelevant. This educational approach is more important when there is more harmonization as opposed to unification since with unification it would be superfluous. For example, in the United States, each state has its own legal system which may not only be different but may also belong to a different legal family altogether.[24] However, in law schools of international repute, such as Harvard, Yale, or Berkeley, students are thought something that is not as such the law anywhere. These schools teach American contract law as if there is one American contract law and not the contract law of Massachusetts, Connecticut, or California. Students are therefore prepared to practice all over the United States. One can remember, for example, David Boise who studied in Yale and practised in New York explaining Florida constitutional law in front of the Supreme Court in *Bush v. Gore* in 2000.[25] If one were to take a non-positivist approach to legal education, the likelihood of a successful Europeanization is increased.

Before analysing the Europeanization methodology in greater depth, it is worth observing that the emerging new European private law is developing as less formal-dogmatic and more substantive-pragmatic than the national legal cultures have been in Europe.[26] Directives are the instruments of European harmonization which has had by far the greatest impact on private law in Europe.[27] Traditionally, private law is regarded as being relatively apolitical. However, with the help of directives, private law is becoming more instrumental in achieving political, economic, social, and other aims. The presence of directives means that private law may be used by the legislator to achieve certain aims. Some scholars, Jan Smits among them, still think that at least the general part of private law, especially contract law and tort law, has its own internal logic and is based on 'fairness' and 'morality'.[28] In practice, I tend to be closer to Christian Joerges that this position has become increasingly

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[23] See M.A. Eisenberg, 'The Unification of Law', in *Making European Private Law: Essays on the 'Common Core' Project*, eds M. Bussani & U. Mattei (Trento: Kluwer Law International, 2003), 35.

[24] For example, the law of Louisiana belongs to the Civil law family while that of New York belongs to Common law.

[25] M.W. Hesselink, *The New European Private Law* (Deventer: Kluwer, 2002), 53.

[26] C. Joerges, 'Editorial and Acknowledgements', ERPL 8(2000): vii.

[27] See for an inventory, P.C. Müller-Graff, 'EC Directives as a Means of Private Law Unification', in *Towards a European Civil Code*, eds A.S. Hartkamp et al., 2nd edn (Nijmegen and The Hague, London, Boston: Kluwer Law International, 2004), 71 ff., on 83.

[28] J.M. Smits, *The Good Samaritan in European Private Law: On the Perils of Principles without a Programme for the Future* (Deventer: Kluwer, 2000).

untenable.[29] The legislator uses private law in order to achieve certain aims. Thus, private law is taking more of a functional approach with the economical effect of different rules becoming more and more relevant. The effect of directives on European private law is making the functional approach more relevant as the concentration is made more on what is the purpose of the directive and how it should be interpreted in the light of that substantive purpose rather than to concentrate on the formal concepts used to implement it.

3.3 Private Law Initiatives

Another important example of the shift from 'form' to 'substantive' European private law is provided by the increase in the proliferation of soft law. Soft law could help to speed up the Europeanization process. In the United States, there is the American Restatements of the Law private committees that have drafted various sets of principles. In Europe, there are now the *PECL*,[30] the *Principles of European Trust Law*,[31] as well as the *Principles of European Tort Law*.[32] These principles are not law in the formal sense and their success is entirely based on their substantive quality and authority. The drafting is based upon a functional approach. These principles can contribute towards the said process as they provide inspiration as well as concrete examples of what success harmonization or unification can aspire.

The above private initiatives have now been followed up by an initiative taken by the European Commission to launch a Common Frame of Reference (CFR) in 2004 and now there is a Draft Common Frame of Reference (DCFR). Following the Communication on European Contract Law,[33] the European Commission adopted a further Communication in February 2003 entitled 'A More Coherent European Contract Law – An Action Plan'.[34] This is considered to be a further step in the ongoing discussion on developments in European contract law. One of the key measures proposed in the Action Plan is the elaboration of a CFR. In order to increase coherence in the contract law *acquis*, the CFR provides a common terminology (e.g., contract, damages) and rules (e.g., non-performance of contracts). The CFR serves two different aims: (1) It should serve as a tool for the improvement of the *acquis*. The addressee of this tool is in the first place the European Institutions, above all the Commission, in order to increase the quality of drafting provisions. (2) It could be the basis for the so-called optional instrument on European Contract Law. Meetings

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[29] C. Joerges, 'The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective', ELJ 3(1997): 378–406 at 394.

[30] Lando & Beale (eds), *Principles of European Contract Law, Parts I and II*.

[31] D.J. Hayton, S.C.J.J. Kortmann & H.L.E. Verhagen (eds), *Principles of European Trust Law* (The Hague: Deventer, 1999).

[32] J. Spier (ed.), *Unification of Tort Law: Causation* (Dordrecht: Springer, 2000).

[33] COM (2001) 398 final.

[34] COM (2003) 68 final.

involving various stakeholders, academics, and Commission officials started in late 2004 and, by 2008, a DCFR has finally appeared.[35] The DCFR engages with subjects that are far more important than they might appear at first sight. The future of private law in Europe, not least contract law, is inextricably linked to the broader political destiny of the EU. A work on European civil code should be understood to compromise not simply a technical solution to the problems of obstacles to cross-border trade, but rather as the task of placing flesh on the bones of a European Social Model.[36]

3.4 Observations

From the above, it can be concluded that European legal culture is undergoing a radical change towards a more functional and less formal and positivist and more pluralist in style. The characteristic of this new legal culture itself facilitates the rise and further development of a new common legal culture. It will also help academics and practitioners overcome differences that are formal such as concepts and structures and will show that differences in substance by no means necessarily coincide with national borders. Another advantage of this is that European and American legal cultures are coming closer to each other and this will facilitate communication and would make the Bologna Process even more relevant for legal education.[37] The main value of anti-formalism is that it allows substantive reasons to prevail. Finding a satisfactory balance between form and substance, between formal and substantive arguments, is the challenge that is being faced by European private law at present. With the Europeanization process, change will not be limited to the new common European private law. National private law will also be affected and it will never be the same again. This is primarily due to the subversive effect of comparison and secondly due to the impact of European Union law on the national legal systems. As a result of further ongoing European integration private law and European law are no longer separate bodies of law but they intertwine together. This would make the analysis of the tools even more interesting.

The EU system has to be constructed as a non-hierarchical open network of overlapping relational patterns among varying dimensions of normativity in a multilevel system. A multilevel system can be taken as a multi-polar network with various nodes and various linkage patterns, the modelling of which requires the cooperation and harmonization of various legal and non-legal norms.[38] A pluralistic cooperative system might therefore form the framework for a methodology for European law.

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[35] <www.sgecc.net>.

[36] See 'Editorial', ERCL 4, no. 3 (2008).

[37] See J. Gordley, 'The Common Law in the Twentieth Century: Some Unfinished Business', *California Law Review* 88(2000): 1815.

[38] See Ladeur, 103.

For example, in practice, the ECJ often intends to favour interpretations that do not require any Member State to abandon its existing approach to problem solving. This could be taken as a pivotal principle of respect of diversity and pluralism. In fact, the Europeanization of private law in could develop through various tools with each tool suitable to achieve a certain level of integration that might be appropriate to a specific field of law.

4. Defining the Tools

Having established that the Europeanization of private law is not barred by the differences between the two main legal families, it follows that the next logical theme is to examine the way in which this could happen. The most important tools that can be analysed are cooperation, harmonization, uniformization, unification and codification. As some writers may use different connotations for each term, it is important to clarify at this stage the meaning being attributed to each of this terminology in this work. In the table below, one can find a list of the tools that are going to be analysed starting with the least integrationist one, cooperation, and going chronologically towards the tool which is the most integrationist, unification (Table 2). The table is followed by another table later on in this article which includes the definition and characteristics of Codification (Table 3). Codification does not fit into the chronology of Table 2 as per definition, given that it can be applied to the results of most of the tools processes listed in the table.

4.1 Cooperation

Cooperation involves the consultation between the Member States to coordinate their national law closer together. The EC Treaty provides for the 'coordination', 'approximation', and 'harmonization' of national legislation in various domains. In EU legal jargon, although the latter two have the same meaning, the latter one is often preferred. Coordination came to be regarded as denoting a different and more superficial action than the other two terms.[39] Thus, one can say that cooperation is to be taken to be a very loose form of harmonization. Cooperation, rather than harmonization taking place by a legal instrument, may take place through soft forms of integration such as informal agreements between Member States or through soft law initiatives. It is the least integrationist of all the tools and does not include any formal steps to achieve the Europeanization of private law. It could be used for those areas that are under the reserved competence of the Member States. As it is a very weak form of harmonization, any further elaboration on this methodology on its own is beyond the scope of this chapter.

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[39] M. Dembour, '*Harmonisation and the Construction of Europe: Variations Away from a Musical Theme*', EUI Law No. 96/4, 1996, 5.

Table 2

Tool	Definition	Level of Integration	Main Characteristics
(1) Cooperation	Consultation between Member States on legislative initiatives	Minimal	– Very partial – Very unsystematic – Dynamic
(2) Approximation/ Harmonization	Legal rules from different jurisdictions are brought closer to each other in scope.	Minimal to Comprehensive with varying degrees of integration	– Partial – Unsystematic – Two levels of governance – Dynamic
(3) Uniformization or Standardization	Legal rules from different jurisdictions are similar to each other in scope.	Comprehensive to almost Complete	– Partial leaning towards Comprehensive – Unsystematic – Two levels of governance – Less Dynamic
(4) Unification	A supranational legal rule applicable in all Member States	Complete	– Complete – Could be systematic – One level of governance – Static

4.2 Approximation or Harmonization

Harmonization or approximation or coordination[40] is the process whereby legal rules from different jurisdictions are brought closer to each other in scope.[41] Harmonization is a common method used by the European Union to bring the laws of the Member States closer to each other by means of Directives in order to achieve the Internal Market. An important characteristic of directives that is affecting the new European legal culture is that a Directive leads to 'Impressionistic Harmonisation'.[42] Directives deal with specific subjects that in most legal systems form part of

[40] These are different terms that are sometimes used interchangeably in the EC Treaty, for example, Arts 6, 27, 40, 41, 43, 54(3)(g), 56, 57, 63, 70, 75, 99, 100, 101, 102, 105, 111, 112, 113, 145, 220 and 235 (numbering as stood before the Amsterdam amendments).

[41] G. Zaphiriou, 'Harmonisation of Private Rules between Civil and Common Law Jurisdictions', *The American Journal of Comparative Law* 38 (1990): 71.

[42] Hesselink, *The New European Private Law*, 36.

a broader subject which may in turn be systematically connected with other subjects. This patchwork characteristic of harmonization of directives is a direct result of the instrumental approach to law. The Commission from which most directives originate is concerned with certain specific changes in the law which it may regard as necessary to fulfil the function of the Internal Market and which are politically desirable. The directive is not concerned with the result it may have on the national legal system and even the same effect could vary from one system to another. This functional and impressionistic approach to private law could lead to friction within the national legal systems. Although the directives aim at unity at European level, they may cause disunity at national level.[43] The disruptive effect is a direct result of the impressionistic approach. As Müller-Graff argues, to make the matters even worse, directives are frequently incoherent among themselves.[44] This has led to the impressionistic approach to be lamented by private scholars and is one of the main reasons for pleas for a systematic unification in the form of a European civil code.[45]

4.3 Uniformization or Standardization

Uniformization or standardization is perfect harmonization. It involves the achievement of a perfect harmonized law, thus making the law of one legal order identical to that of the others. With uniformization, the law of the Member States would be identical but the rules of law would remain at national level. Perfect harmonization brings uniformization. Although some authors, such as George Zaphiriou, would prefer to use the same meaning for uniformization and unification, for the purposes of this work, a different meaning would be used for unification.[46]

4.4 Unification

Unification can be understood to refer to the instance when a supreme law legislated at a supranational level is set to apply in all Member States. Thus, with unification, the talk is no longer about national legal orders but at the European legal order level. Unification would mean perfect Europeanization. Unification is also used by the said Union when the need is to have a law operating at Union level to regulate a particular aspect. The legal instrument used is a Regulation.

4.5 Some Common Characteristics of the Above Tools

Unification and harmonization can be achieved through similar means such as custom, trade practice, legislative acts, judicial practice, as well as the writings of

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43 Joerges, 'The Impact of European Integration on Private Law', 385.

44 Müller-Graff, 77.

45 Lando & Beale (eds), *Principles of European Contract Law, Parts I and II, Prepared by the Commission on European Contract Law* (The Hague: Kluwer Law International, 2000), xxii.

46 *Ibid.*, 71.

academics.[47] Such processes can take place within a nation, between states or provinces of a federation, or within a community of states as in the case of the European Union. In Europe, unification and harmonization were achieved in the past by the creation or reception of civil and commercial codes. In the United States, several areas of law such as copyright, antitrust, and taxation were unified by federal law at both statutory and judicial level. A different kind of unification was achieved by the adoption of the Uniform Commercial Code.[48] Unification or harmonization can be systematic, that is taking place with a particular legal tradition, or it can be between two different legal traditions. At their inception, the Civil law and Common law traditions were homogeneous. However, these were adopted by different countries and therefore they were subjected to the antithetical process of diversification and harmonization.

Harmonization and unification are merely methods to bring different legal orders closer to each other. The success and the type of method used often depend on the aims behind such projects. Whether the Union uses one method or the other depends on what competence the Union has on the particular subject area and on whether the principle of subsidiarity is satisfied. Private law is a very generic term in the sense that it includes a wide area of substantive rules of a legal system. What might be relevant for contract law may not necessarily be relevant for family law.[49] Thus, after examining in detail the results that can be achieved by the said methods, it makes sense to examine briefly in the following chapter how the said tools could be used for some of the most important areas of substantive private law.

In dealing with harmonization and unification, one has to keep in mind the issue of legal irritants. Often, European Directives may contain legal concepts that are alien to the national legal system. These legal irritants occur when a legal transplant, as described in the previous chapter, is to a certain degree not very successful.[50] A particular example is how the notion of good faith was attempted to be introduced into English law as a result of the transposition of the Unfair Terms Directive.[51] The problem that arose is related to the scope that it should become part of the general clause like it is in the civil law system, or should its field of application be limited to the content of standard terms in consumer contracts? The legal irritants may have yet another disruptive effect on the coherence of the national system. Keeping in mind that the European Union has been having directives since its inception as the European Economic Community (EEC) more than half a century

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47 See E. Bodenheimer, 'Doctrine as a Source of the International Unification of Law', *American Journal of Comparative Law* 34 (Supplement 1986), 67 ff., also at <www.cisg.law.pace.edu/cisg/biblio/bodenheimer.html>.

48 See Zaphiriou, 72–73.

49 G. Barnett & L. Berardeau, *Towards a European Civil Code*, ERA, Trier (2002).

50 Teubner, 1 ff.

51 Council Directive 93/13/EEC of 5 Apr. 1993 on Unfair Terms in Consumer Contracts.

ago, directives are now a way of life in the European legal systems. This means that the European legal systems had somewhat to adapt to a new reality, so when analysing the impact of harmonization and unification, one can assess the impact of these tools to prove whether more Europeanization is achievable.

4.6 Codification

Codification is a process of collecting and restating the law of a jurisdiction in certain areas, usually by a subject, possibly forming a legal code. By 'law', it can be taken to mean any legal instrument. Thus, the collection of any legal instrument into one instrument is itself a codification process. Thus, it is wrong to associate unification with codification as it could be applied to any of the previously mentioned tools. For example, Directive 2004/38/EC could also be described as a codification process of the previous harmonization directives.[52] Codification can also be understood to be the process of enacting codes of law such as a civil code. This is maximum codification. In this article, the use of the term codification is not restricted to maximum codification but is used simply to describe the process mentioned in the first part of this paragraph. Therefore codification falls outside the hierarchical order described in Table 2. Below, one can find Table 3 with the characteristics of codification.

5. The Tool of Approximation/Harmonization

Harmonization designates the legal mechanism by which national legislations are aligned so as to reduce or eliminate the inconvenience arising from their disparities. Having established the EEC in 1957, the Member States intended to achieve a common market that has now developed into an Internal Market. As the Community was being established, it was realized that it would be of limited use if technical standards legally imposed in one Member State differed from those of the other Member

Table 3

	Definition	**Level of Integration**	**Characteristics**
Codification	A process of collecting and restating the law of a jurisdiction in certain areas, usually by a subject, possibly forming a legal code	Comprehensive particularly in a selected area	– Comprehensive – Systematic – Often one level of governance – Static but can be changed

[52] European Parliament and Council Directive 2004/38/EC of 29 Apr. 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158 of 30 Apr. 2004.

States. Until standards were 'harmonized', they would constitute obstacle to the four freedoms.

Of the three terms, coordination, approximation, or harmonization, the latter was established in legal parlance towards the middle of the twentieth century. The other two terms were new. The word 'harmonization' was introduced in the legal sphere by René David, who was a French legal comparatist of international reputation. If one were to examine the etymological meaning of 'harmonization', one can refer to Dembour's analysis from the French dictionary *Littré* of 1958.[53] The dictionary offers a definition of the word '*harmonie*' in six parts. Reference to the first and second definition found in the dictionary is enough to make it clear that 'harmony' etymologically refers to an arrangement between different parts of a whole, in such a way as making these parts serve a single purpose. This can be easily transposed in the legal European context. National legislations need to be adopted to further the aim of a common purpose, the establishment of a common market.

5.1 The Various Methods of Harmonization

Lawyers can now distinguish between various methods of harmonization. They are not necessarily provided for in the Treaties or in secondary legislation but can be identified in an academic exercise. As an introduction, one can mention them at this stage. For example, one can speak of 'total harmonization' or uniformization. This allowed no derogation in the pre-empted area except for safeguard measures or to the extent permitted in the directive. In the 1970s, the term 'optional harmonization' was coined to remedy the perceived excesses of the former. This allows producers to apply national norms or Community norms. Some directives also allow Member States to exercise the right of opting-out. Partial harmonization regulates some aspects of the subject matter, for example, only rules for certain cross-border transactions. Minimum harmonization allows Member States to provide for more stringent rules. Alternative harmonization allows Member States to choose between alternative methods of harmonization. This is particularly relevant for mutual recognition of controls whereby Member States are required to recognize each other's control. Often, harmonization leads to a piecemeal legislative method. Finally, one can also speak of 'bottom-up' or 'top-down' harmonization depending on the reasons why it would be taking place.[54]

5.2 The Characteristics of Harmonization

Harmonization is necessarily partial. Each specific harmonization measure requires a sufficient legal base. In light of the principle of subsidiarity, harmonization

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[53] Dembour, 6–8.

[54] W. van Gerven, 'Harmonisation within and Beyond', in *'From Paris to Nice' Fifty Years of Legal Integration in Europe*, ed. M. van Empel (Deventer: Kluwer, 2002), 2.

measures cannot go further than is necessary and are not desirable with a view of the proper functioning of the Internal Market.[55] They must genuinely have as their objective the improvement of the conditions for the establishment and functioning of the Internal Market. A mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortion of competition liable to result therefrom is insufficient to justify Article 95 EC as a legal basis.[56] Even if there is a sufficient legal basis, the Union is allowed to take legislative action only insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States. The principle of subsidiarity and of proportionality prevents any action taken from going beyond what is necessary to achieve the objectives of the Treaty – the creation and functioning of the Internal Market.

Harmonization is also unsystematic. Internal consistency between directives is difficult to achieve as they are often prepared in different DGs of the Commission. For example, directives concerning contract law can be developed on DG Sanco, which is in charge of the CFR-Net and in DG Market. Drafting may also be incoherent and often they are drafted by civil servants in a language that may not be their native language. Directives do not focus on or contain a comprehensive regulation of the entire substantive law of the matter in question. Often, they only regulate specific issues such as information to be provided before the conclusion of the contract and they may also apply to one type of contracts, for example, time-share contracts. Different 'sector-specific' directives often use different concepts. Directives are also completely flat in the sense that, in a directive, all rules are located on the same level of abstraction.[57]

Harmonization takes place on two different levels of governance, the European and the national level. The European and national legislators share legislative responsibilities and neither one, nor the other, has the final responsibility for the whole. There is no superior body or authority such a Supreme Court who can make use of a Constitution to claim the final say on who is responsible for what competence. National courts apply the national law as it has been transposed but they have to do so in conformity with the directive.[58] The national court is free whether to refer a question of interpretation of the Directives according to the parameters of Article 234 EC and the parties do not have the right of appeal as such. If a reference is made, the ECJ does not go into the merits of the case, nor does it have the power to invalidate conflicting national law. It merely has jurisdiction to interpret and clarify the directive in question and provide guidelines for application. This methodology is also dynamic. Directives are instrumental as they aim at change. In particular, they

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55 Articles 94 and 95 EC.

56 See Case C-376/98 *Germany v. European Parliament and Council* [2000] ECR I-8419, at [83].

57 See M.W. Hesselink, 'Codification and Europeanization in the Netherlands', in *The Harmonisation of European Contract Law*, eds S. Vogenauer & S. Weatherill (Oxford: Hart Publishing, 2006), 48 ff.

58 See Case C-106/89 *Marleasing v. La Comercial Internacional de Alimentación* [1990] ECR I-4135.

aim at improving the conditions of the establishment and functioning of the Internal Market.[59]

5.3 Harmonization and Its Objectives

Having established how harmonization works, one can also consider why one should use this tool towards achieving the Europeanization of private law. Here, one can borrow Professor Stephen Weatherill's thesis who explains that harmonization has been historically driven by two rationales.[60] The first is the assumption that market integration is promoted by harmonized rules while the second is that in so far as the EC Treaty is deficient in allocating competence to act in particular areas of non-market regulation then the legal base authorizing harmonization may be borrowed to fulfil that role.

As regards the first rational, Weatherill has two objections on connecting harmonization with effective market building. These are the cultural and economic objections.[61] With regards to cultural objections, it could be argued that harmonization, as a technical process devoted to market building, tends to disregard the rich and deep historical roots of national laws that are subjected to its influence. Cultural tradition could be sacrificed for economical gain.[62] For private law, this could be more important as private law is rich in legal doctrines that could easily be ignored in a simple harmonization process. It could lead to incoherence in legal principles within the same legal system. However, while the above could be true, it does not necessarily justify the non-use of this methodology. It justifies a more proper and careful use to reduce as much as possible cultural objections. The economical objection to harmonization is primarily driven by proponents of inter-jurisdictional regulatory competition as a model for the EU. This perspective would portray harmonization itself as anticompetitive as it would distort competition. Some literature is beginning to examine what 'distort' can and should imply in the context of legal diversity within the EU and to explore the case for and against regulatory competition in particular sectors such as contract law.[63] For harmonization to be successful, economic losses have to offset gains.

It can be observed that harmonization is conventionally understood as a process of generating common rules for a common market. It increasingly coexists with other 'softer' forms of governance and a general willingness to tolerate a high

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[59] Hesselink, in *The Harmonisation of European Contract Law*, 51.

[60] S. Weatherill, 'Why Harmonise?', in *European Union Law for the Twenty-First Century*, eds T. Tridimas & P. Nebbia (Oxford: Hart Publishing, 2004), 11 ff.

[61] *Ibid.*, 13.

[62] See C. Harlow, 'Voices of Difference in a Plural Community', *American Journal of Comparative Law* 50 (2002): 339.

[63] See G. Wagner, 'The Economic of Harmonisation: the Case of Contract Law', CML Rev. 39 (2002): 995.

degree of flexibility and diversity in coverage under the EU umbrella. The EC Treaty itself in Articles 94 and 95 recognizes that harmonization is a sensitive matter, and it includes provisions that reveal a concern to feed in a degree of respect for variation and for effective regulatory protection within the Internal Market.

As regards the second rationale for legislative harmonization mentioned earlier on, as far as the EC Treaty is deficient in allocating competence to act in particular area of 'non-market' regulation, then the legal base authorizing harmonization may be borrowed to fulfil that role.[64] Harmonization of laws for defined ends associated with market building has always been an EC competence recognized by Article 94 EC and follows the Single European Act (SEA) Article 100a, now Article 95 EC. Many harmonization measures adopted pursuant to these provisions are based on the perception that legislative diversity damaged integration. The principle of attributed competence gave way in community practice to the capacity of the Council, acting unanimously to fix the scope of EC action. In the field of harmonization, it appeared to assume that it enjoyed a *carte blanche*.[65] This is what Pollack describes as a competence creep.

5.4 The Limits of Harmonization

The above shows that harmonization is limited by competence, and competence has been expanded as the European Union deepens and widens. The limitations on what could be harmonized means that often harmonization leads to legal disintegration and fragmentation. However, besides the official legislative harmonization that is steered by the European Commission, at European level one can also mention various non-legislative harmonization attempts and this bottom-up approach is also worth mentioning at this stage.[66] This involves non-legislative preparatory work undertaken by legal scholars and practitioners in order to bring European legal systems closer together. Here, one can mention the 'PECL'. This compilation was first presented in 1995 and has been re-issued in 1998 by the Lando Commission named after its initiator and chairman, Professor Ole Lando.[67] This work is confined to the more technical issues of contract law. This restatement is elaborated on a comparative law basis and consists, just as its American predecessors, of rules, illustrations, and comments. These Principles attempt to show what a future European Civil Code might look like and provides a platform for debate.

Besides the above strategy, there have been other initiatives that rely on the harmonization potential of the Europeanization of legal science and education

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64 Weatherill, 19.

65 See M. Pollack, 'Creeping Competence: The Expanding Agenda of the European Community', *Journal of European Public Policy* 14(2007): 95.

66 This expression seems to have been coined by F.A. Hayek, *Law, Legislation and Liberty*, vol. 2 (Routledge, 1973 and 1976).

67 Lando & Beale (eds), *Principles of European Contract Law*, 1995 (Part I).

through synoptic compilations of what might become a new Common Law of Europe.[68] This is based upon the conviction that lawyers too are encouraged to think in European terms. Three books can be mentioned as an example, *European Contract Law* by Hein Kötz,[69] *The Common European Law of Torts* by Christian von Bar,[70] and *Cases, Material and Text on National, Supranational and International Tort Law: Scope of Protection* by Walter van Gerven et al.[71] These books adopting a comparative functional perspective, informed by the historical genesis and the social and economic tasks of private law represent attempts in the classical fields of contract and tort, the foundations of a new European common law. Another project that is worth mentioning is the Trento Project entitled 'The Common Core of European Private Law'.[72]

An effective and sensitive way of harmonizing the standards of protection of certain basic interests of European citizens could be convergence in the case law of the Member States.[73] This could be more effective because the intensity of protection of a certain right depends primarily on the law in action and not on the law in books.[74] Harmonization of this type could be more sensitive because case law convergence operates even in context of the great diversity of legal cultures. All that matters is that the courts of different European states achieve similar results in the same cases, regardless of the norms, doctrines, or procedures they apply in order to reach this end.[75] The mechanism for ensuring top-down harmonization in the EU is available. The judgments of the ECJ and those of the European Court of Human Rights form legally binding guidelines to be compiled with by the Member States. This method of harmonization can be applied to every private law matter touching upon European fundamental rights.[76] Since every citizen of the EU should enjoy the common European fundamental rights without any discrimination on the ground

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[68] C.U. Schmid, 'Bottom-Up Harmonisation of European Private Law: *IUS COMMUNE* and Restatement', in *Function and Future of European Law*, eds V. Heiskanen & K. Kulovesi (Helsinki: University of Helsinki, 1999), 75 ff.

[69] H. Kötz, *European Contract Law, Vol. 1: Formation, Validity and Content of Contracts, Contracts and Third Parties*, trans. T. Weir (Oxford: Clarendon Press, 1997).

[70] von Bar, *The Common European Law of Torts*, English translation (München: C.H. Beck, 1998).

[71] W. van Gerven et al., *Cases, Material and Text on National, Supranational and International Tort Law: Scope of Protection* (Oxford: Hart Publishing, 1998).

[72] <www.jus.unitn.it/dsg/common-core>.

[73] A. Colombi Ciacchi, 'Non-legislative Harmonisation: Protection from Unfair Suretyships', in *The Harmonisation of European Contract Law*, eds S. Vogenauer & S. Weatherill (Oxford: Hart Publishing, 2006), 198.

[74] R. Pound, 'Law in Books and Law in Action', *American Law Review* 44 (1910): 12.

[75] H. Collins, 'European Private Law and the Cultural Identity of States', *European Review of Private Law* 3 (1995): 353.

[76] A. Colombi Ciacchi, 205.

of nationality,[77] one may argue that the standards of private law protecting of these rights in their horizontal dimension should become equal. This could be easily achieved through case law convergence.

It could be argued that the seductive appeal of harmonization is today tarnished. Its role is increasingly contested. The tension between centralization and respect for local autonomy is becoming more problematic in a geographically and functionally expanded EU. The debate about the function of harmonization has essentially become a debate about the function of the EU itself.[78] If the EU is to widen and deepen, the Europeanization of private law could become more feasible. Certainly, with all its pros and cons, harmonization and uniformization remain a very good methodology in achieving greater harmony in private law. Harmonization is the most common tool because it represents the least common denominator for Europeanization, and for many instances it would satisfy the principles of subsidiarity and proportionality when one comes to deal between the national legal orders and the European legal order. However, although harmonization is in more common use than unification and codification, the latter would certainly represent a more advanced level of Europeanization than the former. Nevertheless, these two tools complement each other in the eventual Internal Market building.

6. The Tool of Uniformization/Standardization

Having previously established that uniformization is perfect harmonization, most of what has been said in the previous section also applies to this tool. Sometimes, this term is even confused with unification. However, unification here is being taken to mean a supranational law applicable in all Member States while uniformization is taken to mean that Member States will have identical yet separate law.

An interesting question to pose at this stage is about how to predict the differences in uniformity between different areas of a future European private law. It may be difficult to create uniformity of law by only creating rules through public policy. As Prof. Smits argue, account has to be taken of the legal culture in which uniformization is going to be attempted. And above all, it depends on the evolution of the legislation itself.[79] It can be argued that the mere drafting and enacting of Principles of European private law or the mere searching for a common core does not in itself lead to uniformity. Private law is, to a certain extent, harmonization-resistant even when

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[77] This follows from the non-discrimination principle enshrined in both Art. 12 EC Treaty and Art. 14 ECHR.

[78] See Weatherill, 31-32.

[79] J.M. Smits, 'How to Predict the Differences in Uniformity between Different Areas of a Future European Private Law? An Evolutionary Approach', in *The Economics of Harmonising European Law*, eds A. Marciano & J.M. Josselin (Massachusetts: Edward Elgar Publishing Ltd, 2002), 50.

confronted with centrally imposed rules.[80] Also, as Smits contends, a greater extent of legal uniformity than what exists right now is possible, but should, to a large extent, come about in an organic way.[81] This opens up a whole variety of research themes related to other disciplines than the law in question and aim at the study of cases where organic, spontaneous orders have originated through evolution and not by creation. Uniform law in Europe primarily comes about through an evolution of legal norms.

To predict to what extent the different areas of private law will evolve towards some uniform system is not an easy job. What is perhaps a very important outcome of evolutionary theory applied to the law is that coming into being of a uniform law for Europe. This will to a large extent be the result of the emergence of a spontaneous order that has not so much to do with a deliberate enactment of law by some sovereign, but much more with a 'cultural evolution'.[82] As Hayek puts it: culture is not rationally designed, but a tradition of 'rules of conduct' that are passed on through cultural transmission in a process that is not consciously planned. He continues by saying that a system of rules should primarily be looked at as a spontaneous order that emerges in response to its environment. In this sense, the whole venture of creating an internal European market automatically invokes a new, partly unintended legal system.[83]

7. The Tool of Unification

By unification of law, I mean the legal and social processes by which uniformity is achieved with the intention of having one system of law in that particular substantive area of private law. A distinction can also be made between mandatory unification and voluntary unification. By mandatory unification, I mean legal processes by which separate jurisdictions are required to adopt uniform legal rules. By voluntary unification, I mean legal or social processes, other than mandatory unification, that lead to the uniformity of law. A distinction can also be made between legal doctrines and legal results. Legal doctrine is the stated rules that purport to be the legal rules and that are found in sources that the profession regards as authoritative, such as statutory enactments. Legal results could mean the results that a legal system will reach in given cases. This is very important because it is a well-known fact that legal systems, even from different legal families, may reach the same result on given facts. Should one consider the systems to be uniform if they reach the same end result to a problem or if the doctrines are similar? If uniformity is achieved, then unification is

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[80] See M. Bussani & U. Mattei, 'The Core Approach to European Private Law', *Columbia Journal of European Law* 98(1997–1998): 339.

[81] J.M. Smits, in *The Economics of Harmonising European Law*, 51.

[82] *Ibid.*, 52.

[83] F.A. Hayek (ed.), 'Notes on the Evolution of Systems of Rules of Conduct', in *Studies in Philosophy and Economics* (Routledge: London, 1978), 66.

easier. Uniformity of doctrine achieves predictability and facilitates the coordination. Uniformity of results may not necessarily do the same thing. This is because uniformity of doctrines is easier for the legal profession to determine.[84]

A typical comparative exercise for showing how uniformity and unification of law can work could be made between the situation in Europe and that in the United States. Being a federal system, there are both federal laws and the local laws of fifty different states. Federal laws originate as unified law legal rules, and there is the US Supreme Court that will ultimately unify the law by resolving issues that would have divided lower courts. Local law is more difficult to unify for the US Supreme Court has no jurisdiction to resolve differences in local law.[85] The relationship between federal and state level is partly controlled by law and partly controlled by custom and although federal power can be far reaching, it seldom deals with the areas that are being attempted to be unified at European level. Thus, one can say that there are fifty different systems of private law in the United States as there are twenty-seven different such systems in Europe. Nevertheless, private law in most of these fifty jurisdictions is fairly uniform.

7.1 Possible Methods of Unification

Eisenberg argues that one method for achieving this uniformity has been voluntary state-by-state adoption of uniform statutes proposed to the states by an autonomous organization, the National Commissioners on Uniform State Laws that has no legislative or official powers.[86] This technique is commonly used in the United States. Besides this, as it has been mentioned earlier on in this chapter, in the United States, there is a Restatement approach of law. In legal academic forums and in law schools, the law is debated in general terms divorced from state laws. If it considered that 'Rule R is law', this does not mean that 'Rule R is the law' of a given jurisdiction, federal, or state. For example, in US contract law, a general reference to law would be 'an acceptance of an offer that is effective on dispatch'. This would be unaccompanied by supporting citations as a statement of national law rather than that of a particular jurisdiction. In Europe, the trend is moving closer to the US way especially with the private initiatives mentioned earlier on. However, Europe is still a long way off at present. The Europeanization of private law would be facilitated if Europe moves closer to the US model in this regard.

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[84] Eisenberg, 35 ff.

[85] See K.L. Hall, *The Oxford Companion to American Law* (New York: Oxford University Press, 2002).

[86] Eisenberg, 36–37.

7.2 Unification and Its Objectives

One of the reasons behind unification is often economic. National law is an important instrument for achieving uniformity in areas of law in which either federalization or the adoption of uniform acts has seemed desirable or unattainable. As unification of private law would be beneficial for the Internal Market building, it would be equally beneficial for the American system. However, there are other elements that also play an important part in the unification of law in the United States and in Europe. These elements are historical, institutional, and aspirational.[87]

In the US example, this is much easier as America has been united for more than two centuries. Europe is much loosely united and for much less time. Americans believe in a nation, while in Europe the concept of a nation state is much stronger. In the United States, with the exception of Louisiana, all other states belong to the same legal tradition. Europe is much more diverse. This explains why unification of law in the United States is easier than in the EU. With regards to the institutional element, one can mention Legal education, the Bar examination, Legal Scholarship, and Judicial Practice. As far as the first three are concerned, in the United States, the emphasis is more on the general principles of law rather than the details of the specific jurisdiction. As regards judicial practice, more attention is given to the works of authoritative commentaries. All of this facilitates uniformity and unification. In Europe, the movement towards unification is quite recent and initiatives such as the Bologna Process will certainly help but need a lot of time to be effective as Europe is less prone to change due to historical reasons. Finally, one can say that national law is the product of aspirations. Aspiration is a blend of a special kind of intellectuality. The special kind of idealism is a drive to get the law right. This is a spirit that helps the unification of both American and European law.[88] Thus, from the above, it can be concluded that cross-border commerce is facilitated by unification of law. The unification process would raise complex issues of balancing between economic efficiency and the aspiration of cross-national unity, on the one hand, and the possible overriding of expressions of important norms that differ between national cultures, on the other.

8. Codification

By codification I mean the technical process whereby the different fragmented unified laws are brought together in one legal instrument such as a code. If one were to follow the civil law model for the unification of law, then unification would perhaps also mean codification. Codification, contrary to harmonization, is often comprehensive. This means that it aims to include all private law in one single code. It also means that the code is supposed to provide an answer to any single question that may emerge in a dispute between private parties. It is also systematic as it contains

[87] *Ibid.*, 38.
[88] *Ibid.*, 40.

general rules on several layers of abstraction, for example, the law of obligations or property law. Also, a code is presumed to be coherent and there should be no contradiction between the rules contained therein. Codification takes place on one level of governance, usually at national level. However, with the constitutionalization of European private law, it can also take place at European level. Usually, the Supreme Court will have the final responsibility for coherence. At European level, this may be entrusted to the ECJ, though this court is not equivalent to a supreme court in a federation. Finally, codification is static as it is meant to state the law as it stands in a coherent way. A code can be changed but the code itself does not aim for change.[89]

European law has a dual impact, in that it not only amends the existing regulations or introduces new rules but, when laws implementing the directives are included in the Code, it ends up by altering their structure and balance. This is a problem shared by the codification in Europe.[90] Professor Alpa argues that the Europeanization of private law cannot be considered to have much success as long as the Code is considered, as per Carbonnier, to be the 'country's true constitution'.[91] However, plans for European codification are appearing on the horizon and the likelihood is that if codification is to proceed, it would be because of a functional necessity. Codification is more likely to take place following unification of the law. But it would be a mistake if one were to limit codification to just codification. Codification can also mean simplification and it is possible to have codification of legal instruments achieved through other tools than just unification for simplicity or comprehensive reasons. A good example involves the free movement directives mentioned before.[92]

Unification and codification of law would be the ideal objective for those who favour the complete Europeanization of private law and cite the benefits such process would bring to Internal Market building. However, the principles of subsidiarity and proportionality would probably immediately come to haunt such enthusiasts.[93] Although keeping a neutral position between the enthusiasts and the pessimists, it can be observed at this stage that the immediate necessities of the Internal Market in light of the two stated principles require a mixture of different degrees of the different methodologies discussed so far according to each substantive area of private law. The needs of each area or institute, if one were to follow the way the civil law

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89 See Hesselink, in *The Harmonisation of European Contract Law*, 48 ff.

90 L. Favoreu, 'La constitutionalisation du droit', in *L'Unité du Droit Mélanges en Honneur á Roland Dragon*, eds J-.B. Auby et al. (Paris: Economica, 1996), 25.

91 G. Alpa, 'Harmonisation and Codification', in *The Harmonisation of European Contract* Law, eds S. Vogenauer & S. Weatherill (Oxford: Hart Publishing, 2006), 164 ff.

92 See Section 4.6 of this article.

93 See in R. van den Bergh, 'Regulatory Competition or Harmonisation of Laws? Guidelines for the European Regulator', in *The Economics of Harmonising European Law*, eds A. Marciano & J.M. Josselin (Massachusetts: Edward Elgar Publishing Ltd, 2002), 27.

tradition is divided, could be much different from each other. What holds for the law of obligations may not necessarily hold for the law of persons.

9. Conclusion

In the present-day Europe, the basic nineteenth century situation where each nation state had its own legal system still prevails. On the continent, the codes have survived and the nation states are still strong. R.C. van Caenegem speaks of 'one nation, one state, one code of law'.[94] The same can be said of uncodified English law, whose hold on England and Wales is still very powerful. Although the Tools contribute towards the approximation or unification of law, an issue that remains to be discussed is what form ought the harmonized or unified law. Should it build upon a codified system or should it be built around the common law format? The answer to this question depends on which tool is actually used. Harmonization even if comprehensive does not lead to a unified system of law so the nation state law is preserved as it is, at least in form.

Unification of law could perhaps tip the balance towards a form of private law at European level and therefore a departure from the nation state private law. Probably, the form most likely to be followed would be similar to that in mixed jurisdictions whereby codes may exist but they may not necessarily be exhaustive. Fragmentation can still occur. If one were to follow the example of a mixed jurisdiction, the likelihood is that a unified European private law would be classified in a similar fashion to a civil law system but with some exceptions. Thus, one may be able to speak of a European law of obligations but not necessarily a European law of property as different substantive areas may evolve in a different way and at a different pace.[95] Furthermore, it is likely that unification itself can lead to fragmentation as Member States may feel happy to move on in one field of law but not in another.[96] Although charting the path of how and to what extent European private law is tying the knot may be difficult and debatable, it is an acceptable statement of fact that EU measures, particularly in the field of judicial cooperation in civil and commercial matters, contribute towards achieving a form of Europeanized private law across the Union even if the achievement of a civil code may appear to be a long shot.

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[94] R.C. van Caenegem, *European Law in the Past and the Future* (Cambridge: Cambridge University Press, 2002), 22.

[95] See J. Dalhuisen, *Dalhuisen on International Commercial, Financial and Trade Law* (Oxford: Hart Publishing, 2004), 90.

[96] H. Koch, 'Private International Law: A "Soft" Alternative to the Harmonisation of Private Law?', ERPL 3(1995): 329.