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A COMMON FRAMEWORK OF REFERENCE *AND* TEACHING.

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In July 2001 the European Commission published a Communication on European Contract law in which it outlined four options for future Community policy in the field of contract law. Those options were: (i) do nothing, that is leave it to market forces how contract law at the European level would develop; (ii) promote non-binding common contract principles leading to more convergence of national laws; (iii) improve the quality of existing legislation, particularly in the area of consumer law; (iv) adopt comprehensive and binding legislation at Community level.[1] The Commission submitted its Communication to responses from governments, business, consumer organisations, legal practitioners and academics, and got more than 160 reactions. It became clear from these reactions that the last alternative got little backing, but that options (ii) and (iii) received much support - which corresponded to my own preference.[2] Consistent with this reaction, the Commission adopted, in February 2003, a further Communication entitled "A More Coherent European Contract Law – An Action Plan."[3] In this new Communication, the Commission proposed the elaboration of a *common frame of reference*, which should enable it to increase *coherence* in the Community's 'specific-contract' *acquis* (mainly consumer law), *and* to provide best solutions in *common terminology* as well with regard to *concepts* and abstract terms (like 'contract' and 'damage') as with regard to applicable *rules* (as, for example, in the case of non-performance of contracts). Several groups of academics, ten to be precise, have already indicated their interest, and presented the different perspectives from which they look at a common

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[1] OJ C 255/1, 13 September 2001. For a discussion and a formulation of my own viewpoint, see my article "Codifying European private law? Yes, if…!," *European Law Review*, 2002, 156-176.
[2] See my article referred to supra, which I also submitted, in a somewhat different form, as a response to the Commission's request for reactions. See also infra, fn. 7.
[3] OJ C 63/1 of 15 March 2003.

framework, at the occasion of a symposium organized in Trier by the Academy of European Law in April 2003.[4]

One of these groups is the Casebook project, entitled "Ius Commune casebooks for the Common Law of Europe," which I set up in 1994 and for which the financing for the first six years was procured by Maastricht University. The project is now co-hosted by the Leuven Centre for a Common Law of Europe (Leuven CCLE) and the Maastricht European Institute for Transnational Legal Research (METRO).[5] Among the ten projects, the casebook project is the only one which focuses primarily (but not only) on *actual* case law from national and European courts, and on the contribution they make to the emergence of a new *ius commune*. In this contribution I will try to describe the peculiarities of the project against the backdrop of the Commission's proposed Common Frame of Reference. At the same time, and as a tribute to the creation of this new journal, the *European Journal of Legal Education*, I will emphasize the contribution which any attempt to promote a *ius commune*, should make to the emergence of a truly European legal education. Hence the reference in the title to a common framework of reference *and* teaching.

The Commission's Communications of 2001 and 2003 are part of an ongoing process of *European integration* which engages a steadily growing number of States since the early 50's (the process started with six Member States, and has now been enlarged to 25 Member States). The result of this process is that a large body of uniform European legislation, laid down in Treaties, regulations and directives (and implementing national laws), and numerous judgments from Community and national courts concerning this uniform legislation, have come into existence. However, that legislation, and accompanying case law, remains limited in scope as it only affects those areas of the national legal systems for which the Member States have transferred jurisdiction to the European Community, now the European Union. The consequence of this is that European Community law is "sector-specific," and looks very much like "patchwork," [6] incoherent as a whole and internally inconsistent, which is why the

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[4] For a presentation of their project by each of the ten groups represented at the symposium which was organized by Dr. Angelika Fuchs, Head of Section at the Academy, see *ERA-Forum, Scripta Iuris Europaei,* 2/2003, 99-145..

[5] The project was presented iat the meeting in Trier by Wouter Devroe and Dimitri Droshout, whose presentation is published in *ERA-Forum*, supra, at 114-121. The undersigned is the chairman of the Steering Committee and the General Editor of the casebook series.

[6] See, in addition to the article referred to supra, n. 2, Walter van Gerven, "Comparative Law in a Texture of Communitarization of National Laws and Europeanization of Community Law", in *Liber Amicorum in honour*

European Commission, in its 2001 and 2003 Communications, has propagated to bring more coherence in existing European contract law.

The most radical method to achieve coherence and consistency would be to enact comprehensive codification covering the whole of Member State laws in the area of contract law, that is to extend the European harmonisation process, now covering primarily cross-border aspects, to encompass also intra-State aspects. Thus, for example, to enact a comprehensive *European Consumer Act* which covers the whole area of consumer legislation, regardless of cross-border effects, or even to enact a comprehensive *European Contract Law* covering the whole of general and specific contract law, irrespective of whether it relates to *inter*-state or *intra*-state transactions. The difficulty with this method is that the EU legislature, i.e. the European Parliament and the European Council of Ministers, acting jointly, at the proposal of the European Commission, has no jurisdiction to enact such comprehensive and binding legislation because of the limited transfer of competences by the Member States to the EU.[7] The only way to enact such comprehensive legislation is therefore to proceed by way of an international agreement between the Member States, or some of them, which, to become effective, requires ratification by each of the Member States concerned in accordance with its constitutional requirements – that is with involvement of their national parliaments. Even then, it remains uncertain whether the Member States involved in the process can make use of the Community institutions in view of concluding the agreement, and providing in its application and uniform interpretation with the assistance of a Community court.[8]

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of Lord Slynn of Hadley, Vol. I, *Judicial Review in the European Union* (ed. D.O'Keeffe), Kluwer, 2000, 433-445.

[7] See further my article referred to in fn. 2 where I gave several reasons why comprehensive codification of large parts of private law is not feasible, or desirable. In summary : (i) the Community does not have the legal competence needed therefore; (ii) even if it had, it would not be appropriate to enact binding legislation by qualified majority in the Council of Ministers since that would enable codification-minded Member States to, eventually, outvote less codification-minded Member States; (iii) in order to avoid that such comprehensive codification be drafted "in the abstract," it should not only contain general (mainly suppletive) contract law, but also specific (often coercive) contract law provisions intended to protect weaker contracting parties; (iv) drafting such codification must occur on the basis of policy decisions taken by an elected parliament, preferably by a Convention in which European and national parliaments are represented.. For all these reasons, I indicated that, rather than to draft a comprehensive code, one would start with improving the quality of the existing *acquis* for which the EU legislature does have jurisdiction, and leave comprehensive codification to an international agreement between the Member States. The fact that the Commission has followed this path means that many of the respondents, and probably many within the Commission and the Council, shared this preference.

[8] See further Bruno De Witte, "Chameleonic Member States: Differentiation by means of partial and parallel international agreements" in *The Many Faces of Differentiation in EU Law* (Bruno De Witte, Dominik Hanf, Ellen Vos, eds.), Intersentia, Antwerp, 2001, 231-267, at 255-256 and 260-266.

Of Differences in Legal Styles, Legislative Enactments and Teaching Methods.

To enact uniform laws, within or outside the framework of European integration, is not an easy matter, if one tries, as it should, to do justice to all of the legal mentalities existing within the European Union. Indeed the *differences in style* between the European legal systems, mainly between the Common law, the Romanistic and the Germanic legal families, are considerable and have been set in stone as a result of the codification movement in the 19th century. That movement was closely linked with the emergence of strong nation-states on the European continent, and saw codification as a symbol of national pride and independence.[9] The basic difference in legal mentality between the major legal families has been admirably described by R.C. Van Caenegem, professor emeritus at the University of Ghent, in his Goodhart lectures held in Cambridge in 1984-85.[10] In these lectures, published under the title *Judges, Legislators and Professors*, Van Caenegem compares the peculiarities of English, French and German law, the first being judge made law, the second law being shaped by legislation, and the third bearing the imprint of scholarly, Pandectist, learning. Whence the title of his book.

Whoever wonders whether these differences in legal mentality still exist, should compare judgments of the House of Lords with those of the French *Cour de cassation* and of the German *Bundesgerichtshof*. Only in a common law system is it possible for a judge to say in his decision that: "The state of a man's mind is as much a fact as the state of his digestion"[11] or, more prosaic (and more recently), is it possible for a Law Lord to express himself on a delicate issue of wrongful life in the following terms: " I have not consulted my fellow travellers on the London Underground but I am firmly of the view that an overwhelming number … would answer the question with an emphatic No."[12] By contrast, who would contradict the famous American judge Cardozo where he describes the decisional practice of German judges as "march[ing] at times to pitiless conclusions under the prod of a remorseless

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[9] See my contribution, *supra*, and "A Common Law for Europe: The Future Meeting the Past?," *European Review of Private Law*, 2001, 485-503.

[10] *Judges, Legislators and Professors, Chapters in European legal history*, Cambridge University Press, 1987.

[11] Quoted by B.S.Markesinis, "A Matter of Style," *The Law Quarterly Review*, 1994, 607-628, at 608, from *Edgington v. Fitzmaurice* (1885) 29 Ch.D.459, at 483, per Bowen L.J.

[12] Lord Steyn in *Macfarlane v. Tayside Health Board,* in excerpt in W.van Gerven, J. Lever and P. Larouche, *Cases, Materials and Text on National, Supranational and International TORT LAW*, Hart Publishing, 2002, 92-96, at 96.

logic which is supposed to leave no alternative."[13] And, as much Cartesian as French judges may be, that does not show in the cryptic judgments of the *Cour de Cassation* which, following the style of legislative pronouncements, expresses its opinion with a minimum of justification or explanation. All in all, English judgments continue to reflect spoken language from a judge sitting on the bench, whilst German judgments continue to resemble highly reasoned academic legal writings, and French judgments continue to be formulated in the same authoritative way as statutes promulgated by a legislature. Each of these judicial styles reflects the mentality typical for "Judges, Legislators and Professors," in Van Caenegem's legal narrative, that is for, respectively, judge made law, codified law and scholarly law. They are the result of deep rooted differences between the three legal traditions embodied in *case*-oriented English law, *rule*-oriented French law, and *concept*-oriented German law.

To be sure, legal mentalities and methodologies change with times, certainly now that States from the three large legal families (and from the Nordic countries) have become members of the EU, and therefore became subjected to the same body of Community legislation and jurisprudence. Thus, for example, the UK courts have become, since the Second World war, increasingly "purposive" in their practice of statutory interpretation, a change which has, and will, surely be strengthened now that UK judges become more and more familiar with the teleological approach applied by the Community courts (and by the European Human Rights Court).[14] In the same vein, UK courts have changed their attitude regarding the use of extrinsic materials, more specifically parliamentary materials,[15] just like they have started to discuss work of living academics in their judgments. The latter may seem to be merely anecdotal but it points to a more basic change in the perception of legal authority – that is legal authority which is no longer based solely on official recognition, in statutes or by the judiciary, but now also depends, as in Germany, on natural authority derived from the quality of learning in extra-judicial writings.[16] Contrariwise, in the European continental legal systems, the rule-making or normative function of courts, mainly of supreme courts, is increasingly and openly recognized - a trend which, here also, is stimulated by the creativity

[13] Quoted by Markesinis, supra, ibid., who also observes that German judges quote much academic literature in their judgments: at 609.

[14] See Ian McLeod, *Legal Method*, 3rd ed., Macmillan, 1999, at 261-266, and 327 ff. where it is pointed out that the British version remains so far more conservative.

[15] Ibid., at 294-300, referring to the judgment of the House of Lords in *Pepper v. Hart* [1993] 1 All ER 42.

[16] Thus Peter Birks introducing a colloquium on *Learning and Lawmaking* held on 11 January 2003 in All Souls College, Oxford.

displayed in pioneering case law of the European courts, the European Court of Justice (ECJ) *and* the European Court of Human Rights (ECrtHR).[17]

One of the consequences of these differences in legal styles and mentalities, is the attitude the different legal systems adopt *vis-à-vis* binding *legislation*, and more specifically *vis-à-vis* the desirability of *codification*. As Zweigert and Kötz recall in their *Introduction to Comparative Law*,[18] statutes enacted by Parliament play a different role in the development of English law, as compared with the role played by statutes on the Continent. The reason, obviously, is the prominent role which English judges have fulfilled in recording, and developing, the unwritten common law which has made that, until the 19th century, legislative activity was regarded "as necessary only to counteract some specific social or economic mischief." And, indeed: "With their empiricism and habit of going step by step from case to case the English would have regarded as dangerous and unnatural to prescribe the outcome of comparable cases in advance by making general regulations to cover the whole area of life; …" Accordingly, "English statutes were originally sporadic *ad hoc* enactments which as legal sources had much less force than the unwritten Common Law …"[19] Actually, this reserved attitude *vis-à-vis* statutory law also explains why statutes must be narrowly construed, since they are deviations from the Common Law, and must be drafted as precisely as possible. It may also explain, I would add, why the piece-meal approach of European Community law might be felt less worrisome in the UK than on the Continent.

The lesser role, historically, of statutory law in common law countries is undoubtedly at the origin of the reluctance of common lawyers *vis-à-vis* comprehensive legislation, and *vis-à-vis* general principles or concepts on which comprehensive legislation is due to be built.[20] Indeed, when solving a legal problem, common lawyers will not search for general principles or even

[17] That normative function of the judiciary was, for example, acknowledged in the ECJ's landmark judgment in *Brasserie du Pêcheur/Factortame* where the Court held that the principle of State liability for breaches of Community law causing prejudice to individuals could also be relied on against breaches committed by a national legislature proper (Joined Cases C-46/93 and 48/93 [1996] ECR I-1029). In holding so, the Court rejected the argument of the German government that such ruling cannot be made by a court of law, and stated bluntly that, in a large number of Member States, State liability has been regulated through case law (paragraphs 24 and 30).

[18] K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, translated by Tony Weir, third edition, Clarendon Press, Oxford, 1998, 265ff.

[19] Ibid., at 265.

[20] That has not prevented codification from having had in England a passionate defender in the person of Jeremy Bentham who strongly promoted codification (a word coined by him) in the name of "cognoscibility." Bentham felt indeed "that a law embalmed in thousands of cases spread over many centuries could not be cognoscible to the people": see Van Caenegem, o.c. supra, fn. 10, at 47 where, in the following pages, the reasons are analysed why codification, despite Bentham's plea, nevertheless failed to make headway in England.

rules from which the solution can be derived. They will rather look to cases which can be used as a precedent for having been decided in similar circumstances, or, on the contrary, which can be discarded as a precedent for having been decided in situations that must be distinguished from the case to be decided now. Accordingly, the prevailing paradigm in the common law is not some precept of equal treatment of comparable situations in light of a general rule or principle, but rather the necessity to treat plaintiffs equally, for reasons of natural justice and equity, in the concrete circumstances of the case.[21] However, here also the common law and the continental legal systems have come closer to each other in past decades - equity considerations now also playing an important part in the reasoning of continental courts, and legal certainty considerations not being totally absent from the mind of common lawyers.

All of the above to say that the lesser enthusiasm, if not reluctance, of common lawyers as regards codified law,[22] is an element to be taken into account in assessing the need to enact comprehensive legislation at the European level. Surely, that should not prevent the enactment of specific *Acts* covering a large area of Community law if that is required for reasons of coherent and uniform application of Community law in the Member States - and *provided* that there is a legal basis for it in the Community Treaties. Nor should it stand in the way of the European Commission's concern, as reflected in its 2003 Communication, to develop a common framework of reference, *provided* that it is not a purely 'concept' or 'rule' oriented framework, but also a 'solution' oriented framework of reference *and* teaching, as pointed out hereinafter.

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[21] A typical example is the judgment of the House of Lords, per Lord Goff, in *White v. Jones* where a claim in damages was granted to frustrated beneficiaries of a will that was not drawn-up because of negligence of the solicitor who had failed to make an appointment with the testator in time (the testator died while the solicitor was on vacation). After a thorough analysis of English case law, and of German legal theories, Lord Goff came to the conclusion that there was a lacuna in English law which needed to be filled in order to produce *practical justice*. On that basis he accepted, and with him the majority (two Law Lords dissenting), that the claim of the frustrated beneficiaries was to be granted. See the excerpts in W.van Gerven at alii, *TORT LAW*, supra, n. 11, at 219-223.

[22] To deal with the increasing flood of decided cases which makes the law unmanageable in a large jurisdiction like the United States, case law has been compiled in so-called *Restatements*. However, these restatements of the law do not have more weight with the American courts than a leading textbook (which is not very much): thus Zweigert and Kötz, o.c., supra, n. 18, at 251-252 who also refer to the drafting of the *Uniform Commercial Code* which Code has served as a model for the State legislatures, and was finally adopted in all States of the USA, albeit with reservations or alterations in some of them. The Code is very much the work of professor Carl Llewellyn, and proves that, under the right circumstances, academics may play a role in convincing State legislatures to voluntarily accept comprehensive legislation prepared by a group of external experts.

The basic differences in style between the common law and the civil law traditions are not only responsible for different attitudes *vis-à-vis* legislation and codification, they are also responsible fro different approaches vis-à-vis *teaching methods*, and *teaching materials*. As is well-known, contrary to the prevalent style of teaching on the European Continent which is one of formal and scholarly lectures, Anglo-American teaching (with the emphasis on American) is based on the so-called 'case method,' introduced by Dean Langdell of Harvard University in the second half of the 19th century, and since then adopted under the influence of the American Bar Association in all leading American law schools.[23] The basic idea behind the 'case method' is that the rules of law should be presented to the student in the context of decided cases, an approach to teaching which fully corresponds with the emphasis laid in the common law on the judicial development of the law. Whereas the method of 'formal lecturing' is supported by textbooks in which the rules of the law are described and commented on, the 'case method' is supported by casebooks in which the leading judicial decisions are reproduced and followed up by a large number of questions put forward to the students by the author of the book. The case-method is less systematically applied in the UK than in the USA, but also many English books, used in law schools, contain a large number of excerpts from cases and other legal sources, such as statutes or legal writings, followed by questions.[24] Again, the distinction between common law and civil law countries tends to be less significant to-day than it used to be. Also on the continent, especially in countries like Belgium and the Netherlands, formal lecturing and case-oriented seminar meetings are essential parts of the curriculum, and a large amount of case material is put at the disposal of students, often at the initiative of faculty members who have taken an LLM degree in the USA, or the UK, and are therefore familiar with the case method.[25]

The case method of teaching, and the use of case (and other material) books in that context, are, in my opinion (and experience), essential elements in studying the law - which, in the end, is always about applying legal rules to concrete situations, and solving conflicts when rules are not complied with voluntarily in a particular instance. Looking at the law 'top down,' that is looking at the rules to find solutions and apply them to the facts of the case, is surely one aspect of legal training but must be accompanied by looking at the law 'bottom-

[23] See Zweigert & Kötz, o.c., supra, n.18, at 244-245.

[24] See for instance, in the area of contract law, HG Beale, WD Bishop & MP Furmston, *Contract. Cases and Materials*, third edition, Butterworths, 1995: S.Wheeler & J..Shaw, *Contract Law, Cases, Materials and Commentary*, Clarendon Press Oxford, 1994.

[25] At my own University, the KU Leuven, a large majority of the professors have taken a degree, and/or have been teaching, at one of the top American law schools.

up,' that is by looking at decided cases to see how rules work out in the field, and whether they lead to acceptable solutions in comparable cases. For indeed, if the latter appears not to be the case, then the solution-finding process needs to be verified, to see whether the rule has not been wrongly selected, or wrongly construed, or has been applied in isolation, that is without regard for a more basic principle, or a conflicting rule, or inconsistent with "equity" or "natural justice." In that regard, the case method is to be an essential part of the learning process, and has been recognized as such not only in common law countries but also in other jurisdictions. Indeed, no one less than the famous German scholar Rudolf von Jhering wrote in 1881 that he has "always believed that [he] could introduce his students more effectively to the law by paying special attention in his lectures to its casuistry," adding that "Nobody who has had any experience as an examiner will doubt that a student is only able truly to comprehend those ideas which he can conceptualise in the concrete form of actual cases."[26] An experience which has been further analysed, in a context of comparative law, by professor Basil Markesinis who points out that the study of a foreign law system through decisional law, rather than through doctrinal writings, has the advantage of making one feel at home by "the comparative juxtaposition of factually similar cases," without being confused "by structures, terminology, or concepts that are either un-translatable or, if apparently easy to translate, … misleading."[27] Once being put at ease, by focusing on a study of narrow, litigated cases, Markesinis goes on to say, it becomes possible for the human mind to move forward and to broaden the enquiry in order to explore any differences which the comparison may have revealed.[28]

The Bottom-up Approach as represented by Case- and (other) Source-books.

As mentioned above, the casebook project for the common law of Europe applies a bottom-up approach. Rather than to aim at the unification of the European legal systems by way of legislation, its aim is to uncover common solutions to legal problems in the various legal systems functioning within the territory of the EU Member States, whether national or

[26] In the Introduction, at p. 5, of his book *Zivilrechtsfälle ohne Entscheidungen*, fourth edition, 1881, quoted by B.S.Markesinis, "Bridging Legal Cultures," *Israël Law Review*, 1993, 363-383, at 374.
[27] "Unity or Division: The Search for Similarities in Contemporary European Law, " *Tort Liability of Public Authorities in Comparative Perspective* (Duncan Fairgrieve, Mads Andenas and John Bell, eds), Th British Institute of International and Comparative Law, 2002, 451-472, at 452.
[28] Ibid., at 454. Differences to be explored should not be differences in concepts, notions and legal reasons, to which comparatists have devoted too much time in the past, but differences concerning underlying political, moral, social, and economic issues: at 468-469.

regional, supranational or international. These solutions are embodied in combined sets of statutory rules, judicial decisions and legal writings, that is in a variety of legal sources which, when thoroughly analysed, demonstrate the existence of principles, rules, even concepts which different legal systems, not necessarily all of them, have in common. The advantage of looking at the rules from beneath - that is by adopting a 'functional' approach, taking decided cases as a point of departure, and examining how solutions to concrete conflicts are found with the help of concepts, rules and principles - is that 'law in action,' as opposed to 'law in the books,' is studied in a context of daily life situations, and not in abstract surroundings. Rather than to *create* unity from above in laws which must be applied to concrete situations later on, the bottom-up approach attempts to *find* convergence from below in solutions which have been applied to concrete situations, and from there on to explore the actual functioning of laws. Obviously, that does not mean that the top-down approach is to be set aside, quite on the contrary: particularly in a context of European integration, legislation will be needed when the bottom-up approach does not yield enough harmonisation to support integration - thus playing a role comparable to that of statutory law in relation to the common law in Common Law countries, that is creating unity where no convergence is found, or where inequalities or conflicts of rules appear to exist.

It is not the place here to describe the present status of the case book project; that has been done elsewhere.[29] It may suffice to mention that, so far, three casebooks have been published: one on Torts, one on Contracts and one on Unjustified Enrichment.[30] The books contain not only judicial decisions but also, where appropriate, statutes and doctrinal writings. Moreover, the excerpted documents are accompanied by introductory, explanatory or concluding notes, and explained in comments below each document. Writing a case book is not an easy task. The 'job' has been well described by professor Markesinis in a similar context: "It takes time to read decisions in order to find factual equivalents that lend themselves to comparison. It takes even more of an effort to ensure that, having delved deeper into the procedural, constitutional, and political peculiarities of each system, you feel confident enough to emphasize their similarities and explain their differences. Finally it takes Jovian patience to remain faithful to the overall cause of searching for and emphasising similarities in order to

[29] See W. Devroe and D. Droshout, supra, n.-.

[30] The book on torts is quoted supra, n.-. For the book on contracts, see Hugh Beale, Arthur Hartkamp, Hein Kötz, Denis Tallon, *Cases, Materials and Text on CONTRACT LAW*, Hart Publishing, Oxford, 2002; for the book on Unjust Enrichment, see Jack Beatson and Eltjo Schrage, *Cases, Materials and Texts on UNJUSTIFIED ENRICHMENT*, Hart Publishing, Oxford, 2003.

facilitate greater European integration without distorting the raw material you have discovered."[31]

However difficult and time-consuming it is to produce a casebook - more difficult, in my experience, than to write a textbook - the process is worth the effort, because it allows the author and, it is hoped, the reader to reach a level of understanding which one does not reach when reading a textbook, however well-written it is. The reason is that learning the law through cases helps one to see how rules operate in a concrete situation which looks familiar to the author and the reader because, if the cases are chosen from daily life (and similar daily life cases exist in all legal systems), they have lived, or know somebody who has lived, in the same type of situation. However, as mentioned in the quotation from Markesinis' article, that is not the end of the effort: to fully understand the case, both author and reader must cope with the peculiarities of the system where the case is drawn from. Moreover, he or she must try to identify him-(or her) self with the legal position adopted, and the arguments used, by the litigating parties and with the legal reasoning and arguments which have induced the court to decide the case as it has. The latter is not only a question of understanding the legal reasoning correctly, but also of understanding the underlying interests and the meta-legal arguments which led the deciding judges to chose one solution above another solution - which they might have reached as well on the basis of a different line of reasoning.

All this to say that there is an important added value in also teaching, or learning, the law "bottom-up," that is with the help of teaching materials focusing on actually decided cases "of flesh and blood," which enable "students of the law," of whatever age or position, to perceive the workings of the law in its natural environment, that is how rules are complied with and, where needed, enforced in actual practice. Thus studying the law, with the help of teaching materials which can be used throughout the European Union in university curricula, or "continuing education" programs, may be the most valuable way to educate future and present lawyers who will be able to apply newly created European laws. For, indeed, only by educating lawyers who can handle European laws, will it be possible to make a European *ius commune* to become a reality in actual practice.[32]

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[31] B.S. Markesinis, supra, n.-, at 468.
[32] See further my article quoted supra, n. 2, at 174-176.

Back to the Commission's a Common Frame of Reference …and Teaching.

Reading the Commission's Communication, it is clear that is written primarily from a perspective of *concept*-building and *rule*-making, that is from a perspective inherent primarily in the German and the French legal tradition. Indeed, according to the Communication, the *framework of reference* is meant to be "a publicly accessible document which should help the Community institutions in ensuring greater coherence of existing and future *acquis* in the area of European contract law" and should also "be taken as a point of reference by national legislatures inside the EU … whenever they seek to lay down new contract rules or amend existing ones."[33] As is clear also from later references, the institutions meant in the first place are the European Commission, the Council and the European Parliament and the Member State authorities acting as legislatures.[34] The general idea of the document is to elaborate a framework, as a result of "extensive research" and after wide consultation with "stakeholders and other interested parties,"[35] which "should provide for best solutions … in the definition of *fundamental concepts and abstract terms* such as 'contract' or 'damage' and of *rules* which apply, for example, in the case of the non-performance of contracts."(emphasis added).[36]

The Communication's concept- and rule oriented approach comes also to the fore in two other proposals. One is to promote the drafting of *EU-wide standard contract terms* developed by "one of the contracting parties … where a single contracting party possesses sufficient bargaining power to impose its contract terms," or "by a group of contracting parties, representing either one side in contract negotiations or, more rarely both sides …."[37] In other words, the framework should be useful not only for official legislatures but also for private rule makers (which in itself is a correct approach). The other proposal would consist in encouraging the drafting of *an optional instrument of non-sector specific measures*, "which would provide parties to a contract with a modern body of rules particularly adapted to cross-border contracts in the internal market" to which contracting parties "could simply refer …as

[33] Document quoted supra, n.-, in points 59 and 60.
[34] Ibid., points 58, 62 and 80. Obviously also the Community courts can make use of the frame of reference if they would wish to do so.
[35]Points 63 and 65.
[36] Point 62, where it is added that "contractual freedom should be the guiding principle; restrictions should only be foreseen where this could be justified with good reasons."
[37] Point 83.

the applicable law."[38] Clearly, with respect to these two additional instruments, the Commission can only play a supportive role, the actual drafting being left, in the first instance, to associations of contracting parties (preferably, I would, think representing either side) with the assistance of legal counsel and academics, and, in the second instance, to academics after consultation with interested parties and their legal counsel.

In all of the above instances, drafting rules and defining concepts is the prevailing paradigm. That does not mean however, that the case-oriented approach, inherent in the English tradition,[39] is entirely absent in the Commission's Communication. Indeed, in outlining the elements which the Commission expects the framework to cover, the Communication refers to three basic sources which must be taken into account in the preparation of the framework of reference. Those sources are worded as follows: (i) "Advantage should be taken of existing national legal orders to find possible common denominators, to develop common principles and, where appropriate, to identify best solutions," (ii) " It is particularly important to take into account the case-law of national courts, especially the highest courts, and established contractual practice, and (iii) "The existing Community *acquis* and relevant binding international instruments, above all the International sale of Goods (CISG), should be analysed"[40] This is precisely what the "casebook project" is about (as pointed out above): its very purpose is to uncover common concepts, principles and solutions in the legal orders - that is primarily in the case law but also the statute law and legal writings - of and in the Member States and the European supranational (EU *and* ECHR) and international legal orders.

Although the reference to these "basic sources" is almost self-evident, it was useful to make it, as it reminds us of the necessity to formulate legal concepts, rules and principles not in the abstract, that is as flowing automatically from pre-formulated legal premises, but with explicit reference to underlying decisions, statutes and good practices as they appear in the various

[38] Point 90. For a strong plea in favour of such an optional Code, based on 'law and economics' arguments (and in comprehensible language), see Gerhard Wagner, "The Economics of Harmonization: The case of contract law," CMLRev., 2002, 995-1023.

[39] For convenience sake, I refer to the English tradition, as I refer to the French or the German tradition, by which I mean the Common law, the Romanistic and the Germanistic tradition. As for the Nordic tradition, although historically developed on the basis of German legal ideas, it has never taken over the "scientification" of legal doctrine and practice, as it occurred in Germany because of the reception in that country of Roman law and the acceptance of the Enlightenment idea of codification. Thus, Zweigert & Kötz, o.c., supra, n.-, at 284-285. In other words, as in the Common law countries, also in the Nordic countries a healthy realism and a sound sense of what is useful and necessary in practice prevail: ibid.

[40] Communication, point 63.

legal orders, and to actual practice, that is with reference to the law as it operates 'in the field.' Making explicit where the concepts and rules identified in the common frame of reference emanate from, is of crucial importance for various reasons. The first is simply, in order to *document* the need for a concept or rule to be included in the frame of reference, that is to indicate the origin of the concept or rule, and the support it has in the national and supranational legal orders concerned. A second reason is to attribute *democratic legitimacy* to the framework of concepts and rules. Indeed, in the absence of a European legislature having global jurisdiction over the areas of private law involved in the harmonisation process, democratic legitimacy must be found elsewhere, that is in the official authority which legislatures and judges whose legal products are included in the common framework, derive from their respective legal orders. A third reason is to *explain* to students and practitioners of the law *the legal background* of the concept or rule in order to make it possible for the common frame of reference to function also as a *common frame of teaching* that can be used in university curricula, and continued education programmes throughout the European Union, and to educate lawyers to look beyond their own national legal system. To make that possible, the elements incorporated in the common frame must be fleshed out in concrete terms referring to daily life situations allowing teachers and students to understand them correctly, and to place them in their natural context..

Following its 2003 Communication, the Commission has launched a call for research activities to elaborate the common frame of reference, as part of its sixth framework programme for research and technological development (FP6).[41] Judging by the ten responses from potential candidates present at the ERA-Conference in July,[42] the "top-down" approach will obviously be well represented. Only the casebook project focuses primarily on *actual* cases decided by national and supranational, EU and ECHR, judges and legislatures looking for similarities between the legal orders concerned in view of facilitating European integration by uncovering commonalities, and explaining differences, at the European level. For the reasons indicated in the preceding paragraph, such a "bottom-up" approach is needed to supplement, and support, more concept- and rule-oriented approaches. Let me try to describe the different stages of that approach in concrete terms.[43] *First*, material - decided cases in the

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[41] Point 68.Within that programme there is priority 7 "Citizens and governance in a knowledge-based society" which the Commission regards as the appropriate analytical and intellectual context for the common frame endeavour.
[42] Supra, n. 4.
[43] See also professor Markesinis' article referred to in n. 27.

first place, but not exclusively - must be collected from supranational and national laws (not always the same) representing the four large families (that is including the Nordic countries), and grouped around ten or more selected themes of contract law - or any other area of private law for which a common frame of reference is set up. The material should be selected because of its similarity in the factual and legal context to which it relates (thus, for case law, because of the typical or recognizable character of the issues involved). *Second*, the material must be analysed in view of situating it within the context of the legal system to which it belongs, in view of identifying the procedural, constitutional and political peculiarities of that legal system, and determining whether the material can be used in a wider context of European integration. *Third*, the role played by abstract concepts, general principles and specific rules of the legal system concerned in shaping the concrete judicial or statutory solution examined, must be defined and compared with the role played by these elements in other legal systems (often different concepts, rules or principles may lead to similar solutions, just like similar concepts, rules or principles may lead to different solutions). *Fourth*, the impact of meta-legal or meta-judicial considerations, often of an ethical, sociological, economic or political nature, on the (judicial or statutory) decision-making process should be analysed for each legal system in comparison with the impact of these considerations in other systems. Only at the end of such a complex investigation will it be possible to decide whether a concept, a rule or a principle is a candidate for inclusion in the frame of reference. Only then can a fruitful search for common concepts or rules be undertaken. That does not mean that only "references" should be included which are identical or similar to all legal systems, but it means that, where such is not the case, similarities and differences must be substantiated and explained in a documented way. Only with the help of such a thorough investigation will it be possible for the drafters of a common frame of reference to avoid, and be seen to avoid, the trap of legislating in the abstract.

The proof of the pudding is in the eating. In other words, does the "bottom-up" approach work in practice as a method to promote convergence? Two recent decisions of the House of Lords indicate that the answer is in the affirmative. They both relate to the law of obligations. One is the judgment in *Macfarlane v. Tayside Health Boar.*[44] In that case, the question came up whether parents who had already four children, could claim damages in negligence for the *cost of maintaining* until majority, a fifth and healthy child born in spite of a vasectomy

[44] Referred to supra, n.-, at -. Excerpts from the speeches of Lord Slynn and Lord Steyn are reproduced in the casebook on Torts at 92-96.

which the father had undergone in the clinic of the defendant. The House of Lords held that the claim of the mother to obtain damages for pain, suffering and distress relating to the pregnancy and birth should proceed to trial, but dismissed the claim for compensation of the cost of raising the child. Interestingly enough, two of the Law Lords who expressed their opinion on the issue, stated different reasons to conclude that the defendant Health Board had no duty of care as against the parents with regard to the cost of maintenance. For Lord Slynn, the reason for the non-existence of a duty was the lack of proximity between the physician and the parents as regards that head of damage, thus avoiding to rest his opinion on public policy factors ("just, fair and reasonable"). Contrariwise, Lord Steyn analysed the case from the point of view of distributive justice, which is concerned with the just distribution of burdens and losses among members of society. He concluded that it would not be morally acceptable, relying on principles of justice, to grant compensation for cost of maintenance. In reaching his conclusion, Lord Slynn referred (among other material, much from Commonwealth countries) to the judgment of the Dutch *Hoge Raad* of 21 February 1997 (of which he was informed through the casebook on Torts where the judgment was excerpted and discussed).[45] In that judgment the Dutch Supreme Court, deviating from a strongly-motivated opinion from its Advocate General J. Vranken, granted the parents' claim, also with regard to the cost of maintenance, in a similar factual and legal context. Although both Supreme Courts differed in their judgment as to substance, they examined the same kind of arguments, many of an ethical nature, but attached different weight to the arguments pro and contra.

The difference in legal reasoning, but not in outcome, between the opinions of the two Law Lords in *Macfarlane*, and the difference in outcome, if not in legal reasoning, between the House of Lords and the Dutch Advocate-General on the one hand, and the Dutch Supreme court on the other hand, illustrate how much the same legal concepts can be used, in different but also in the same legal system, to support opposite solutions. But also how different legal concepts can be used to reach similar solutions on the basis of a different assessment of legal arguments and, even more important, how different legal solutions can be reached on the basis of same or similar underlying ethical and societal considerations, and value judgments. Just to state the outcome of these decisions as an element to include a concept or rule in a European frame of reference, without giving any further insight of the kind suggested in the

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[45] The judgment was already reproduced and discussed in the first (and short) edition of the casebook, published by Hart Publishing, Oxford in 1998, at 161-165. In the second (and enlarged) edition of the case book, the judgment is reproduced and discussed at 133-136.

preceding paragraph,[46] would not be adequate, and even be misleading, abstracted as the outcome would be from its concrete content, and factual and legal environment.

The second judgment in point is the decision of the House of Lords in *Fairchild v. Glenhave*.[47] The case concerns the issue of double or multiple causation, that is whether a victim that has suffered a legal wrong can obtain compensation for harm caused by one of several possible persons (all having acted in breach of duty), even although it has not been possible for the plaintiff to prove who of those persons was the real culprit. The harm consisted in getting mesothelioma from inhaling asbestos during the victim's employment at different times by two employers. In his leading speech Lord Bingham put the issue in a wider perspective, examining not only immediate judicial precedents but also wider jurisprudence from other jurisdictions, including civil law jurisdictions, mainly Germany and the Netherlands. In that respect, he referred to Christian von Bar's book on *the Common European Law of Torts*, to Markesinis and Unberath's book on *The German Law of Torts*, and to the casebook on *National, Supranational and International Tort Law*, co-authored by the undersigned, Jeremy Lever QC and Pierre Larouche.[48] In a long quotation from the casebook, Lord Bingham noted the authors to say that it was unfortunate that the House of Lords had, in the past, retreated from earlier case law at a time when laws in other countries were converging on the point of law at issue - that is accepting liability in the case of multiple causation.[49]

At the end of an extensive and thorough overview of case law in many Commonwealth and European countries, Lord Bingham made the following remark, which deserves a long quotation: "This survey shows, as would be expected, that though the problem underlying cases such as the present is universal the response is not. Hence also the intensity of academic discussion … But it appears that in most of the jurisdictions considered the problem of attribution [of legal responsibility to multiple causes] would not, on the facts such as those of the present cases, be a fatal objection to a plaintiff's claim… Development of the law in this country cannot of course depend on a head-count of decisions and codes adopted in other

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[46] As in the explanatory comments accompanying both the House of Lords and the Hoge Raad decisions in the casebook, quoted in the preceding note.
[47] The judgment, of 20 June 2002, concerns three joined cases.
[48] Paragraphs [23] and [25]. The casebook on *TORT LAW* is referred to supra, n.-.
[49] The quotation in Lord Bingham's speech are taken from the casebook pp. 441, 461 and 465. In the quotation from von Bar's book, reference is made to a well known decision from the Dutch Hoge Raad, known as the DES daughters case, which is also excerpted and commented on in the casebook at pp. 447-452.

countries around the world, often against a background of different rules and traditions. The law must be developed coherently, in accordance with principle, so as to serve, even-handedly, the ends of justice. If, however, a decision is given in this country which offends one's basic sense of justice, and if consideration of international sources suggests that a different and more acceptable decision would be given in most other jurisdictions, whatever their legal tradition, this must prompt anxious review of the decision in question."

Concluding Remarks.

The foregoing judgments show that convergence of European laws comes about through case-law as well as through statutory law, *provided* that judges are sufficiently open-minded to look beyond their own national horizon, and *provided* that materials are made available which are sufficiently circumstantiated to make foreign laws understandable in their application to concrete cases. To achieve that, it is not enough to draft a common frame of concepts and rules in the abstract. Such a common frame will remain a useless skeleton if it does not explain, in concrete terms, how the concepts and rules included in the frame operate in actual practice in the legal systems they are coming from, and how they may be called upon to operate as common denominators in future concrete circumstances, and in other jurisdictions. To make such a common frame of reference operational, it will need to be supported by case-oriented material which adds flesh to the skeleton, and helps to explain to students and teachers, academics and practitioners, how the concepts and rules operate in daily life situations in the systems they are coming from, and how they will operate in similar situations in other jurisdictions. Would it not indeed, "be highly ironic if the same domestic systems of contract law that inspired and enriched the work on the European Principles of Contract Law were thrown on the scrap heap of history once the task is completed and the principles in place"?[50]

Coming back to the differences in style of decision-making which characterize the European legal traditions, as pointed out previously, I would like to make one last remark. In order to allow each of these traditions to make a valuable input in shaping a *ius commune Europaeum*, judges, especially those of the Supreme courts in the EU Member States, must be made aware

[50] Thus Gerhard Wagner, art. cit., n. 38, at 1023. The reference in the quotation is to the European Principles of Contract law is to the work accomplished by the Commission on European Contract Law under the chairmanship of Ole Lando.

of the need to use language which is comprehensible to lawyers not belonging to their own legal system. That would mean for the common law judges to be shorter, for the judges who have adopted the German style to be less academic, and for those who have adopted the French style to be less cryptic. Moreover, they will have to keep in mind that their judgements may need to be translated in another language, often English. They may not like that, but they should be aware that, if their legal system is to have, at the European level, the influence which it deserves, it will have to be understood also by those who do not know the language. That, of course, is of crucial importance for the less spoken languages.