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BOOK REVIEW

A. Hartkamp, Martijn Hesselink, et al., Towards a European Civil Code, 3rd ed

Kluwer Law International, Nijmegen, 2004, 847 pp, €195.00, ISBN 90-411-2280-X

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As an English legal academic who has always been enthralled by the story-telling characteristics of the common law, and whose first brush with European Community Law (as it was then called when I attended University in the mid-1980's) left a distinct feeling of ennui towards a subject that woefully failed to excite the imagination, it is with a sense of duty mixed with apprehension that I approach any edicts emanating from the European Union. Thankfully, I have enough curiosity to balance against my more negative feelings and I can at least face the task with some equanimity—a good job since my main area of interest is contract law. Contract law has seen a good deal of European intervention, although up to now this has been confined to rather discrete areas, consumer contracting for example. Or else it has concentrated on supporting the production of optional ''codes'' such as the well-known Principles of European Contract Law (PECL). However, with the European Commission's *Communication on European Contract Law*, the subsequent *Action Plan* and *The Way Forward* document, it is clear that the harmonisation project has become more ambitious, even if the proposals as yet still fall short of advancing a ''one size fits all'' body of contract law rules applicable across Europe. Of course the ''Europeanisation'' of contract law is not driven solely by the laws, communications, principles and so forth promulgated by the various institutions of the European Union. Much of the impetus also derives from the work of academics engaged on various comparative research ventures (such as the Trento Common Core of European Private Law project). Although it is into this latter ''benign'' category that the work under review falls, one should not lose sight of the fact that these works are not just flights of academic fancy. It is academic researchers (for example, the Study Group on a European Civil Code and the Acquis Group) that will produce the Common Frame of Reference that is the central plank in the European Commission's future plans for European contract law. These academic works offer important insights into the future direction of European private law.

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The creation of a European Civil Code is, naturally, a much broader project (although this book displays a distinct bias towards contract) and one that is more easily dismissed than attempts at harmonisation of contract law. Yet one of the most startling things about this book is the sympathy with which the idea is treated by the majority of the (impressive) contributors. The tone of the book is set in the first chapter where *Ewoud Hondius* argues that the domestic legal systems of Europe are no longer so far apart that a Restatement of Private Law cannot be contemplated (''Towards a European Civil Code'', p. 4). He identifies ''legal cultures'', sources of law and procedural matters as the main points of difference between the different legal systems now, not substantive law. This is borne out by the work of the Trento Common Core project which through discrete examinations of good faith and the enforceability of promises in contract law was able to conclude that substantive differences between the twelve legal systems studied are more apparent than real. Despite their general sympathy, the contributors to *Towards a European Civil Code* nevertheless differ considerably over the extent to which private law can be codified *en masse* and whether the development of Europe-wide principles might not be the better strategy. Only one chapter (out of 44) regards the whole project as misguided (*Pierre Legrand*, ''A Diabolical Idea'', chapter 14).

The book is divided into two parts. The first part (16 chapters) examines the general issues surrounding codification. It includes contributions from *Walter van Gerven* (''The ECJ Case Law as a Means of Private Law Unification'', chapter 6), *James Gordley* (''The Foreseeability Limitation on Liability in Contract'', chapter 12) and *Ugo Mattei* (''Basics First Please! A Critique of Some Recent Priorities shown by the Commission's Action Plan'', chapter 16). The contributions in this part take a variety of perspectives on what is perceived to be the main difficulty: unifying the different legal cultures. A particular concern evident in some contributions is incorporating (rehabilitating?) English common law method. *Reinhard Zimmerman* points out the disadvantages of the discreteness and selectivity of laws that have so far emanated from the European Union, but argues that talk of a Civil Code is premature without first developing a ''European scholarship'' at its foundation (''Roman Law and the Harmonisation of Private Law in Europe'', pp. 22–23). This development is not such a big step as might be supposed, since such intellectual unity did historically exist in the *ius commune* of 12th to 16th century Europe. England's supposed isolation from this continental legal culture is denounced as a myth (p. 34). Even that peculiarly English requirement of consideration is explained as a manifestation of *causa* doctrine (p. 38). The black sheep *can* be welcomed back into the fold! Utilising a different approach to *Zimmerman*, but largely arriving at similar conclusions, *Richard Hyland* examines what lessons can be learned from the American experience of codification through the Uniform Commercial Code and the various Restatements (''The American Experience: Restatements, the UCC, Uniform Laws, and Transnational Coordination'', chapter 4). The main lessons are that dialogue is important and that codification does not require total integration of rules into a systematic structure, but the creation of a common vocabulary for further discussion (p. 70). He points to the UNIDROIT principles and the PECL as examples of the necessary bridge-building, and as providing grounds for optimism for the future of codification. The lone voice of dissent belongs to *Pierre Legrand* (chapter 14). In a chapter that is as entertaining as it is informative, he argues that attempts to emphasise the unity that exists between civil and common law systems are misplaced since they fail ''to appreciate that English law not only is different, but

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that *it has wanted to be different* by taking the road not travelled.'' (p. 247, emphasis in original). For *Legrand* the differences between the two systems are more real than apparent since they reflect ''moral preferences which are culturally embedded and which, on that account, are incompatible and incommensurable.'' (p. 267). It is in some ways a matter for regret that this is the only contribution that really seeks to question the wisdom, and even the possibility, of greater unity.

Part two of the book (28 chapters) deals with substantive law and there are chapters on family law (two chapters), contract law general (eleven chapters), contract law specific (three chapters), restitution (one chapter), tort (five chapters), property (four chapters), trusts (one chapter) and company law (one chapter). Again, the bias in favour of contract law is evident and one is left wondering whether ''Towards a European Contract Code'' is not the more apt title for this work. Of most interest to readers of this journal may be the essays by *Thomas Wilhelmsson* (''Standard Form Conditions'', chapter 24), *Viola Heutger* and *Christoph Jeloschek* (''Towards Principles of European Sales Law'', chapter 30) and *Geraint Howells* (''Product Liability—A History of Harmonisation'', chapter 35). *Wilhelmsson's* contribution is a general overview of the problems posed by standard contract terms and how they might be resolved. It goes over much familiar territory—such as whether such terms should be addressed by procedural or substantive methods of control—and it reviews key European law on the subject. It has surprisingly little to say on codification or increased harmonisation, perhaps because standard terms is an area where harmonisation has already taken place (under the Unfair Contract Terms Directive). But I find it difficult to believe there is not more to say on this topic, particularly in relation to commercial contracts (the position on this in the UK at least has recently been reviewed by the Law Commissions; see Law Com No. 292/ Scot Law Com No. 199 ''Unfair Terms in Contracts'' 2005 Cm 6464). In relation to the chapter on European Sales Law (chapter 30) one might again argue that there is not much more that needs to be done by way of harmonisation. *Heutger* and *Jeloschek* suggest that this is not the case and that the two measures most associated with unified sales law—the Consumer Sales Directive and the UN Convention on the International Sale of Goods—are quite limited in scope. The contribution then concentrates on the work of the Study Group on a European Civil Code and its production of draft Principles of European Sales Law. In the conclusion the authors recognise that critics may voice concerns over the legitimacy and authority of ''scholars ... to act as legislators.'' (p. 549). This issue, while noted, is not really answered, the authors taking the view that legitimacy is conferred by the Commission's *Action Plan*. I confess that this does not worry me so much as the burgeoning number of projects, study groups, networks and the like that are contributing to the drive towards increased harmonisation of European private law. The precise scope and function of these various groups is often difficult to discern and their connections, both to each other and their previous incarnations, has a level of complication worthy of the family tree of an antiquated royal house.

This book, like the harmonisation project generally, is thoroughly ambitious and no doubt it will serve as an inspiration for those working in the field. The general sense the book conveys of what can be achieved with a little imagination is one of its main strengths. But while the book demonstrates great optimism in relation to a European Civil Code, it also is a reminder of how much work there is left to do. From reading the contributions one is struck about how little consensus there is about what the process of ''codification'' entails, about the level of formality

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envisaged and about the status of such an instrument(s), if ever developed. These are not just matters of tinkering with the details, but involve attention to fundamental and perhaps irresolvable issues concerning legal cultures, identities and sovereignty. Any European Civil Code must have a solid foundation—and no amount of enthusiasm for the idea of a code will compensate for the lack of that foundation.

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