

## **The Europeanisation of national legal systems: some consequences for legal thinking in civil law countries**

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### **1. Introduction**

This paper focuses on the consequences of Europeanisation of law for national legal thinking. As the growing influence of European treaties, directives and case law on the *substance* of domestic legal systems is being assessed more and more,<sup>1</sup> the influence on the process of national legal reasoning as such stays behind. This does not come as a surprise: it is seldom that the European institutions or courts give concrete guidelines as to the way that the substantive rules have to be dealt with. But there can be no doubt that the increasing body of law of European origin has important consequences, not only for the way that domestic lawyers reason with this type of legal rules, but also for the way that the more ‘classic’ parts of national legal systems are addressed.

This paper is restricted to a discussion of the consequences of Europeanisation of private law in civil law countries. Thus, both the common law and other areas of law than private law are left out. As far as the common law is concerned, there is a growing amount of literature on the influence of European Union law and human rights law on the way the common law judge reasons.<sup>2</sup> Naturally, in describing the characteristics of the civil law tradition, one cannot go completely beyond the features of the common law for the simple reason that these characteristics have to be contrasted with those of that other great law tradition. But one should also keep in mind that it is impossible to isolate the ‘European’ influence on legal reasoning from other influences that have been present over the last decades as well: in this respect, Europeanisation of law is only one of the factors, together with globalisation and a trend towards more substantive reasoning.

It is useful to make clear at the outset that we are far from establishing a ‘methodological *ius commune europaeum*’: the mere fact that there is law of European origin that influences national legal reasoning does not in any way imply that this influence leads to convergence of national legal systems. On the contrary: it is likely that Europeanisation of substantive law rather reinforces differences in legal reasoning instead of eliminating them. This point is taken up again

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<sup>1</sup> See on the debate on the emergence of European private law, among others, Jan Smits, *The Making of European Private Law*, Antwerp-Oxford-New York (Intersentia) 2002; Arthur Hartkamp et al (eds.), *Towards a European Civil Code*, 2<sup>nd</sup> ed., Nijmegen (Ars Aequi) 1998.

<sup>2</sup> Cf. Pierre Legrand, for example *European Legal Systems are Not Converging*, 45 *International and Comparative Law Quarterly* 1996, 52 ff; *Against a European Civil Code*, 60 *Modern Law Review* 1997, 44. See E.H. Hondius, *Nieuwe methoden van privaatrechtelijke rechtsvinding en rechtsvorming in een Verenigd Europa*, Med. KNAW Afd. Letterkunde, NR dl. 64-4 (2001); Mark van Hoecke, *The Harmonisation of Private Law in Europe: some Misunderstandings*, in: Mark van Hoecke & François Ost (eds.), *The Harmonisation of European Private Law*, Oxford etc. (Hart Publishing) 2000, 1 ff. On the differences between the two legal traditions, see Smits, o.c., with further references, and in particular Geoffrey Samuel, *System und Systemdenken – Zu den Unterschieden zwischen kontinentaleuropäischem Recht und Common Law*, 3 *Zeitschrift für Europäisches Privatrecht* 1995, 375 ff.

in Paragraph 8. First, some characteristics of legal thinking in the civil law will be described (Paragraph 2) and assessed from a viewpoint of increasing internationalisation (Paragraphs 3-7).

## 2. Legal thinking: the traditional features of the civil law tradition

In order to be able to assess the influence of Europeanisation on the modes of reasoning in national legal systems, it is useful to first make a list of the decisive factors that determine the legal reasoning in the distinctive private law systems. Consensus on what such a list should look like, is however hard to reach. In their classic textbook on comparative law, Zweigert and Kötz identify five different factors that are crucial for the 'style' of a legal system.<sup>3</sup> Two of these (the mode of thought in legal matters and the kind of legal sources a legal system acknowledges) explicitly deal with modes of reasoning. But there are other aspects of equal importance, as we shall see underneath. In addition, it should be noted that there are also *within* one national legal system various types of reasoning, dependent on who is engaging in it (judge, legislator, practising lawyer or legal scholar) and what type of case is at hand (hard cases as opposed to relatively easy cases). In this Paragraph, five closely related aspects of reasoning that are in my view constituent for the civil law tradition (without stating that there no other aspects), are identified. In the subsequent Paragraphs, these characteristics are elaborated with a view to the effect that Europeanisation of law may have on them.

The first aspect of the civil law way of reasoning is concerned with the sources of law. It is well-known that traditionally, in civil law countries, rules are issued by a national legislator for a specific time, as opposed to the common law, where the law dates from time immemorial.<sup>4</sup> Although this characteristic has lost much of its importance to distinguish the civil law from the common law way of reasoning because of the present-day importance of case law in civil law countries and of statutes under English law, it definitely still plays a role.<sup>5</sup> In particular the aspect that it is the *national* legislator (or highest court) that decides what the law is, is still important.

Closely related to this, is that in most civil law countries private law is laid down in a national Civil Code with, at least traditionally, a pretension of coherence and completeness,<sup>6</sup> while under English law the importance of precedent is emphasised. Zweigert and Kötz seem to regard the problem of sources solely as a matter of the opposition between statutory and case-law systems,<sup>7</sup> but there is more to it. As far as the civil law judge is concerned, the specific relationship between the sources of law implies that his natural *habitat* is to find a solution *within* the existing legislation and case law and not to go beyond the national system. For the legal scholar, it implies an emphasis on the national debate: his main activity is to systematise *national* legislation and case law. Although there are signs that this has now changed somewhat,<sup>8</sup> it still is true for *most* legal scholars in *most* civil law countries,

A second civil law characteristic consists of two different aspects.<sup>9</sup> The first aspect is of a more historical nature: civil law is systematised in accordance with the taxonomy of rights that is provided by Roman law. By using the system of Justinian's *Institutiones*, rights are located in a greater scheme of things. Through this, different areas of private law are separated from each

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<sup>3</sup> K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, translated by Tony Weir, 3<sup>rd</sup> ed., Oxford (Clarendon Press) 1998, 68 ff.; cf. Smits, *o.c.*, 73 ff.; Wolfgang Fikentscher, *Methoden des rechts in vergleichender Darstellung*, Tübingen (Mohr) 1975-1977.

<sup>4</sup> Legrand, *European Legal Systems Are Not Converging*, *o.c.*, 71; Van Hoecke, *o.c.*, 11.

<sup>5</sup> See Smits, *o.c.*, 86 ff.

<sup>6</sup> See for example Reinhard Zimmermann, *Codification: History and Present Significance of an Idea*, 3 *European Review of Private Law* 1995, 95 ff.

<sup>7</sup> Zweigert & Kötz, *o.c.*, 71.

<sup>8</sup> See *supra*, Paragraph 5.

<sup>9</sup> Cf. Smits, *o.c.*, 79 ff.

other so that a law of contract, of property and of delict could develop. Would this aspect be the only one of this feature of systematisation, it could readily give way for a less systematised law. There is however still another, highly important, aspect of systematisation: it has, at least up till now, always been an essential part of the civil law tradition that there is something *programmatic* to systematisation as well: new case law and legislation are immediately categorised in accordance with the existing taxonomy of rights.

It would be incorrect to state that this systematisation is a task of legal scholars alone. In the civil law, it is essential that this system is also used to adjudicate cases. Any civil law judge feels himself at least to some extent bound by the system that his predecessors helped to create. This is important because it implies that policy arguments always have to go through the filter of that system. Ever since the rediscovery of Roman law, jurists have tried to create a 'scientific' legal science, ensuring that choices among competing rights had to be constrained by clear and unambiguous principles, 'so that judicial judgement could be separated from the uncertainties of political rhetoric and metaphysical theory', as Van der Walt put it.<sup>10</sup> In other words: legal certainty was ensured through academic activity (where in English law this was done by a highest court and the doctrine of precedent<sup>11</sup>). Legrand relates this guaranteeing of certainty through method with the stereotype of a Civil Code as 'a self-contained and self-referential system, (that) illustrates the deep conviction held by civilian jurists that experience lived ought to be no longer privileged (...) that experience lived can be reduced to proportional knowledge in the form of a panoptic and autarkic body of rules of law, and that it is useful to organise experience lived (and the law) in this way'.<sup>12</sup> In my view, this reduction of knowledge to a body of rules has not so much to do with the presence of a civil code as such, but more with the received civil law tradition, this characteristic already being present before any civil code was introduced in Europe (to be precise: ever since the reception of Roman law).

A third feature of the civil law tradition is specifically related to the way courts reason. Traditionally, this reasoning is deductive, made possible by the existence of rather abstract legal norms.<sup>13</sup> This does not imply that reasoning through a syllogism is always explicit from the case itself – in fact this is only the case in some countries – but it definitely is often underlying the court decision: it is attempted as much as possible to let the correct results flow directly from the dogmatic or statutory system. In French law, this becomes rather clear if one looks at the case law of the Cour de Cassation: results seem to be achieved in a logical way by putting the legislative rule first, then presenting the facts of the case and finally allowing the coherent result to follow from there. Any further rationalisation of the result is generally not considered necessary. In other words: reasoning is not substantive but formal: the justification for the judgement lies in the application of the authoritative rule.<sup>14</sup>

A fourth characteristic of the civil law deals with the way that statutes are interpreted. Traditionally, the opposition between civil law and common law countries as to interpretation of statutes is that in the civil law, the literal meaning of the words is not decisive. Instead, many factors play a role to interpret the legislative text: the intent of the legislator (as apparent from the legislative history), the systematic context and the purpose of the rule are at least as important as

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<sup>10</sup> A.J. van der Walt, Marginal notes on powerful(l) legends: Critical perspectives on property theory, *THRHR* 1995, 396.

<sup>11</sup> Consistent with this is that in a time when precedent has become less important, systematisation is of growing importance. A powerful plea for systematisation of English law is R. Goff, *The Search for Principle*, 1983, reprinted in: William Swadling & Gareth Jones (eds.), *The Search for Principle*, Oxford (OUP) 1999, 313.

<sup>12</sup> Legrand, *Against a European Civil Code*, o.c., 45-46.

<sup>13</sup> Zweigert & Kötz, o.c., 69.

<sup>14</sup> For more details Smits, o.c., 83 ff.

the words of the statute itself.<sup>15</sup> Of course, this is only true under recognition of the differences among the various civil law countries (in particular France and Germany). Under English law, interpretation of statutes used to be very different: because of the supremacy of the common law, statutes – looked at as intrusions of the sacred common law – had to be interpreted as restrictively as possible. In practice, this ‘exclusionary rule’ came down to deciding what the ‘plain meaning’ of the statute was. Over the last decade, this approach has changed as a result of the case of *Pepper v. Hart*, in which the House of Lords has allowed in principle the taking into account of the legislative history of a statute.<sup>16</sup>

As a fifth feature of legal reasoning, one can look at the ‘mentality’ of the legal system. This is something of a ‘mixed bag’, with various elements regarding the legal technique used in a national legal system. Among these are the importance attached to open-ended norms and to comparisons with other parts of the national legal system or with other legal systems, the extent to which courts are prepared to anticipate on future legislative texts, the possibility of giving judicial opinions retro-active effect,<sup>17</sup> etc.<sup>18</sup> As the most important aspects of this mentality, I regard the legislative, judicial and scholarly style of a legal system. As to judicial style,<sup>19</sup> there is a well-known difference between French and German law, the *Cour de Cassation* preferring a brief motivation of its decision, based on the just as brief statutory provisions of the *Code Civil* and avoiding any reference to case law<sup>20</sup> or legal doctrine, the *Bundesgerichtshof* providing the parties (but foremost the academic community) with a judgement, which looks like a scholarly treatise with ample attention for cases and doctrine. The other civil law systems are somewhere in between these two extremes. Likewise, one can distinguish between various styles of legislation and legal scholarship. Generally speaking, the civil law countries try to be as exhaustive as possible in drafting their statutes (with exceptions, of course). Likewise, their scholarship is regarded as an indispensable tool for legal practice to continuously systematise the law (next to an autonomous function for legal scholarship).

These features of the civil law tradition will now be confronted with the increasing Europeanisation of law. This is not an easy task: often, the representatives of a national legal system are not even aware of their own ways of legal reasoning if compared with other countries, leave alone that they know what influence is exercised on their modes of reasoning by EC law or by international instruments to protect human rights. Nevertheless, it is tried to assess this influence here.

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<sup>15</sup> See on interpretation in a comparative perspective the important study by Stefan Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent: eine vergleichende Untersuchung der Rechtsprechung und ihrer historischen Grundlagen*, Tübingen (Mohr) 2001; Reinhard Zimmermann, *Statuta sunt stricte interpretanda? Statutes and the Common Law: a Continental Perspective*, 56 *Cambridge Law Journal* 1997, 315 ff. and ib., *Roman Law, Contemporary Law, European Law*, Oxford (OUP) 2001, 182 ff. D. Neil MacCormick & Robert S. Summers (eds.), *Interpreting Statutes: A Comparative Study*, 1991.

<sup>16</sup> [1993] 1 *All ER* 42. Cf. Peter Birks, *Adjudication and interpretation in the common law: a century of change*, 14 *Legal Studies* 1994, 166.

<sup>17</sup> On which recently the comparative study by O.A. Haazen, *Algemeen deel van het rechterlijk overgangsrecht*, Deventer (Kluwer) 2001.

<sup>18</sup> Cf. J.B.M. Vranken, *Argumenteren in het recht*, *Weekblad voor Privaatrecht, Notariaat en Registratie* 6428 (2001), 14 ff.

<sup>19</sup> Cf. B.S. Markesinis, *A Matter of Style*, in: idem, *Foreign Law and Comparative Methodology*, Oxford (Hart Publishing) 1997, 126; also see idem, *Judicial Style and Judicial Reasoning in England and Germany*, *Cambridge Law Journal* 2000, 294 ff.; H. Kötz, *Über den Stil von Höchstgerichtlichen Entscheidungen*, 37 *RechtsZeitschrift* 1973, 245.

<sup>20</sup> In *Cass. Civ. 3e*, 27 March 1991, *Bull. Civ. V*, no. 101, it was determined that a reference to another case can under no circumstance serve as a motivation for the decision in the case before the court.

### 3. The Europeanisation of the sources of law

The traditional idea of a *national* legislator that drafts acts that are in principle *complete* and *within* which the civil law judge has to find the solution to the case at hand, has been under pressure for more than a century now.<sup>21</sup> Here, we refrain ourselves to the specific pressure of European origin, that is much more recent.

The most important factor in this context is that as a result of the increasing Europeanisation, the *amount* of sources has increased. This has led to a much more complex relationship between the sources of law than there was in the time that the legislator and the courts were the only two important players in the (then national) field. Nowadays, the law also derives from the institutions of the EC and the Council of Europe. Because of the direct effect of EC legislation, national courts need to take this EC law directly into consideration. The multiplication of legal sources that is relevant to the legislative process and to the adjudication of cases, is however not restricted to law that originates from the European institutions. There is also an increasing need to take into account what other national legislators and courts have done with this law of European origin. To decide how an EC directive should be implemented, for example, it is useful to take into account how that same directive is implemented in other countries. Likewise, for the court that has to interpret national law in conformity with a directive, it might be useful to consider foreign case law. Unfortunately, comparative studies in which the implementation and application of implemented directives are assessed, are until now largely absent.

This increasing plurality of sources gives rise to specific problems, both for the legislator and for the courts. This becomes particularly clear in the case of directives – the most important source of EC private law. It has often been remarked that the provisions of these directives are of poor language and do not make use of the traditional legal terminology. But apart from that, for the legislator, the freedom to implement these directives is rather limited (despite art. 249 s. 3 EC Treaty), especially in the area of consumer protection (which is where most of the private law directives are about). It is settled case-law of the European Court of Justice that the implementation should make the legal position under national law sufficiently precise and clear and that individuals have to be made fully aware of their rights.<sup>22</sup> In a recent case, the European Court of Justice ruled that interpretation of national law in conformity with the directive cannot achieve the clarity and precision needed to meet the requirement of legal certainty, in particular not in the field of consumer protection.<sup>23</sup> This leaves little room for the national legislator: to be certain of an effective implementation, he will probably have to take over the provisions as literally as possible.

In addition, the national courts that need to apply the directives, regardless whether they want to give it direct effect, interpret national law in accordance with the directive or because they want to establish State liability for non-implementation, find it difficult to turn to the legislative history of the directive. If there are any documents at all concerning the way how to interpret the directive, they are often difficult to access. This point is taken up again in Paragraph 6.

The multiplication of legal sources through the process of Europeanisation is also present in legal scholarship.<sup>24</sup> There, it is in particular the idea that a uniform European private law should be created, that has led to an increasing interest in foreign law. In some European countries, among them Germany, Italy, the Netherlands and the United Kingdom, a cross-

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<sup>21</sup> On this development Smits, o.c., 96.

<sup>22</sup> C-365/93, *ECR* [1995] I-499 (Commission/Greece)

<sup>23</sup> C-144/99, *ECR* [2001] I-3541 (Commission/Kingdom of the Netherlands).

<sup>24</sup> See in particular Martijn W. Hesselink, *The New European Legal Culture*, Deventer (Kluwer) 2001.

fertilisation of the law is the result.<sup>25</sup> The famous words of Rudolf Von Jhering, coined in 1852, that legal science had deteriorated into a provincial study<sup>26</sup> is now rapidly losing importance.

As to the increasing number of sources, it is of some interest to draw a parallel with the times of the *ius commune*. Before the rationalisation of law by the Pandectists and their systematising predecessors, a great number of legal sources existed as well. It was only the systematisation by legal scholars that allowed the rulers of that time to draft codes as the ultimate source of law to get rid of the existing legal uncertainty and inefficiency.<sup>27</sup> It is well-known that these codes were often provided with a prohibition against interpreting and further developing their provisions. Right now, we are witnessing a similar process: in order to create legal certainty in the areas that are covered by EC law, the European Commission and ECJ put themselves at the centre of application of EC law, allowing only very restricted freedom of implementation and interpretation to the national institutions.<sup>28</sup> It is therefore no coincidence that the preliminary rulings procedure of art. 234 EC Treaty reminds us of the famous *référé législative*, that also kept the power to interpret statute law with the legislator itself.<sup>29</sup>

#### 4. Systematisation and Europeanisation of law

Europeanisation of law also affects the idea of a legal system as it has existed for several hundreds of years. This is the case in at least three different ways. In the first place, as to the ingredients of the system, it should be noted that the growing internationalisation of law leads to a decline of the use of Roman law concepts: the terminology, used in European directives and other European instruments (like the European Convention on Human Rights), is largely autonomous and not based on the *lingua franca* of Roman law. In the case of EC directives, it is even the European Commission's policy to abstain from using terms that are already part of a national legal terminology. According to the Commission, this avoids the idea that a concept from one legal system is used. There are many examples of this autonomous terminology. Thus, EC directives make mention of a right to 'reduction of the price' and of a right of 'withdrawal'.<sup>30</sup> It can of course be questioned whether this is a sound policy: these 'neutral' terms are immediately translated into the national legal terminology,<sup>31</sup> but they can never become completely part of it because of their autonomous European origin.

This brings me to a second way in which the idea of a legal system is disturbed. Because of the different character of European law that is parachuted into the national legal systems, it

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<sup>25</sup> See for an example from the UK *White v. Jones* [1995] 2 *WLR* 187. For an argument for the use of comparative law: T.R. Bingham, 'There is a World Elsewhere': The Changing Perspective of English Law, 41 *International and Comparative Law Quarterly* 1992, 513.

<sup>26</sup> Rudolf Von Jhering, *Geist des Römischen Rechts*, Bd. I, 8. Aufl., Leipzig 1924, 15: 'Die Rechtswissenschaft ist zur Landesjurisprudenz degradirt'.

<sup>27</sup> Zimmermann, *Roman Law*, o.c., 181-182.

<sup>28</sup> Cf. Paragraph 5.

<sup>29</sup> On which recently Matthias Miersch, *Der sogenannte référé législative: eine Untersuchung zum Verhältnis Gesetzgeber, Gesetz und Richteramt seit dem 18. Jahrhundert*, Baden-Baden (Nomos) 2000.

<sup>30</sup> Art. 3 Directive 1999/44 on Sale of consumer goods and associated guarantees (*OJ* 1999 L 171/12) and art. 6 of Directive 97/7 on the Protection of consumers in respect of distance contracts (*OJ* 1997 L 144/19) respectively.

<sup>31</sup> The 'right of withdrawal' of art. 6 of Directive 97/7 is a 'herroepingsrecht' in the official Dutch translation, while in the Dutch implementation (art. 7:46d BW), it is modelled as 'ontbinding'. In German law, it has become a 'Widerrufsrecht' (Par. 312 d BGB) and in the English one, it is a 'right to cancel' (Regulation 10 of the Consumer Protection (Distance Selling) Regulations 2000).

starts to work as a ‘legal irritant’, as Teubner has called it.<sup>32</sup> In this respect, Teubner specifically referred to the requirement of good faith that was introduced in English law as a result of the implementation of the EC Directive on Unfair terms in consumer contracts. But also in civil law countries, directives may disturb the coherence of the national legal system. This is for example caused by the fact that directives do not follow the traditional dividing lines between the various areas of law. They adopt, in accordance with the competencies of the Directorates-General in Brussels, a more functional approach, providing rules where that is needed to solve a problem (most of the time getting away with barriers for the common market or with protecting the consumer). This explains why one can often find, in one directive, aspects of both property law and contract and tort law. A specific aspect of the irritation by directives is caused by the fact that their provisions are mainly applicable to consumer contracts and thus create a dichotomy in contract law: there are now for example differing rules for remedies in the case of sale of goods, dependent on whether it is a consumer sale or a business transaction.<sup>33</sup>

The third – and perhaps most important – aspect is that Europeanisation also challenges the idea of guaranteeing certainty through method. The programmatic desire to fit new cases and legislation within the national system, because that would enhance legal certainty, has lost much of its importance. One of the reasons for this is indeed the increasing Europeanisation of law: other institutions than the national legislator or highest national court now decide what the law should be in the areas covered by the EC or Council of Europe. This implies that there are other ways to attain legal certainty than through academic activity. The weighing of policy arguments is taken over by the supranational institutions that have their own ways of ensuring legal certainty. From a viewpoint of legal reasoning on the national level, this is a step back, from substantive to formal reasoning: there is no need anymore to weigh the policy arguments behind the rule of European origin. Even more, the European institutions would penalise such a weighing at the national level as a violation of European law. What used to be the rationalised system in the civil law or the doctrine of precedent in the common law, now has become the rule of European origin for both: a guarantee for legal certainty, about which discussion is no longer needed.

Here too, there is an interesting parallel with the former *ius commune*. Before any systematisation of the law took place, the analysis of the legal texts was rather textual: the question raised was what the drafters of a legal text actually meant with it, not how the text could be understood as part of a larger whole. It might be so that in the areas, covered by law of European origin, the movement is one of withdrawing from a law *more geometrico* and returning to what the text of the directives and other instruments actually say. This might change as soon as a ‘European’ system of private law has come into being. But despite efforts to create such a system, we are still far from it.<sup>34</sup>

## 5. Deductive reasoning and Europeanisation of law

The question to be discussed under this heading is how to go from the sources of law to deciding a concrete case. I have already indicated that the reasoning in civil law countries is traditionally of a formal nature: because of the fact that the legislator has made a policy decision about how to

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<sup>32</sup> G. Teubner, Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences, 61 *Modern Law Review* 1998, 11.

<sup>33</sup> EC directives have created many more specific rules for specific types of transactions. See Jan Smits, The Future of European Contract Law: on Diversity and the Temptation of Elegance, in: M. Faure, J. Smits & H. Schneider (eds.), *Towards a European Ius Commune in Legal Education and Research*, Antwerpen (Intersentia) [forthcoming].

; Mauro Bussani, ‘Integrative’ Comparative Law Enterprises and the Inner Stratification of Legal Systems, 8 *European Review of Private Law* 2000, 85.

<sup>34</sup> The drafting of ‘principles’ (see footnote 44) can be looked at as such an effort.

weigh the different interests in specific types of cases, the court only has to apply the 'formal' rule. It is crystal clear that this line of reasoning can no longer be accepted if the interests have to be weighed again or if there are new types of cases that are not covered by the formal rule. The reaction of the various European legal systems regarding this type of cases, differs a lot. In Germany, for example, the court is often willing to explicitly discuss the various arguments in favour and against a certain outcome of the case.<sup>35</sup> Here, German law approaches English law, where courts are usually prepared to openly discuss and balance the policy considerations that underlie a particular rule. Lord Goff has said that 'it is better to have a feast of contrasting sources, festering with ideas, than a single hygienic package, wrapped in polythene (...)'.<sup>36</sup> In France, this discussion is usually still hidden behind the rules of a legal-technical nature. This does not come as a surprise where a particular French judge once said that he and his colleagues 'do not write our judgments for the parties, their legal advisors or, still less for the general public. We write them for ourselves'.<sup>37</sup> Other countries are somewhere in between these two extremes.<sup>38</sup>

Does the Europeanisation of law have any effect on these ways of reasoning by the courts? If I am not mistaken, Europeanisation gives rise to two conflicting developments. On the one hand, it reinforces deductive reasoning in the areas covered by EC directives, on the other hand it gives rise to more explicit policy reasoning where the courts draw inspiration from comparative law.

In the first place, a rather restrictive interpretation is needed where national law concerns implemented EC directives. In the view of the European Commission and of the ECJ, the implementation by the legislator and the application by the courts have to be very precise and do not leave much space for an autonomous interpretation of the law. National variations are eliminated in favour of one European, rather literal, interpretation. The already cited case of *Commission/Kingdom of the Netherlands* seems to suggest that the margins for the Member States to implement directives in the field of consumer protection in are now rather narrow. There are several cases in which this has become apparent. Thus, concerning Directive 93/13 on Unfair terms in consumer contracts,<sup>39</sup> the ECJ has made clear that the court has to be able to determine of its own motion whether a term of a contract is unfair, regardless what the national law of the Member States states about this.<sup>40</sup> In the case of Directive 1999/44 on Sale of consumer goods and associated guarantees<sup>41</sup>, the Commission requires the Member States to meticulously implement the provisions, even if there are national rules with which similar results could be reached, but where this is left to the courts. That is thought of as being not 'effective' enough. The Dutch, for example, were forced to implement the right to price reduction laid down in art. 3 of this directive, even though the courts could reach similar results by making use of the provision on partial termination of the contract.<sup>42</sup> Thus, implemented directives lead to isolated parts of national private law where a very specific mode of legal reasoning is required. National courts should therefore always be aware of the European origin of a rule.

In the second place, there is a tendency away from deductive reasoning on the basis of national rules. This is caused by the growing internationalisation of the legal debate. More and more, courts are willing to draw inspiration from foreign law. Again, the extent to which this

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<sup>35</sup> Cf. Markesinis, *Judicial Style and Judicial Reasoning in England and Germany*, o.c.

<sup>36</sup> Goff, *The Search for Principle*, o.c.

<sup>37</sup> Cf. Mackenzie-Stuart, in: D.L. Carey Miller & R. Zimmermann (eds.), *The Civilian Tradition and Scots Law*, Berlin (Duncker & Humblot) 1997, 360.

<sup>38</sup> Cf. on Dutch law Vranken, o.c., 19-20, where the case of HR 8 September 2000, *NJ* 2000, 734 (Baby Joost) is contrasted with HR 8 april 1983, *NJ* 1984, 717 (Van der Heijden/Holland).

<sup>39</sup> *OJ* 1993 L 95/29.

<sup>40</sup> C-240-244/98, *ECR* [2000] I-4941 (Océano Grupo); cf. C-372/99 (Commission/Italy).

<sup>41</sup> *OJ* 1999 L 171/12.

<sup>42</sup> See on this J.M. Smits, *De voorgenomen implementatie van de richtlijn consumentenkoop: een gebrekkig wetsvoorstel*, *Weekblad voor Privaatrecht, Notariaat en Registratie* 6470 (2001), 1047.

takes place, differs from one country to another. In France, a court hardly ever refers to foreign materials, in Germany this happens much more often.<sup>43</sup> But *if* it happens, it is because a court is willing to look at the argumentation used in other countries. The existence of ‘principles’ of European private law<sup>44</sup> also drives national courts away from deductive reasoning. Judges are then invited to interpret their national law in accordance with those principles. It is still too early to draw any conclusions about the use of these principles. It is however likely that they will receive a more favourable reception by the courts in countries like Germany, the United Kingdom and The Netherlands (where the drawing of comparative inspiration is not new) than in Spain, Greece or Portugal.

## 6. Interpretation and Europeanisation of law

The ‘multi-factor’ approach of interpretation – in interpreting legislative texts, the wording, legislative history, system and purpose of the statute are taken into account – is at present the leading approach in civil law countries. The process of Europeanisation of law influences this approach in at least three different ways.

First of all, where EC law itself is concerned, there is a movement away from the traditional methods of interpretation. In the case of areas of law covered by European directives,<sup>45</sup> for example, the interpretation needs to take place as much as possible in conformity with that directive.<sup>46</sup> This often leaves less space for the legislative history and the system of the text than exists under national law. The rather liberal approach towards the wording of the statute, as exists in many civil law countries, then has to be given up in order to fulfil the requirements of the ECJ with regard to the giving of effect to directives. It is no surprise that the legislative history of a statute cannot play a big role in this respect: often, the documents needed to ascertain what the intent of the legislator has been, are difficult to find (if existent at all). The wording and purpose of the directive then become much more important.<sup>47</sup>

In this respect, one can draw an interesting parallel with English law. One of the main arguments for the exclusionary rule, stating that the parliamentary history of a statute may not be consulted, was that legal certainty demands ‘that the rules by which the citizen is to be bound, should be ascertainable by him (...) by reference to identifiable sources that are publicly accessible.’<sup>48</sup> This can be related to the reasoning of the ECJ in the *Commission/The Netherlands*

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<sup>43</sup> Cf. Smits, o.c., 84 and U. Drobnig & S. van Erp (eds.), *The Use of Comparative Law by the Courts* (Reports XIVth Congress of Comparative Law), The Hague (Kluwer) 1998.

<sup>44</sup> Like Ole Lando & Hugh Beale (eds.), *Principles of European Contract Law*, The Hague (Kluwer) 2000; G. Gandolfi (ed.), *Code européen des contrats; avant-projet, livre premier*, Milano (Giuffrè) 2001; D.J. Hayton et al (eds.), *Principles of European Trust Law*, Deventer (Kluwer) 1999.

<sup>45</sup> See for other areas of EC law, where there is influence of general principles of law (cf. art. 288 EC Treaty) Reiner Schulze, *Pluralismus der Rechte und Konvergenz des Rechtsdenkens – Zur geschichtlichen Rolle allgemeiner Rechtsgrundsätze*, in: H.-D. Assmann, G. Brüggemeier & R. Sethe (Hrsg.), *Different Legal Cultures – Convergence of Legal Reasoning*, Baden-Baden (Nomos) 2001, 9 ff.

<sup>46</sup> C-14/83, ECR 1984, 1891 (Von Colson and Kaman/Nordrhein-Westfalen): ‘in the light of the wording and the purpose of the directive’. On ‘Europafreundliche Auslegung’, see Winfried Brechmann, *Die richtlinienkonforme Auslegung*, München (Beck) 1994; Stefan Grundmann, *Richtlinienkonforme Auslegung im Bereich des Privatrechts*, 4 *Zeitschrift für Europäisches Privatrecht* (1996), 399 ff.; R. Schulze, in: idem (Hrsg.), *Auslegung europäischen Privatrechts und angeglichenen Rechts*, Baden-Baden (Nomos) 1999; M.H. Wissink, *Richtlijnconforme interpretatie van burgerlijk recht*, Deventer (Kluwer) 2001.

<sup>47</sup> As to the system of the directive, this often does not give a clue either.

<sup>48</sup> *Fothergill v. Monarch Airlines Ltd.*, [1981] AC 251, 279, per Diplock, LJ.

case,<sup>49</sup> where the literal implementation of directives in the field of consumer protection was emphasised because of the necessary clarity and legal certainty.

This duty of interpretation in conformity with the directive leads to different ways of interpretation of national law and implemented EC law. It is therefore important that the law of European origin can always be recognised as such. If directives are implemented in previously existing national codes (as usually happens in Germany, France and the Netherlands), it is however often not clear which part is 'European' and which part is national. This calls into question whether the different way of reasoning requires the drafting of a separate national code of European origin. I would say that there is no need for that, as long as the European parts of the law remain recognisable as such.

Secondly, the interpretation of statutes is governed more and more by human rights. In particular in countries where a constitutional review of national legislation is allowed (like in Germany, Italy and Belgium), private law is interpreted in the light of the applicable human rights. Especially in German and Belgian law, this constitutionalisation<sup>50</sup> of private law (including contract and tort law) is important. Also the European Convention on Human Rights has had a profound influence on specific parts of private law. Apart from family law and procedural law, a broad definition of property is part of the protection by the ECHR.<sup>51</sup>

It is seldom that a national rule is explicitly struck down because of its incompatibility with human rights. More often, the national rule is interpreted in the light of the constitution or the ECHR. For instance, in a famous German case, the Bundesverfassungsgericht stated that a court must, on the basis of art. 2 of the German Constitution, take into account the extent to which a contract disproportionately affects one of the contracting parties. The fundamental rights contained in the Constitution become part of private law, for example through open-ended norms like those on good faith.<sup>52</sup> In that case, concerning suretyship in a family relationship, this meant that Par. 138 and 242 BGB had to be interpreted in accordance with art. 2 of the Constitution, protecting the right of everyone to 'free development of his personality'.

A third tendency is related to the drawing of 'comparative inspiration' by national courts. In the specific area of EC directives, it is often useful to look at foreign implementations to better understand what is meant with the provisions of a directive. Thus, what is meant with 'threshold' in art. 9 of the directive on products liability,<sup>53</sup> can be better understood if one takes into account both the German and the French implementation. And apart from directives, there are signs that national law will be interpreted more and more in accordance with sets of European 'principles'. One of the ambitions of the drafters of these principles is at least that national courts use the principles where national law does not provide a solution to the issue raised.<sup>54</sup>

## 7. The Europeanisation of 'mentality': the style of legal scholarship

In the above, I have already hinted at what Europeanisation of law means for national judicial styles. Here, I will focus on the consequences of Europeanisation for the style of legal

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<sup>49</sup> C-144/99, *ECR* [2001] I-3541 (Commission/Kingdom of the Netherlands).

<sup>50</sup> On which C.-W. Canaris, *Grundrechte und Privatrecht*, Berlin (Walter de Gruyter) 1999; C. Joerges, *European Challenges to Private Law: On False Dichotomies, True Conflicts and the Need for a Constitutional Perspective*, 18 *Legal Studies* (1998), 146 ff.; Johannes Hager, *Grundrechte im Privatrecht*, *JuristenZeitung* 1994, 373 ff.

<sup>51</sup> Art. 8 and 6 ECHR and Art. 1 of the First Protocol to the ECHR respectively.

<sup>52</sup> Bundesverfassungsgericht 19 October 1993, *Entscheidungen* 89 (1994), no. 18, 214.

<sup>53</sup> Directive 85/374 concerning Liability for defective products, *OJ* 1985 L 210/29; see Hondius, o.c., 7.

<sup>54</sup> Cf. art. 1:101 s. 4 PECL. About the way that the Unidroit Principles of International and Commercial Contracts (1994) are used by the courts: M.J. Bonell, *The Unidroit Principles in Practice: The Experience of the First Two Years*, *Uniform Law Review* 1997, 34.

scholarship. As indicated before, this scholarship has been national in nature for over 200 years now. In each European country, private law is still predominantly studied and taught from national textbooks. But the call by Zimmermann that ‘the essential prerequisite for a truly European private law would appear to be the emergence of an “organically progressive” legal science, which would have to transcend the national boundaries and to revitalise a common tradition’,<sup>55</sup> is acted upon more and more. There is already a fair amount of textbooks on European private law that focus on the extent to which common solutions can be found in the various European Member States.<sup>56</sup> Together with other methods, like the drafting of principles, the competition of legal systems and the teaching of students on the basis of comparative law, they form the beginning of a truly European legal science.

An important aspect of this newly created legal science, is that it cannot solely consist of a *legal* debate. In order to find out what the best rules for a future Europe should be, one has to go beyond the traditional boundaries of the law.<sup>57</sup> I have defended before that in order to build up a new European private law, one cannot just draft common solutions in the form of principles by looking at the positivistic rules of the European legal systems. These rules are just formalistic shadows of the policy considerations that underlie them and that have to be brought to the surface before they can play a role at the European level. It is with these policy considerations, together with an economic analysis of law and the insights of legal history, legal theory and empirical evidence that a new European private law has to be built up. This interdisciplinary approach is indispensable for the discipline of European private law itself, but it will also have important consequences for scholarship in national legal systems. These will be looked at more and more from a European perspective, using the acid-test of ‘Europe-resistance’. The contest of national and European private law will definitely lead to a demystification of national private law. One could quote Cardozo that ‘few rules in our time are so well established that they may not be called upon any day to justify their existence as means adapted to an end’.<sup>58</sup> Europeanisation will lead to jurists, no longer looking backward to the mass of national legal materials, but looking forward to what we wish the legal system to be. Perhaps, this is even the most important aspect of the Europeanisation of law.

## 8. Europeanisation of national legal orders?

A final point to be raised, is whether the developments described in the above lead to a ‘methodological European private law.’ To put it differently: is there convergence of legal thinking in Europe?<sup>59</sup> Legrand has denied this categorically: civil law jurists think in terms of ‘rights’, whereas common law lawyers take ‘actions’ as their starting point. In his view, these are two epistemologically different conceptions of the law.<sup>60</sup> Such a statement is however too general to be tested against the background of the actual developments. If one takes these as one’s starting point, the conclusion may be different. One should then differentiate between those areas that are covered by EC directives and those where Europeanisation of law is of a more ‘voluntary’ character.

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<sup>55</sup> Carey Miller & Zimmermann (eds.), o.c., 293.

<sup>56</sup> For an overview: Smits, o.c., 42 ff.

<sup>57</sup> Jan M. Smits, *The Good Samaritan in European Private Law*, Deventer (Kluwer) 2000, in particular 46 ff. See for a similar view now also Hesselink, o.c., 72 ff.

<sup>58</sup> Benjamin Cardozo, cited by Richard Posner, *Overcoming Law*, Cambridge Mass. (Harvard University Press), 1995, 391.

<sup>59</sup> See on this question Ernst A. Kramer, *Konvergenz und Internationalisierung der juristischen Methode*, in: Assmann et al (Hrsg.), o.c., 31 ff.

<sup>60</sup> Legrand, *European Legal Systems Are Not Converging*, o.c., 52.

In areas of national private law where directives have to be implemented, there is a high pressure on the national legislator and courts to give up the national methodology. Even though directives formally leave the Member State the freedom to choose the method of implementation (cf. art. 249 s. 3 EC Treaty), in practice most directives are in the field of consumer protection with a corresponding very limited margin for the Member States. For, as we have seen, the European Commission and the European Court of Justice want the Member States to adopt a rather literal approach towards that type of directives.<sup>61</sup> This means for example that their provisions have to be laid down in a statute and that a national practice of leaving the implementation to the courts by way of interpretation of national law in accordance with the directive (like the Dutch government had adopted in some cases) has to be given up.<sup>62</sup>

This implies that for the specific areas of law that are covered by directives, uniformity in legal thinking among the European Member States is promoted considerably. However, another type of divergence is the inevitable result of that: for reasoning in areas *not* covered by directives remains the same, having for a consequence that it depends on the origin of the rule what type of reasoning one has to adopt. Europeanisation thus gives rise to a fragmentation of national law.<sup>63</sup> It may very well be a rhetorical question whether the advantage of a uniform methodology in Europe for one specific part of private law outweighs the disadvantage of a fragmented methodology *within* the national legal systems.

In other areas of national private law, drawing inspiration from foreign law takes place on a voluntary basis. Any development towards the Europeanisation of method will there be slow and incremental, possibly even more slow than the taking over of substantive law. Legal history shows that where foreign rules or institutions are transplanted from one system to another, the newly introduced transplant will rapidly become part of the importing system. The way of reasoning of the latter will govern the imported rule.<sup>64</sup> The transplanting of a whole way of reasoning from one system to another, is much more rare.

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<sup>61</sup> See above, Paragraph 5.

<sup>62</sup> There is a similar argument in case of enforcement of human rights.

<sup>63</sup> This 'fragmentation' of national private law is discussed in Smits, *The Future of European Contract Law*, o.c.

<sup>64</sup> Cf. Jan Smits, *On Successful Legal Transplants in a Future Ius Commune Europaeum*, in: Andrew Harding & Esin Öricü (eds.), *Comparative Law in the 21st Century*, London etc. (Kluwer Academic Publishers) 2002, 137.