View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by Brooklyn Law School: BrooklynWorks

Brooklyn Journal of International Law

Volume 29
Issue 3
SYMPOSIUM:
Creating and Interpreting Law in a Multilingual Environmnent

Article 8

2004

Toward a European Civil code Without a Common European Culture? The Link Between Law, Language and Culture

Ana M. Lopez-Rodriguez

Follow this and additional works at: https://brooklynworks.brooklaw.edu/bjil

Recommended Citation

Ana M. Lopez-Rodriguez, *Toward a European Civil code Without a Common European Culture? The Link Between Law, Language and Culture*, 29 Brook. J. Int'l L. (2004).

Available at: https://brooklynworks.brooklaw.edu/bjil/vol29/iss3/8

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

TOWARDS A EUROPEAN CIVIL CODE WITHOUT A COMMON EUROPEAN LEGAL CULTURE? THE LINK BETWEEN LAW, LANGUAGE AND CULTURE

Ana M. López-Rodríguez, Ph.D.[*]

I. INTRODUCTION

In recent years, an intense debate has arisen among European scholars regarding the need to harmonize private and, in particular, contract law in the European Union ["EU"].[1] For some time, the debate has been merely academic, but over the past four years, the issue of harmonizing contract law has been impregnated with a political character. The debate culminated on July 11, 2001, when the European Commission launched a Communication to the Council and the European Parliament on European Contract Law.[2] This Communication sought information from all interested parties as to whether the co-existence of different national contract laws hindered the internal market's ability to function[3] and, if so, what was the most appropriate solution to such a problem.[4] Among the possibilities was the suggestion to adopt an overall text comprised of provisions on general questions of contract law as well as specific contracts (Option IV) — in other words, a European Contract Code.[5] Other options were to leave the solution of any identified problems to the market (Option I), to promote the development of non-binding common contract law principles (Option II) and to review and improve existing EC legislation in

* Assistant Professor, Department of Private Law, University of Aarhus, Denmark.

1. *See, e.g.,* Ole Lando, *Why Codify the European Law of Contract?*, 5 EUR. REV. OF PRIVATE L. 525 (1997); Christian von Bar, *A Civil Code for Europe*, JURIDISK TIDSKRIFT VID STOCKHOLMS UNIVERSITET, ÅRGÅNG 13 (2001-02 NR1).
2. Communication from the Commission to the Council and the European Parliament on European Contract Law, COM(01)398 final, 2001 O.J. (C 255) 1.
3. *Id.* at 10–11.
4. *Id.* at 16.
5. *Id.* at 61.

the area of contract law (Option III).[6] Following from this Communication, the Council[7] and the European Parliament[8] reacted in November 2001, the latter calling for the establishment and adoption of a body of rules on contract law in the EU from the year 2010.[9] Most recently, taking account of the over 181 responses[10] to the Communication from the Commission to the Council and the European Parliament on European Contract Law, the Commission issued a new Communication on February 12, 2003, setting forth an *Action Plan on a More Coherent European Contract Law*.[11] This plan suggests, *inter alia*, the adoption of a common frame of reference for contract law (Option III) as an important step towards consistency in EC contract legislation.[12]

The *European contract law project*, as the process described above is known, has been influenced by many scholarly opinions.[13] Some scholars have argued that a uniform European contract law is needed because the mere existence of different contract laws "may be regarded as a non-tariff barrier to trade" and furthermore, because "it is also here that we find a fragmentary European legislation enacted as directives."[14] In this

---

6. *Id.* at 46.

7. 2001.Doc. 13017/01 JUSTCIV 129 (Nov. 16, 2001) *at* http://www.register.consilium.edu.int/pdf/en/01/st12/12735en1.pdf.

8. Report on the Approximation of the Civil and Commercial Law of the Member States, EUR. PARL. DOC. (COM 2001) 84 final [herinafter Report on the Approximation].

9. *Id.* at 9, para. 11.

10. Reactions to the Communication on European Contract Law (2001), *at* http://www.europa.eu.int/comm/consumers/policy/developments/contract_law/comments/summaries/sum_en.pdf (last visited Apr. 2, 2004).

11. Communication from the Commission to the European Parliament and the Council, A More Coherent European Contract Law, An Action Plan, COM(03)68 final, 2003 O.J. (C 63) 1, *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/c_063/c_06320030315en00010044.pdf [hereinafter A More Coherent European Contract Law] (last visited Apr. 2, 2004).

12. A More Coherent European Contract Law, *supra* note 11, at 16, *available at* http://www.europa.eu.int/comm/consumers/policy/developments/contract_law/comments/summaries/sum_en.pdf (last visited Apr. 2, 2004).

13. *See, e.g.,* Ole Lando & Christian von Bar, *Communication on European Contract Law and the Study Group on a European Civil Code*, *at* http://www.europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law ?comments/5.23.pdf (last visited Apr. 2, 2004).

14. Lando, *Why Codify the European Law of Contract?*, *supra* note 1, at 526.

regard, the pursuit of an all-embracing European law of contract is embodied in the more ambitious task of codifying private law in Europe and setting up a Working Group to draft a European Civil Code.[15]

Nevertheless, the venture of a European Civil Code is a controversial matter, as acknowledged by the European Parliament.[16] A European Code is likely to encounter some obstacles relating to, *inter alia*, the legal basis for such an enterprise, the choice of instrument and scope of the adopted measures, the feasibility of unifying European private law, the crisis of codification, the sociological background of private law institutions and, finally, the link between private law, language and cultural identity.[17] Some scholars argue that, in the absence of a common European legal culture, the chances of achieving legal uniformity are rather slim.[18] Considering the lack of experience regarding the incorporation of EC law into national law, at this point, the idea of a European Civil Code even sounds like a fallacy. Accordingly, this Article suggests that any legislative measure imposed from Brussels should be preceded by, or at least should run parallel to, the promotion of a European legal discourse, which may ultimately crystallize into a European legal culture.[19]

II. THE IMPACT OF EC LEGISLATION UPON DOMESTIC PRIVATE LAW

Due to the growing number of EC acts, diverse areas of private law have been partially harmonized, in particular, com-

15. *See* Von Bar, *supra* note 1, at 9–10.

16. Resolution A5-0384/2001, PARL. EUR. DOC. (Recital D) (Nov. 15, 2001).

17. For an overview of these obstacles see ANA M. LOPEZ-RODRIGUEZ, LEX MERCATORIA AND HARMONIZATION OF CONTRACT LAW IN THE EU 254 (2003).

18. Pierre Legrand, *Sens et Non-Sens d'un Code Civil Européen* [*The Sense and Nonsense of a European Civil Code*], 48 REVUE INTERNATIONAL DE DROIT COMPARÉ 779, 798 (1996) [hereinafter Legrand, *Sens et Non-sens*].

19. *See also* Christoph U. Smid, *Bottom-Up Harmonisation of European Private Law: Ius Commune and Restatement*, *in* FUNCTION AND FUTURE OF EUROPEAN LAW 75–89 (1999); Pierre Larouche, *Ius Commune Casebooks for the Common Law of Europe: Presentation, Progress, Rationale*, 8 EUR. REV. OF PRIVATE L. 101, 101–09 (2000).

pany law, labor relations, industrial property, copyright law and contract law.[20] As a result of this so-called *communitarization* of private law,[21] the irruption of new elements in the EC legal acts is increasingly eroding the peculiarities of domestic, private law.[22] To the extent that in the overall process of market integration, the legislative intervention of the Community has been driven by specific economic, social or political goals, EC law has been confined to specific issues, working in a fragmentary way. Thus, EC law has been unable to provide an exhaustive or coherent regulation of the core areas of private law. For instance, a consumer may be simultaneously entitled to a right of renunciation[23] under the Doorstep-selling Directive[24] and the Timeshare Directive.[25] Yet, the length of the period in which the consumer may exercise this right is different in each text, namely, seven days in the former[26] and ten days in the latter.[27] In addition, such a right is endorsed under the different notions of *cancellation* (Doorstep Directive) and *withdrawal* (Timeshare Directive).[28]

Such a casuistic approach is also reflected in the specific character of some directives and the use of terms that are unknown or have a different scope in national law. These inconsistencies have led to problems in the implementation and application of national transposition measures.[29]

A. Minimum Harmonization

The legislative intervention of the Community in the field of private law has been generally shaped in the form of direc-

20. *See, e.g.,* ULRICH DROBNIG, PRIVATE LAW IN THE EUROPEAN UNION 4 (22 Forum Internationale 1996).

21. GIANNANTONIO BENACCHIO, DIRITTO PRIVATO DELLA COMUNITÀ EUROPEA 9 (Fonti, Modellie, Regole 1998).

22. *Id*. at 26.

23. *See* Case 423/97, Travel Vac SL v. Manuel Jose Antelm Sanchis, 1999 E.C.R. I-02195.

24. Council Directive 85/577 art. 5, 1985 O.J. (L 372) 31.

25. Council Directive 94/47 art. 5.1, 1994 O.J. (L 280) 83.

26. Directive 85/577, *supra* note 24, art. 5.

27. Directive 94/47, *supra* note 25, art. 5.1.

28. Directive 85/577, *supra* note 24, art. 5; Directive 94/47, *supra* note 25, art. 5.1.

29. *See, e.g.,* Jurgen Basedow, *The Renascence of Uniform Law: European Contract Law and its Compenents*, 18 LEGAL STUDIES 121 (1998).

File: Lopez4.23.04macro.doc Created on: 4/23/2004 9:33 PM Last Printed: 6/25/2004 1:53 PM

tives.[30] This intervention consists primarily of minimum standard directives that restrict harmonization to the extent necessary to allow each Member State to establish higher standards of protection.[31] The unavoidable consequence is that differences arise between the different national laws transposing a given directive. In the case of a cross-border transaction governed by a directive of minimum standards, it is necessary to determine which national law applies.[32]

Furthermore, none of the EC acts provide an overall regulation of given legal institutes.[33] These acts consist of a limited number of basic rules that must be implemented within the framework of national private law in one way or another.[34] Thus, the adjustment to the national context may be effected differently in each Member State, distorting the uniformity intended by the EC measure.[35] For instance, the Doorstep Selling Directive grants the consumer a right of cancellation in an otherwise binding offer or acceptance.[36] The consumer may renounce his undertaking by sending notice to the seller within a period of not less than seven days from the consumer's receipt

30. *See* Annex I Important Community Acquis in the Area of Private Law, *in* Communication from the Commission to the Council and the European Parliament on European Contract, COM (2001) 398 final at 19.

31. *See, e.g.,* Council Directive 99/44/EC recital 24, 1999 O.J. (L 171) 12 [hereinafter Directive 99/44] on certain aspects of the sale of consumer goods and associated guarantees: "Whereas Member States should be allowed to adopt or maintain in force more stringent provisions in the field covered by this Directive to ensure an even higher level of consumer protection." *See also* Council Directive 90/314, 1990 O.J. (L158) 59 (on package travel, package holidays and package tours "for the purpose of protecting the consumer").

32. *See, e.g*., BERND VON HOFFMANN, RICHTLINIEN DER EUROPÄISCHEN GEMEINSCHAFT UND INTERNATIONALES 45, 47 (Pravatrecht, 36 ZFRV 1995).

33. *See, e.g.,* Council Directive 94/47/EC recital 4, 1994 O.J. (L 280) 83 ("[T]his Directive is not designed to regulate the extent to which contracts for the use of one or more immovable properties on a timeshare basis may be concluded in Member States or the legal basis for such contracts.").

34. *See* Directive 99/44, *supra* note 31, recital 18 ("Whereas Member States may provide for suspension or interruption of the period during which any lack of conformity must become apparent and of the limitation period, where applicable and in accordance with their national law, in the event of repair, replacement or negotiations between seller and consumer with a view to an amicable settlement.").

35. Basedow, *supra* note 29, at 133.

36. Directive 85/577, *supra* note 24, art. 5.

of the written information of his right of cancellation.[37] Under Article 5 of the Directive, the consumer's notice is to be effected in accordance with the procedure laid down by national law,[38] but this provision has given rise to some divergences between national measures transposing the Directive. For instance, as it is unclear whether the consumer's right of cancellation must be effected in writing, German[39] and English[40] law have embodied the requirement of a written notice, whereas Spanish[41] and Danish[42] law have allowed for the consumer's will of cancellation to also be implied from his behavior.

B. Transposition of Concepts

Each national legal system uses terminology that does not necessarily correspond with the legal languages of other countries. Hence, a literal translation of a given legal term into another language may not exactly express the same concept. For instance, the English expressions *contract* or *obligation* comprise different concepts than *vertrag, contrato* or *obbligazione*.[43] Similarly, the French term *cause* is slightly different from the Spanish or Italian *causa,* and there is no corresponding term in other legal systems.[44] To date, there are 16 legal systems within

37. *Id.*

38. Directive 85/577, *supra* note 24.

39. *Gezetz über den Winderruf von Haustürgeschäften und ähnlichen Geschäften* [Statute on Cancellation of Doorstep and Similar Contracts] v.1.16.1986 (BGBI. II s. 122) (amended by a new statute on June 29, 2000). The written requirement has been incorporated into the German Civil Code (§ 355.2 BGB).

40. Cancellation of Contracts Concluded Away from Business Premises (1987) SI 1987/2117, art. 4.5.

41. *Sobre contratos celebrados fuera de los establecimientos mercantiles* [Statute on Contracts Concluded Away from Business Premises], art. 5.2 (B.O.E. 1991, 283).

42. §6.4 *Lov om visse forbrugeraftaler (Dørsalg m.v., fjernsalg og løbende tjenesteydelser)* nr. 886, 23 December 1987, *Lovtidende* [the Statute on Certain Consumer Contracts: Doorstep Selling, Distance Selling and Ongoing Services] (LBK nr 866 af 23/12/1987) (Denmark).

43. HUGH BEALE ET AL., CASES, MATERIALS AND TEXT ON CONTRACT LAW 2 (2002) [hereinafter BEALE, CASES, MATERIALS AND TEXT].

44. *See, e.g.*, PRINICIPLES OF EUROPEAN CONTRACT LAW 141 (Ole Lando & Hugh Beale eds., 2000).

the EU,[45] expressed in 11 different languages.[46] As demonstrated by the divergences between the different language versions of EC Directives, these disparities not only hinder the task of the EC legislator in drafting acts,[47] but they also affect the national legislator effecting community acts and the national judge adjudicating in consonance with EC law.

By way of example, the Directive 13/93 on Unfair Terms in Consumer Contracts only covers clauses concluded by a professional and a consumer.[48] A consumer is defined in Article 2(b) of the Directive as "any natural person who … is acting for purposes which are outside his trade, business or profession …"[49] Yet, in French law, this Directive has been transposed into Article L 132-1 of the *Code de la Consommation*, which defines unfair contract terms as those contained in a contract concluded "between a seller or supplier and a person who is not acting in the course of his trade, business or profession, *or* a consumer."[50] Does this mean that in French law the definition of consumer is different from that of a person not acting in the course of his trade, business or profession, as defined in the Directive?

In addition to the *European legal babel*, EC acts also embody terms that significantly differ from the terminology internally used in domestic law. Some terms may even be expressions which are used in a given sector of activity but lack any legal character.[51] For example, Article 5 of Directive 98/84/EC87[52]

45. The UK comprises the English and Scottish systems. Sarah Carter, *A Guide to the UK Legal System*, Law Library Xchange, *available at* http://www.llrx.com/features/uk2.htm#UK%20Legal%20System (last visited Apr. 2, 2004).

46. Europa Commission, *Languages in Europe*, *at* http://europa.eu.int/comm/education/policies/lang/languages/lang/europeanlaguages_en.html#Occicial%20eu (last visited Mar. 3, 2004).

47. Robert Huntington, *European Unity and the Tower of Babel*, 9 B.U. INT'L L. J. 321, 325, 328–29, 333–34 (1991).

48. On unfair terms in consumer contracts see Council Directive 93/13/EEC of 5 April 1993, art. 1, 1993 O.J. (L 95) 29–34.

49. *Id.* at art. 2(c).

50. Art. L 132-1 of the Code de la Consommation. *See generally* Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, 27 April 2000, *at* http://europa.eu.int/comm/consumers/cons_int/safe_shop/unf_cont_terms/uct03_en.pdf.

51. BENACCHIO, *supra* note 21, at 42.

includes a provision under which one of the protective measures for providers of protected services is the application "for disposal outside commercial channels of illicit devices" (for whatever that means).[53] Likewise, through EC legislation, new legal concepts have been introduced into national law. These changes consist of existing concepts modified by EC law, as well as entirely new concepts.[54]

1. Existing Legal Concepts Affected by EC Law

Certain domestic legal terms are used in the Community framework with a different name or meaning.[55] As a result, the scope of some traditional domestic concepts has either been restricted or expanded. These modifications may be confined to the interpretation and application of the EC law or may be extended to national law.[56]

For instance, the notion of *diritto di receso* (the right to renounce) has been used both in the Italian version of some consumer Directives and in the laws implementing them into the Italian system.[57] However, within the EC framework, the right to renounce refers to the cancellation of an otherwise binding offer or acceptance.[58] In this respect, the cancellation of a binding acceptance amounts to the termination of a contract, which in Italian law has been traditionally termed *risoluzione del contratto* or *rescissione del contratto*.[59] Consequently, EC law has renamed a domestic concept, although the use of the new name

52. Council Directive 98/84/EC, art. 5, 1998 O.J. (L 320) 57 (providing for different forms of legal protection for potential infringement upon providers of protected services). *See also* Helen Xanthaki, *The Problem of Quality in EU Legislation: What on Earth is Really Wrong?*, 38 COMMON MARKET L. REV. 651, 670 (2001).

53. For more detail see Xanthaki, *supra* note 52, at 670. "Protective Services" are those which provide "against remuneration and on the basis of condition access" such as television and radio broadcasting. Council Directive 98/84/EC, art. 2(a), 1998 O.J. (L 320) 56.

54. *See* BENACCHIO, *supra* note 21, at 46–51.

55. *Id.*

56. *Id.*

57. *Id.*

58. *See, e.g.,* Council Directive 85/577/EEC, art. 5, 1985 O.J. (L 372) 31 (providing for the protection of consumers with respect to contracts negotiated away from business premises).

59. *Id.*

seems to be restricted to the community framework. In the same way, the Spanish version of the Directive on distance selling refers simultaneously to the consumer's right of withdrawal as *rescisión* and *resolución*, concepts which are not exactly interchangeable.[60]

2. New Concepts

A number of legal concepts adopted within the community framework are new in some, if not all, of the Member States legal systems. One of the most well known examples of this phenomenon is the irruption of the principle of good faith into English law after the enactment of the Directive on Unfair Clauses in Consumer Contracts.[61] Pursuant to Article 3 of the Directive, a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of *good faith*, the term causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.[62] This requirement, which limits the effective agreement of the parties by standard contract terms, did not previously exist in English law.

In the UK, the Directive has been transposed by the Unfair Terms in Consumer Contracts Regulations,[63] but English courts lack a general legal doctrine to guide the invalidation of consumer contract terms contrary to the principle of good faith.

60. Council Directive 97/7/EC, art. 6 1997 O.J. (L 144) 19 (implemented into Spanish Law through the Act on Contracts Concluded Away from Business Premise of 20 May 1997). *Rescisión* is a mutually agreed termination of a contract, which can, in some circumstances, also be exercised unilaterally, following a statutory provision in that respect. *Resolución* is, by contrast, a remedy for breach which entitles the aggrieved party to escape from the agreement and claim damages, where appropriate. *See* LUIS DÍEZ PICAZO & ANTONIO GULLÓN BALLESTEROS, SISTEMA DE DERECHO CIVIL: VOLUMEN II 268-69 (1993) [Civil Law System, Vol. II. General Theory of Contract].

61. See Council Directive 93/13/EEC, 1993 O.J. (L 95) 29–34 (requiring Member States to ensure that consumers not be bound by unfair terms in contracts which are contrary to the requirement of good faith).

62. *Id.* at art. 3(1). "A contractual term which has not been individually negotiated shall be regarded as unfair, if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer." *Id.*

63. (1994) SI 1994/3159, *repealed by* Unfair Terms in Consumer Contracts Regulations, (1999) SI 1999/2083.

Hence, when the Court of Appeals was called on to interpret the good faith requirement under the act transposing the Directive in *Director General of Fair Trading v. First National Bank plc*,[64] the Court held that "good faith has a special meaning in the regulations, having its conceptual roots in civil law systems."[65] Furthermore, the Court referenced the 1976 German Standard Contract Terms Act, alleging the strong impact of said text on the Directive.[66] Meanwhile, French law has incorporated the Directive into Article L 132-1 of the *Code de la Consommation* with no reference to the principle of good faith whatsoever.[67] Perhaps, the French legislator deemed the terms "unfair" and "contrary to good faith" to be interchangeable. Finally, in other countries, the transposition of the duty of good faith has not been without problems.[68]

C. A Common Framework for EC Legislation on Contract Law

The incidence of the EC legal patchwork on the Member States' legal systems is deemed to have destroyed the coherence of domestic private law, which has been traditionally characterized by its solid systematic structure or even codification.[69] In this sense, the duty of national courts to interpret domestic law consistently with EC law should not be forgotten.[70] The present situation is especially disastrous in the field of contract law,

---

64. Director General of Fair Trading v. First National Bank plc, 2000 Q.B. 672 (Eng. C.A.).

65. *Id*. at para. 27.

66. *Id.*

67. The French statute provides in pertinent part "Dans les contrats conclus entre professionnels et non-professionnels ou consommateurs, sont abusives les clauses qui ont pour objet ou pour effet de créer, au détriment du non-professionnel ou du consommateur, un déséquilibre significatif entre les droits et obligations des parties au contrat." Law No. 95-96 of Feb. 1, 1995, J.O., Feb. 2, 1995, annex. *See also* BEALE, CASES, MATERIALS AND TEXT, *supra* note 43, at 544.

68. In Denmark, see A. Plesner Björk, Harmonisering af urimelige kontrakvilkår I europäiske forbrugeraftaler, 5 års erfaringer med direktiv 93/13/EØF, U.2000B.86 [Harmonization of Unfair Terms of Europoean Consumer Contracts; 5 year experience with the Directive 93/13/ECC].

69. Christian Joerges, *European Challenges to Private Law: On False Dichotomies, True Conflicts and the Need for a Constitutional Perspective*, 18 LEGAL STUD. 146, 161 (1998).

70. Case C-106/89, Marleasing SA v. La Comercial Internacional de Alimentacion SA, Directive 68/151/CEE (1990).

where the Community has been particularly active.[71] As a result, the Community has envisaged the simplification and coordination of the existing EC legislation on contract law in the Communication on European Contract Law (Option III)[72] and the Resolution of the European Parliament on the Approximation of Civil and Commercial Law.[73] This initiative is embodied within the broader endeavor to modernize the body of EC law by consolidating, codifying and recasting existing instruments centered on transparency and clarity.[74]

Yet, the simplification of existing EC legislation on contract law for the purpose of internal consistency requires the formulation of principles of general application which cannot be extrapolated from the legal conglomerate of EC provisions.[75] Alternatively, the Community could use the general principles of contract law common to the laws of the Member States to assist in the review and re-formulation of existing EC legislation.[76] However, this possibility must be immediately discarded, since there is no common notion of contract law within the legal systems of the Member States.[77] While some general principles may be drawn on a comparative basis,[78] they can hardly provide

71. For a complete overview of the legislative intervention of the Community in this legal field, see Communication from the Commission to the Council and the European Parliament on European Contract Law COM (2001) 398 final (Nov. 7, 2001), *available at* http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/cont_law _02_en.pdf.

72. *Id.* at 15–16.

73. European Parliament Resolution on the Approximation of the Civil and Commercial Law of the Member States, para. 14(c), 2001 O.J. (C 140 E) 541.

74. *See* Interim Report from the Commission to the Stockholm European Council: Improving & Simplifying the Regulatory Environment, COM (2001) 130 final at 10 (Mar. 7, 2001), *available at* http://europa.eu/int/comm/stockhoml_council/pdf/regeny_en.pdf.

75. *See, e.g.,* Communication on European Contract Law: Joint Response of the Commission on European Contract Law & the Study Group on a European Civil Code, COM (2001) 398 final, at 38-39, para. 77 (Nov. 29, 2001), *available at* http://www.europa.eu.int/comm/consumers/policy/developments/contract_law/comments/5.23.pdf.

76. Treaty Establishing the European Community, Feb. 7, 1992, art. 288.2, [1992] 1 C.M.L.R. 573, 634.

77. *See, e.g.,* ARTHUR TAYLOR VON MEHREN, INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, VOL VII: CONTRACTS IN GENERAL 5 (1982).

78. *See, e.g.*, HEIN KÖTZ & AXEL FLESSNER, EUROPEAN CONTRACT LAW (1997).

a sufficient framework for the systematization of existing community contract law.

Therefore, the improvement of existing EC legislation has been considered in connection with the pursuit of harmonizing domestic contract law in Europe. Indeed, in the long run, the conglomerate of EC provisions may not be sufficiently systematized without being set against the common framework of contract law — a framework which does not yet exist. Leaving the issue of proportionality aside, it is here adduced that a Contract Code should not be intended as *the* one-for-all measure to obtain uniformity in contract law across Europe. Legal uniformity in that regard would require additional conditions prior to, or running parallel to, any aforementioned act of legislative unification imposed.

III. LINK BETWEEN LEGAL UNIFORMITY, LANGUAGE & CULTURE

A recent conception of law has made a distinction between three legal levels.[79] These are the *surface level of law*, which consists of legal provisions, case law and comparable material; the *legal culture*, which is comprised of legal concepts, general principles and juridical method; and, finally, *a deep structure of law*, which is more static and reflects each historical period.[80] All three of these levels are normally interrelated so that legal culture and its deep structure influence the surface level of the law and vice-a-versa. In this sense, EC law currently seems to be comprised of the surface level of law, being reduced to a conglomerate of rules with no major systematization. The other levels of law, such as legal culture, are missing. As legal culture plays the crucial role of determining how legal rules are understood and applied, EC law must unavoidably be read through national glasses.[81] An illustrative example is the case *Corte Inglés S.A. v Cristina Blázquez Rivero*, in which the ECJ advised the Spanish court to interpret its domestic law in ac-

79. Kaarlo Tuori, *EC Law: An Independent Legal Order or a Post-Modern Jack-in-the-Box?, in* DIALECTIC OF LAW AND REALITY: READINGS IN FINNISH LEGAL THEORY 397, 403 (Lars D. Erikson et al. eds., 1999).

80. *Id.* at 403–06.

81. Thomas Wilhelmsson, *Jack-in-the-Box Theory of European Community Law, in* DIALECTIC OF LAW AND REALITY: READINGS IN FINNISH LEGAL THEORY 437, 449 (Lars D. Erikson et al. eds., 1999).

cordance with the Package Tour Directive which Spain should have, but had not yet, implemented.[82] In a judgment following this European Court ruling, the *Juzgado de Primera Instancia de Sevilla* refused to use this "interpretation," as the result was in clear violation of the text of the Spanish Civil Code.[83]

Meanwhile, the proponents of a common European contract law depart from the idea that an all-embracing codification would palliate the lack of coordination in EC law, providing the necessary framework in which the latter can be systematized.[84] However, considering the interrelation of the different levels of law previously described, if a Contract Code is ever enacted, the gap between this articulated uniformity and the various legal cultures across the EU — manifested, for example, in terms of local practices — would be once again difficult to bridge.[85] In other words, the risk would still exist that national courts could interpret a European Code in light of domestic law, thus making actual uniformity impossible.

In contrast, when certain conditions are present, legal uniformity is possible even outside the mandate of positive law.[86] For instance, in the United States, Congress refrained from exercising broadly its power to pass legislation in the field of private law.[87] In turn, a certain degree of legal uniformity has been achieved outside federal law.[88]

As in the U.S., a common legal culture is promoted everywhere by the reception of a legal source with authority, the

---

82. Corte Inglés S.A. v. Cristina Blázquez Rivero, 1996 E.C.R. I-1281 at para. 6.

83. *See generally* Leone Niglia, *The Non-Europeanisation of Private Law,* 4 EUR. REV. OF PRIVATE L. 575 (2001).

84. Von Bar, *supra* note 1, at 9–10.

85. *See, e.g.,* Pierre Legrand, *On the Unbearable Localness of Law: Academic Fallacies and Unseasonable Observations,* 1 EUR. REV. OF PRIVATE L. 61, 74–75 (2002) [hereinafter Legrand, *Localness of the Law*].

86. Axel Flessner, *Rechtsvereinheitlichung durch Rechtswissenschaft und Juristenausbildung* [Legal Harmonization through Legal Doctrine and Legal Education], 56 RABELS ZEITSCHRIFT FUR AUSLANDISCHES UND INTERNATIONALES PRIVATRECHT 243 (1992) [hereinafter Flessner, *Rechtsvereinheitlichung*].

87. Whitmore Gray, *E Pluribus Unum? A Bicentennial Report on Unification of Law in the United States,* 50 RABELS ZEITSCHRIFT FUR AUSLANDISCHES UND INTERNATIONALES PRIVATRECHT 111, 122–25 (1986).

88. *See* Detlev F. Vagts, *Harmonizing Divergent Laws: The American Experience*, 1998–1 UNIFORM L. R. 711 (1998).

common-law developed by the judiciary.[89] In addition, the influence of the "national law schools," teaching common American law as a unity with local variations, has allowed for the production and use of common legal literature, guided by similar legal thinking and working methods. The possibility of practicing in any state after having passed a complementary local test and the existence of English as a common legal language has further facilitated the gradual approximation of laws.[90]

The Nordic countries constitute another, although rather peculiar, example of uniformity. These countries have neither a political or economic unity nor a common legal source.[91] Yet, there is a strong feeling of normative unity due to geographical proximity, the similarity of lifestyles and languages and parallel socio-political history. Traditionally, an intensive cooperation regarding legal and administrative policies has existed.[92] Even today, Scandinavian scholars still maintain an ongoing legal debate that is usually presented as a single position when exposed abroad.[93] A contradictory case is that of the German speaking countries, Germany, Switzerland and Austria. These countries share a common language and similar socio-economic and cultural backgrounds. However, they lack both political unity and a common legal source and, contrary to the Nordic countries, their legal scholars have no interaction at all.[94]

In view of these examples, it may be deduced that a determinant condition for the achievement of legal uniformity is the existence of *a common legal culture*, generated by a *common legal discourse*. Shared language or similar socio-economic conditions in the countries involved are also influential factors, al-

---

89. *Id.* at 712. Until 1938, federal courts could apply "a federal common law rule independent of a different practice prevailing in the particular state involved." *Id.*

90. Arthur Rossett, *The Unification of American Commercial Law*: *Restatements and Codification, in* IL DIRITTO PRIVATO EUROPEO: PROBLEMI E PROSPECTITIVE 99 (1993).

91. Flessner, *Rechtsvereinheitlichung*, *supra* note 86, at 244.

92. *See, e.g.,* M. Matteucci, *The Scandinavian Legislative Co-operation as a Model for a European Co-Operation, in* LIBER AMICORUM 136 (A. Bagge ed., 1956).

93. *See, e.g.,* Gebhard Carsten, Europäische Integration und Nordische Zusammenarbeit auf dem Gebiet des Zivilrechts [European Integration and Nordic Cooperation in the Field of Civil Law], 1 Z EUP 333 (1993).

94. Flessner, *Rechtsvereinheitlichung*, *supra* note 86, at 246.

though to a lesser extent. In this regard, none of the factors relevant to the achievement of legal uniformity are present throughout the European Union.[95] While geographic proximity, religious homogeneity and a common philosophical background exist, with the exception of EC law,[96] Europe lacks a basic legal authority over the whole territory, as well as a common legal thinking. Disparities are not only found between *common law* and *civil law,* but there is also a multiplicity of national codifications which reflect, at most, national uniformity.[97] Finally, there is obviously no language common to all the Member States of the EU.

A. The Divide Between Common Law & Civil Law

Within the EU, two main legal families co-exist, namely, common law and civil law.[98] The existing differences of these families reflect the idiosyncrasies of the countries to which they belong and their distinctive mentalities. For instance, civil law tradition privileges the legal rule, whereas common law grants priority to practical experience.[99] According to Legrand, each approach reflects a world vision deeply anchored in the society in which it arises, possibly drawing a parallel between legal culture and culture in any other form.[100] As a result, legal uniformity does not make any sense without a shared rationality and morality. To the extent that different legal traditions have developed in a way that is historically, sociologically, economically, and politically different — in essence, culturally different — converging them is nearly impossible.[101] As a matter of fact,

95. *Id.* at 255.

96. *Id.*

97. *Id*.

98. *See* PRINCIPLES OF EUROPEAN CONTRACT LAW, *supra* note 44, at xxii.

99. *See* Sir Otto Kahn-Fruend, *Common Law and Civil Law — Imaginary and Real Obstacles to Assimilation, in* NEW PRESPECTIVES FOR A COMMON LAW OF EUROPE 137, 152–53 (M. Capelletti ed. 1978).

100. Legrand, *Sens et Non-sens, supra* note 18, at 798.

101. *See* Legrand, *Localness of the Law, supra* note 85, at 63. *See also* Pierre Legrand, *Are Civilians Educable?*, 18 LEGAL STUD. 216, 222 (1998) (stating "[t]he communion assumed to be epitomized by a European civil code would in effect represent…the excommunication of the common law way of understanding the world…leav[ing] them at odds with the culture they inhabit…[C]ommon law lawyers would find themselves compelled to surrender

different understandings of the law among different legal families make uniform interpretation and implementation of EC law a difficult task.[102] If ever enacted, this difficulty would also exist in a Contract Code.

One could argue that a position which stresses the divide between common law and civil law recognizes that different European legal traditions have long been informed by and exposed to many influences from divergent cultural origins.[103] Common law is silently permeating continental Europe through business life by means of legal constructions such as leasing agreements, franchises or trusts, which are not embodied in the European civil codes and do not even belong to the civil law tradition.[104] Both legal traditions are indeed converging. However, whereas courts in civil law countries have developed sophisticated standards to be applied in matters of contracts and torts, in common law, contrarily, the number of statutes is increasing.[105] The process of *communitarization* has already put an end to the existence of isolated, coherent legal cultures.[106] The drafting of EC legal texts requires a great deal of legal understanding, and their implementation in the different legal backgrounds of Member States erodes distinctive legal idiosyncrasies.[107] Additionally, the influence of the ECJ and the European Court of Human Rights has reshaped a number of general principles of law embodied in the Member States' legal systems.[108]

---

cultural authority and to accept unprecedented effacement *within their own culture*.") (emphasis in the original).

102. Thomas Wilhelmsson, *Private Law in the EU: Harmonized or Fragmented Europeanisation?*, 10 EUR. REV. PRIVATE L. 77, 81 (2002).

103. Joerges, *supra* note 69, at 152.

104. *See* Thijmen Koopmans, *Toward a European Civil Code?,* 5 EUR.REV. PRIVATE L. 541, 544 (1997).

105. Anthony Chamboredon, *La Texture Ouverte d'un Code Européen du Droit des Contrats* [The Open Texture of a European Contract Code], JDL 5ff. at 14 (2000).

106. Oliver Remien, *Denationalisierung des Privatrechts in der Europäischen Union? – Legislative und gerichtliche Wege* [Denationalization of Private Law in the EU? – Legislative and Jurisdictional Paths], ZFRV 116 (1995). "Europeanization and denationalization are naturally the two sides of the same coin or, in other words, the same thing seen under different viewpoints. Europeanization stresses what we win; denationalization reflects what we lose." *Id*.

107. Joerges, *supra* note 69, at 152.

108. Koopmans, *supra* note 104, at 545.

In any case, and in spite of the technical approximation of common and civil law, some reminiscences of legal *chauvinisme* may still be detected across Europe, motivated by the fear of losing the national cultural identity.[109] In this regard, some scholars have even claimed that adopting a European Contract Code would be like renouncing to the European culinary varieties in favor of a McDonald's eating culture.[110]

B. Language

There is no one language common to all the Member States, but instead, eleven legislative and administrative legal languages: Danish, Dutch, English, Finnish, German, French, Greek, Italian, Portuguese, Spanish and Swedish. After the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and the Slovak Republic to the EU, the number of official languages will be almost doubled.

Law and language are closely connected in that they usually are products of the same social, economic and cultural influences.[111] In the same sense, cultural heritage is embedded in law, including the linguistic dimension.[112] In this regard, some scholars have affirmed that as legal thinking cannot be easily separated from the language in which it is formed, any future codification of contract law in Europe must be multilingual.[113] Only with a multilinguistic form of contract law will the linguistic and cultural differences within Europe be respected.

---

109. *See, e.g.,* Response of the UK Government to COM (2001) 398 final, para. 29, *available at* http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/comments/1.4.pdf (last visited Apr. 8, 2004).

110. As concluded by Andre Tunc *at Incontro di studio sul futuro condice europeo dei contratti*, Oct. 1990, *reported by* Rufini Gandolfi, M.L. *Una Condificazione Europea sui Contratti: Propettive e Problemi* [Study Meeting on a Future European Contract Code, reported by Gandolfi M. L.: a European Contract Codification: Perspectives and Problems.]; RIVISTA DEL DIRITTO COMMERCIALE E DE DIRRITO GENERALE DELLE OBLIGAZIONI 658, 683 (1991).

111. Flessner, *Rechtsvereinheitlichung*, *supra* note 86, at 257.

112. Denis Tallon, *Les Faux Amis En Droit Comparé*, *in* FESTSCHRIFT FÜR ULRICH DORBNIG ZUM SIEBZIGSTEN GEBURTSTAG 677 (Jurgen Basedow, ed. 1998) [False Friends in Comparative Law, in Festschrift in the Occasion of Ulrich Drobnig's 70 Anniversary].

113. Flessner, *Rechtsvereinheitlichung*, *supra* note 86, at 257.

Actually, since the formation of the European Communities, the main point of departure has been that of linguistic equivalence.[114] Yet, multilingualism has its costs in that the EU drives the largest translation and interpretation services in the world.[115] Furthermore, multilingualism causes a considerable delay in the legislative procedure since texts have to be translated into the different official languages.[116] Most importantly, the quality of the final product is impaired by the fact that there is rarely an equivalent word in two different languages. This difficulty is further amplified by the existence of different legal systems and traditions across Europe. The various language versions of EC legislative acts provide sufficient evidence thereof.[117]

To overcome, to some extent, the difficulties carried out by legal multilingualism, the ECJ has developed a method to interpret the different textual versions of EC law which gives weight to legislative policy rather than language.[118] Accordingly, all of the relevant versions are considered, but the ECJ accords only limited significance to textual interpretation.[119] When two or more versions of a text differ in meaning, the ECJ has tried to set forth a single interpretation by looking to the purpose and spirit of the provision in question, rather than by using a strictly literal approach.[120] The problem with this method,

114. EEC Council Regulation, No. 1 art. 1 & art. 1, [1958–1959] OJ SPEC. ED. 385–86 (determining languages to be used by the European Economic Community).

115. Huntington, *supra* note 47, at 334.

116. *Id.*

117. The European Community Council and Commission must often revise texts because of linguistic divergences. *See* Regulation 1622/87, (1987) O.J. (L 150) 30 (requiring corrections to the non-Spanish version of a wine commerce regulation). Likewise, the ECJ has been confronted in numerous occasions with issues of language interpretation. *See* COUR DE JUSTICE DES COMMUNAUTES EUROPEENES: RECHERCHE ET DOCUMENTATION 106–18, *available at* http://curia.eu.int/da/content/outils/tm.pdf (last visited Apr. 4, 2004).

118. Pierre Pescatore, *Interpretation des Lois et Conventions Plurilingues dans la Communaute Europeene*, 25 LES CAHIERS DE DROIT 989, 1000 (1984).

119. Nikolas Urban, *One Legal Language and the Maintenance of Cultural and Linguistic Diversity?,* 8 EUR. REV. OF PRIVATE L. 51 (2000).

120. *See generally* Huntington, *supra* note 47, at 334. *See, e.g.*, Stauder v. City of Ulm, 1969 E.C.R. 419, 1970, C.M.L.R. 112, 1969; Case 30/77, Regina v. Bouchereau, 1977 E.C.R. 1999, 2 C.M.L.R. 800 (1977); Worsdorfer v. Raad van Arbeid, 1979 E.C.R. 2117, 2724–25, 1 C.M.L.R. 87, 92–92 (1980); North Kerry

which may be characterized as *metalinguistic* interpretation,[121] is that the aid of the ECJ is constantly required. To the extent that EC law is multilingual, national courts and administrative authorities cannot rely solely on their own understanding of the European law drafted in their language.[122] Thus, if an all-embracing European contract law is ever enacted, the same guidance would be required, having potentially disastrous consequences on an already saturated ECJ by multiplying the length of proceedings in domestic law. Additionally, this increase would have a negative impact on the degree of legal security, especially if the Code was enacted by a directly binding instrument, such as an EC Regulation.

C. Absence of a Common European Legal Culture

Currently, a common European legal culture does not exist. In the absence of such a culture, the enactment of a European Code would probably require the over-regulation of contract law. Some scholars argue that the codification of many issues would be nearly impossible in terms of general clauses or standards, since national courts would probably construe them differently.[123] Furthermore, even if the ECJ had the competence to interpret the Code, many issues would be left to the evaluation of domestic courts. The European legislator should therefore attempt to bridge the cultural and linguistic divides prior to, or at least in conjunction with, any future comprehensive harmonization of contract law. Once the legal contexts in which uniform rules have to be interpreted and applied begin surfacing, the confidence of domestic courts in their own understanding of the uniform rules will also rise, diminishing the "aiding" role of the ECJ.

Truth be told, legal uniformity is possible in countries with co-existing different legal traditions. Even at the international level, uniform laws, like CISG, have contributed greatly to such uniformity through the substantive law of international sales,

---

Milk Products Ltd. v. Minister for Agriculture and Fisheries, 1977 E.C.R. 425, 2 C.M.L.R. 769 (1977).

121. Pescatore, *supra* note 118, at 1000.

122. Urban, *supra* note 119, at 55–56.

123. Ulrich Drobnig, *Scope and General Rules of a European Civil Code,* 5 EUR. REV. OF PRIVATE L. 489 (1997).

comprised of contracting nations from very different socio-economic and legal backgrounds.[124] Yet, the *European contract law project* contemplates an all-embracing, harmonizing enterprise whose ultimate consequence might be the total replacement of the Member States' domestic legislation in the field of contract law. In this sense, a prime illustration is the outcome of the U.S. codification movement in the Nineteenth Century. In 1865, a Civil Code was drafted under the chairmanship of David Dudley Field in a style influenced by the Code Napoleon and contained some civil law content.[125] The greatest achievement of this Code was its adoption in California.[126] Yet, as the Code required a major departure from the traditional legal method, California judges quickly became aware that in terms of determining results, their inherited common law method was almost as significant as the Code's content.[127] Accordingly, judges managed to minimize the innovations carried out by the Code through a variety of techniques, thus, keeping California law in line with the previous rules.[128]

IV. THE DEVELOPMENT OF A COMMON EUROPEAN LEGAL DISCOURSE

The European legislator should, accordingly, promote the development of a *common European legal discourse* through legal research, legal education and the gradual creation of a common legal methodology. Ultimately, a *common legal culture* may crystallize, thereby facilitating the achievement of real uniformity.

A. Legal Research

Various private initiatives have recently promoted the mutual interest of European legal diversity and even a strengthened feeling of common heritage. Worth mention are *The Pavia*

---

124. Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 International Lawyer 443–83 (1989), *available at* http://www.cisg.law.pace.edu/cisg/biblio/garro1.html.

125. Gray, *supra* note 87, at 115.

126. *Id.* at 116.

127. *Id*.

128. *Id*.

Group on a European Contract Code,[129] *The Trento Common Core Approach to European Private Law*,[130] *The Study Group on a European Civil Code*[131] and *The Commission on European Contract Law*.[132] This promotion is further supported by works such as Zimmermann's *The Law of Obligations: Roman Foundations of the Civilian Tradition*[133] and *Good Faith in European Contract Law*[134] and new legal reviews such as the *Zeitschrift für Europäisches Privaterecht*,[135] the *European Review of Private Law*,[136] the *Europa e Diritto Privato*[137] and the *Columbia Journal of European Law*.[138]

Similar initiatives should be encouraged by EC institutions, as they promote the mutual understanding of diverse legal traditions existing in Europe. Indeed, a serious debate on the need to harmonize contract law and even private law in the EU can only be conducted if all of the parties are aware of their commonalities and divergences. In this regard, it is relevant to note that research activities in that direction could be undertaken within the Sixth Framework Programme for research and technological development.[139]

---

129. GIUSEPPE GANDOLFI, CODE EUROPEEN DES CONTRATS: AVANT-PROJET (2001).

130. See Mauro Bussani, *The Common Core of European Private Law, at* http://jus.unitn.it/dsg/common-core/approach.html (last visited Mar. 12, 2004) for a general description and a list of the participants seeking to create a model "European Law School" in order to shape a truly common legal education.

131. Christian von Bar, *The Study Group on a European Civil Code*, *in* TIDSKRIFT UTGIVEN AV JURIDISKA FÖRENINGEN I FINLAND 323 (2000).

132. Hugh Beale, *Towards a Law of Contract for Europe: The Work of the Commission on European Contract Law, in* NATIONAL AND EUROPEAN LAW ON THE THRESHOLD TO THE SINGLE MARKET 177 (Günter Weick ed., 1993); PRINCIPLES OF EUROPEAN CONTRACT LAW, *supra* note 44, at xi.

133. *See generally* REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION (1990).

134. *See generally* GOOD FAITH IN EUROPEAN CONTRACT LAW (Reinhard Zimmermann & Simon Whittaker eds., 2000).

135. *ZEuP,* from 1993, Verlag C.H. Beck Munich.

136. EUR. REV. OF PRIVATE L., KLUWER LAW INTERNATIONAL, THE NETHERLANDS, KLUWER LAW INTERNATIONAL, THE NETHERLANDS (1993).

137. GIUFFRE EDITORE, MILANO (1998).

138. THE COLUMBIA JOURNAL OF EUROPEAN LAW, PARKER SCHOOL OF FOREIGN AND COMPARATIVE LAW, COLUMBIA LAW SCHOOL (1994).

139. *See, e.g.,* A More Coherent European Contract Law, *supra* note 11, at para. 68. For a general overview on the Sixth Framework Programme see,

B. Legal Education

The endeavor to converge the private or contract laws of Member States can only succeed if there is a mass of European-minded jurists who are prepared to work in a multi-system environment.[140] Here, European law schools have an important role to play. These schools should educate future lawyers regarding the dilemmas of viewing national legal systems in isolation. Foreign law must be identifed as a mere local variation of the rules learned in law school.[141] To acquire these analytical tools, students must be educated in the principles and policy frameworks behind the law.[142] In the U.S., for instance, the first year of legal education is dedicated to learning legal methods as well as the social and economic dimensions of law in order to demonstrate the openness of legal solutions.[143] Such education may be facilitated with the addition of books such as the *Ius Commune Caseworks for the Common Law of Europe*, which puts forward common general principles already present in the Member States' private laws. As stressed by Kötz,

> [A]ll that is needed to constitute European private law is to recognise it. For this purpose we need books, books which disregard national boundaries and, freed from any particular national system or systematics, are addressed to readers of different nationalities. Of course national rules must be taken into account, but only as local variations of a European theme.[144]

Likewise, the mobility of law students should be encouraged, for example, by means of the already existing SOCRATES and ERASMUS Programs, to improve the recognition of law studies carried out in other EU countries.[145] Some scholars have even

---

European Commission, *The Sixth Framework Programme in Brief, at* http://www.europa.eu.int/comm/research/fp6/pdf/fp6-in-brief_en.pdf (Dec. 2002).

140. Pierre Larouche, *supra* note 19, at 106–07.

141. *See* Flessner, *Rechtsvereinheitlichung*, *supra* note 86, at 255.

142. Larouche, *supra* note 19, at 101.

143. *See* W.F. Ebke, *Legal Education in the United States of America*, *in* THE COMMON LAW OF EUROPE AND THE FUTURE OF LEGAL EDUCATION 107 (Bruno de Witte & Caroline Forder eds., 1992).

144. KÖTZ & FLESSNER, *supra* note 78.

145. *See* Flessner, *Rechtsvereinheitlichung*, *supra* note 86, at 253–54. *See generally* I. von Münch, *Europarecht ohne Europäisches Rechtsudium [Euro-*

suggested the creation of a European Moot Court Competition in the area of private and commercial law.[146]

C. A Common European Legal Method

The growth of a genuine uniform contract law in Europe will certainly require the development of a common legal methodology. Awareness regarding the existence of common rules and principles alone will be insufficient to compel the contract laws of the Member States to converge. Thus, it may be opportune to prompt courts throughout Europe to construct and apply domestic law in light of a European comparative method, taking into account the functionally equivalent solutions reached in other jurisdictions.[147] This method would result in the development of a European doctrine of precedents.[148] According to one scholar, the comparison between the facts and the social and economic dimensions of a case vis-à-vis other foreign precedents would not only allow for the development of a European standard,[149] but may also lead to "more sophisticated, more creative and more efficient decision-making because it makes the judge more aware of the specificity of the case before him."[150]

The law of contract is especially adequate for undertaking functional comparisons. This area of the law is dominated by party autonomy and therefore to a large extent free from national public policy constraints.[151] This liberty allows judges to

---

pean Law Without A European Legal Education?], ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 1 (2000).

146. Friedrich Blase, *Leaving the Shadow for the Test of Practice — On the Future of the Principles of European Contract Law*, 3 VINDOBONA JOURNAL OF INTERNATIONAL COMMERCIAL LAW AND ARBITRATION 3, 14 (1999), *available at* http://www.cisg.law.pace.edu/cisg/biblio/blase.html (last visited Apr. 2, 2004).

147. *See* Klaus Peter Berger, *The Principles of European Contract Law and the Concept of "Creeping Codification" of Law*, 9 EUR. REV. PRIVATE L. 30 (2001).

148. *See* Klaus Peter Berger, *Harmonisation of European Contract Law: The Influence of Comparative Law*, 50 INT'L & COMP. L.Q. 877, 883-94 (2002) [hereinafter Berger, *Harmonisation*]; Auf dem Weg zu einem europäischen Gemeinschaftsrecht der Methode, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 4, 11 (2001).

149. Berger, *Harmonisation*, *supra* note 148, at 887.

150. *Id.* at 890.

151. Ole Lando, *Why Codify the European Law of Contract?*, 5 EUR. REV. PRIVATE L. 525, 529 (1997).

take account of the socio-economic dimensions of the case at hand.[152] Arguably, courts in the EU Member States should therefore try to coordinate the application of contract law with other jurisdictions.[153] This method is already used in relation to international conventions, where a uniform interpretation of the text in light of the international character is required.[154]

D. Legal Language(s) Common to the EU?

In which language is the development of a common European legal discourse to be conducted? Here, again, we find the linguistic divide. In the Middle Ages, the development of the so-called *Ius Commune* or, at least, of a common legal discourse, was facilitated by the fact that there was a common legal language throughout Europe: Latin.[155] Today, however, unless the predominance of certain languages is acknowledged, even the development of a common legal discourse would have to be multilingual. This multilingual discourse would, of course, presuppose the existence of polyglot lawyers and academics in command of many languages.

Truthfully, the principle of linguistic equality is a fiction, even at the EC level. With the exception of the European Parliament, the number of working languages in the EU institutions has been reduced to French, English and, to a lesser extent, German.[156] Even "private" harmonization enterprises such as the *Commission on European Contract Law* or the *Group for a European Civil Code* have operated in these languages, stressing that although law and language have a cultural component, the two may be disconnected from each other.[157] Another initiative, the *Trento Project on the Common Core of European Private Law,* justified the use of English by postulating that "law has no necessary relationship with the words ordinarily used to give it expression."[158] With the goal of providing

152. Berger, *Harmonisation, supra* note 148, at 891.
153. *Id.* at 887.
154. *See, e.g.,* EC Convention on the Law Applicable to Contractual Obligations, art. 7/18, 1980 O.J. (L 266).
155. *See* Flessner, *Rechtsvereinheitlichung*, *supra* note 86, at 246.
156. *See* Urban, *supra* note 119, at 54.
157. PRINCIPLES OF EUROPEAN CONTRACT LAW, *supra* note 44, at xxvi.
158. Nicholas Kasirer, *The Common Core of European Private Law in Boxes and Bundles*, 3 EUR. REV. PRIVATE L. 417, 420 (2002).

a legal map of European private law, the Trento Project uses visual representations of legal ideas under the premise of the viability of non-verbal communication in law.[159] Under this method, Trento scholars share the view that the law of the common core is fundamentally meta-linguistic.[160]

Assuming the impossibility of isolating, to some extent, law and language, citizens and administrations throughout the EU should be advised to adapt to the factual dominance of French, English and German in order to facilitate the development of a common legal discourse in Europe. This measure has already been taken by legal periodicals such as the *European Review of Private Law/Revue Européenne de Droit Privé/Europäische Zeitschrift für Privatrecht*, which is published in these three languages.[161] However, since language will always maintain a cultural dimension, the ability to work with other languages would be convenient and respectful of the European linguistic diversity. Accordingly, promoting the education of foreign languages is one of the priorities of the EU. The recent Action Plan *Promoting Language Learning and Linguistic Diversity*[162] set out three broad areas in which action is to be taken: extending the benefits of life-long language education to all citizens, improving language education methods, and creating a more language-friendly environment.[163] This plan thus proposes a series of actions to be taken at the European level from 2004 to 2006 in order to secure a major step towards promoting language learning and linguistic diversity.[164]

---

159. Mauro Bussani, *Integrative Comparative Law Enterprises and the Inner Stratification of Legal Systems*, 8 EUR. REV. PRIVATE L. 85 (2000).

160. Kasirer, *supra* note 158, at 420.

161. *See generally* Kluwer Law International Online: European Review of Private Law, *at* http://www.kluwerlawonline.com/toc.php?mode=byjournal&level=2&values=European+Review+of+Private+Law (last visited Apr. 2, 2004).

162. Commission of the European Communities, Communication From the Commission to the Council, the European Parliament, the Economic and Social Committee, and the Committee of the Regions - Promoting Language Learning and Linguistic Diversity: An Action Plan 2004-2006, COM (03)449 final (July 24, 2003), *available at* http://europa.eu.int/comm/education/doc/official/keydoc/actlang/act_lang_en.pdf.

163. *Id*.

164. *Id*.

V. CONCLUSION: A COMMON LEGAL DISCOURSE AS THE INDISPENSABLE FOUNDATION FOR A EUROPEAN CONTRACT LAW

The European legal profession must be educated towards uniformity and the advantages of seeking inspiration from foreign colleagues. Within a common legal discourse, even linguistic diversity will be a minor problem, as courts and administrations will feel confident interpreting and applying the EC laws drafted in their own language. Even the solutions for many legal issues could be "taken for granted" without having to constantly resort to the ECJ for a preliminary ruling. In order to facilitate the development of a common European legal discourse, as well as the legislative task of the EC, it would be opportune to acknowledge the *de facto* predominance of certain languages, although the knowledge of other European languages should be encouraged as well.

All in all, the foundations of a genuine European contract law can hardly be set alone by the legislator through the enactment of a Code. The common effort of the European legal profession will have an important role to play here.