European Private Law between Utopia and Early Reality

'Towards a European Civil Code' was the title of a one-day symposium held in the Hague on 28 February 1997. It is not the first time that a conference on the desirability and feasibility of drafting a European Civil code has been organized. A remarkable feature of the symposium was that the initiative for this meeting was taken by the Ministry of Justice of the Netherlands and the Ministry referred expressly in its invitation to the fact that the Netherlands presently holds the Presidency of the Council of the European Union. In the opinion of the Ministry this opportunity should be used to discuss the unification of private law in Europe. This discussion was presented as being the result of the 1989 Resolution of the European Parliament requesting the Council, the Commission and the Member States to start the necessary preparatory work on drafting a Common European Code of Private Law. The invitation also mentioned that scholars in many countries have answered this challenging request of the European Parliament, while political circles seem to have kept silent.

The February conference can be regarded as a political sign that at least one Member State thinks that the topic, concerning the desirability of the unification of private law in Europe, is an important issue which should be taken seriously at both academic and political levels. It is remarkable that precisely the Member State with the most recent codification of private law (the Dutch New Civil Code has been in force since 1992) is ready to discuss the feasibility of such a unification. At first sight one would expect the contrary. But one has to realize that the recent recodification of private law has perhaps caused Dutch lawyers to be less reluctant to embrace a new modification of important parts of their legal system than their colleagues in other Member States. They have already prepared themselves for the introduction of a new private law and have seen the advantages of a new codification.

The main advantages of the Civil Code of the Netherlands of 1992 were the incorporation of many court decisions into the text of the Civil Code, the revision of choices made by the legislator in the past and the restructuring of regulations. The main

advantage of a European Civil Code would be an enormous reduction in 'transaction-costs' in case of transboundary transactions and therefore the removal of a further obstacle to the perfection of the internal market.

Although the invitation to the symposium can be classified as a political sign, the conference itself cannot be described as a political meeting. The participants were academics, judges, practitioners and Member State officials. Politicians were in the minority. The conference therefore had a semi-political character.

The conference programme did not include separate presentations on the pros and cons of a unification of private law in Europe. Nevertheless during presentations and discussions on other issues, many remarks were made in favour or against such a unification.

A frequently mentioned argument in favour concerned the previously mentioned reduction of transaction-costs in transboundary transactions. Furthermore the piecemeal unification of small parts of private law by directives and regulations without a developed private law background was considered to be undesirable and disturbing for the systemic balance of private law systems. The argument against codification was that there was no need for a uniform law; it was further argued that a uniform law would contain suboptimal solutions because every Member State would try to retain several traditional provisions.

The first item addressed in the presentations concerned the question of the legal basis for a European Civil Code. Which provisions of the EC Treaty and the Maastricht Treaty allow for legislative actions by the Union? Does the First or the Third Pillar contain provisions on which a European Code of private law could be based? Within the First Pillar Articles 100, 100A, 235 and 220 of the EC Treaty were discussed, with special attention to the legal basis of Article 100A. Some participants concluded that Article 100A could not be used as a legal basis for the enactment of a European Civil Code (inter alia because of the constitutional character of a codification of private law), others nevertheless pleaded that Article 100A does provide a basis for a unification of private law. It goes without saying that, in the given context, the subsidiarity principle introduced by the Maastricht Treaty is just as crucial.

Some participants also argued that the Commission should not impose a (part of a) European Civil Code on the Member States. On the contrary, an attempt should be made to conclude a treaty containing the text of a European Civil Code in a first annex and a protocol giving the right of final interpretation to the Court of Justice of the European Communities in a second annex. Such a treaty could be based on Articles K.3, j° K 1 nr. 6 EU Treaty. Unlike Article 220 EC, this Article does not contain the requirement of ratification by all Member States before the adopted convention can come into force.
If one accepts the feasibility of a European Civil Code, the next question is how the drafting of the Code should be organized. Should the first draft be made by a working group of experts or by a regular working party of Member States representatives? Based on the recent Dutch experiences in drafting a new civil code, the necessity of a working group in an institutional framework was advocated.

Several questions regarding the material scope and the content of a European Civil Code were discussed. One of these questions concerned the possibility of restricting the applicability of the Code to international relations only, which some speakers saw as the first step. Others believed that a restriction of the scope of a new Civil Code to intra-EU border-crossings would disadvantage the intended effect of such a Code. Moreover, the determination of the definition of transboundary cases would cause tremendous problems.

A rather passionate discussion flared up after the question was raised as to which topics were most in need of a European codification and at which level of abstraction. Should only the law of contracts be unified, or also tort law, and which parts of property law? Should only general principles be formulated or more detailed provisions?

Many questions were raised during the symposium. Some of these have already been mentioned, others have not. Many different attempts were made to provide answers. A consensus on these answers could, however, not be reached. But that is not surprising. If the contrary were the case it would be incredible. And if I were to pretend to be able to give proper answers, writing this editorial in the train coming back from this conference, it would be even more incredible.

The symposium organized by the Dutch Presidency was in the first place an incentive for further detailed discussions on the above-mentioned issues. The background is the general feeling that the piecemeal approach of increasing unification and harmonization of small parts of private law through regulations and directives gradually affects the most important feature of national codifications: their systemic coherence. If we do not want to have rather chaotic legal systems in private law, action has to be undertaken. One option is to draft a European Civil Code and then to redraft directives and regulations in the light of the system of this new Civil Code. Another possibility is the coordination of the drafting of directives and regulations in view of a system of private law, which could constitute the basis of a European Civil Code to be enacted in the future. A further possibility is to harmonize or unify larger parts of private law than currently is the case. The directive on the return of cultural objects unlawfully removed from the territory of a Member State causes systematic difficulties because the possessor in good faith of protected cultural goods is treated differently from the purchaser in good faith of other goods, whereas the borderline between both groups

(cultural goods and other goods) is certainly not always clear for the buyer involved. The same applies for the possibility of acquiring property by way of limitation (acquisitive prescription). Less systematic frictions would occur had the directive not been restricted to the acquisition of cultural goods in good faith and related limitation problems but instead dealt with these problems with regard to all movables.

During the symposium the need for a European legal education was mentioned several times. In the future lawyers should not only be educated in their own legal systems, but should be able to handle problems from a comparative perspective. They should be aware of similarities and differences between the major European legal systems. This is necessary if they are to work on a further harmonization or even unification of private law in the future, but also if there is no progress in the unification process in this field.

Living at the very end of this century we can observe that in respect of future developments in the field of private law many questions are raised. It is a challenge to search for answers: a challenge for researchers, for politicians and for teachers.

In the middle of the eighteenth century Voltaire complained that in France one had to change jurisdictions more often than horses. Half a century after this complaint the situation was different: the Code civil was promulgated. Nowadays we use horses mainly for pleasure and have other means of transport. Travelling by train in Europe one can contemplate variations on Voltaire’s complaint and observe that one changes jurisdiction more often than one has to change trains. Will this be any different in fifty years time?

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