

England and the European Civil Code

1. In the past, the English have never been the champions of a European Civil Code, but the times they are a'changing. Whereas German authors pour the most severe criticism over the Draft Common Frame of Reference (DCFR),¹ English authors have shown themselves much more benign. Two recent examples may demonstrate this. In his inaugural address at Leyden University,² published in this issue of *European Review of Private Law*,³ John Cartwright advocates a rethinking of the principles of English contract law. As a source of inspiration, he suggests the use of the DCFR. Even further goes Hugh Collins, who pleads for the introduction of a European Civil Code.

2. It is the legal security of its case law, which is the power of English Contract Law, according to Cartwright. But this system also makes it less flexible, especially because the number of cases decided by the House of Lords is quite limited. The rejection of precontractual liability and the maintenance of the consideration requirement are examples brought forward by the author. How to remedy this? Cartwright evokes the failed attempt to bring about a British (Anglo-Scottish) Contracts Act in the late 1960s. At present, European harmonization presents 'a unique opportunity for a reassessment of domestic law'. Not that Cartwright would like the DCFR to come into force: its style is too utterly un-English, and there is no need for harmonization but:

It is to be hoped that the detail of the drafting of the Common Frame of Reference... will be subject to a proper thorough analysis in England, not simply to tell us how very different it is, and therefore how very bad it is, but to instigate a broader debate about the principles and rules of our own law of contract.

3. Even more surprising, from a continental point of view, is Hugh Collins' book, *The European Civil Code/The Way Forward*.⁴ As the title suggests, it

¹ Jürgen Basedow, 'Kodifikationsrausch und kollidierende Konzepte – Notizen zu Marktbzug, Freiheit und System im Draft Common Frame of Reference', ZEuP (2008): 673–676; Horst Eidenmüller et al., 'The Common frame of reference for European private law – policy choices and codification problems', *Oxford Journal of Legal Studies* (2008): 1–50; Ulrich Huber, 'Modellregeln für ein Europäisches Kaufrecht', ZEuP (2008): 708–744; Thomas Pfeiffer, 'Von den PECL zum DCFR', ZEuP (2008): 679–707; Hannes Unberath, 'Der Dienstleistungsvertrag im Entwurf des Gemeinsamen Referenzrahmens', ZEuP (2008): 745–774.

² This is the prestigious Chair of Anglo-American Private Law, which previously was held by Sir Basil Markesinis and by the late Peter Birks.

³ John Cartwright, 'The English law of contract: time for review?', *ERPL* (2009): 155–175.

⁴ Hugh Collins, *The European Civil Code/The Way Forward* (Cambridge: University Press, 2008), 267.

encompasses a plea in favour of a European Civil Code. The author himself is conscious of the surprise, which he has in store, ‘Continental colleagues will probably assume that the work will be sceptical ...’, and of the ostracism, which his compatriots may indulge in, ‘... within the United Kingdom, anyone who demonstrates much interest in or sympathy with the activities and proposals of the European Union is immediately suspected of conspiring to abandon national sovereignty to foreign powers’.⁵

Collins’ principal idea may be expressed in the following quote:

European legislators cannot ignore much longer the constitutive role of private law in establishing a particular kind of market, because that market will always threaten to subvert any European measures of social protection. Sector-specific regulation merely provokes growth of business activity in a closely related, but unregulated sphere of activity. The history of regulation of timeshare ownership of holiday apartments reveals, for instance, how businesses can avoid particularistic regulation by introducing novel commercial arrangements for financing holiday apartments that neatly bypass those inconvenient or expensive regulations. More general rules and principles are needed to provide the necessary social protection. The development of an Economic Constitution therefore requires Europe to engage in building its own, effective, private law system. In short, Europe needs to move towards a civil code.⁶

Is there a catch? Yes, there is. Collins does not wish to introduce the DCFR or Gandolfi’s *Avant-projet*. What he has in mind, rather, is a codification of principles – a principles-based regulation, a framework of normative standards for a transnational civil society rather than a complex body of detailed rules – and, moreover, one that is in agreement with the social justice manifesto. A European civil code will contribute to the development of a common European identity, which by focussing on principles leaves room for national cultural diversity.

Notwithstanding his plea, Collins does see a number of obstacles ahead. Not the least of these is the different attitudes of lawyers:

In recent years, I have attended many conferences and symposia where the proposals for harmonisation or codification have been investigated by scholars and lawyers from different Member States. One is struck not just by the national differences in the legal analyses, but more fundamentally about how differently lawyers from diverse traditions talk and think about the

⁵ Ibid., ix.

⁶ Ibid., 123.

law. German professors typically present systematic lists of rules or events, the longer the better; French lawyers explore abstract concepts, ideally through binary oppositions; and English legal scholars, if they bother to come at all, mostly tell stories.

Collins' book, if anything, is such a nice story.

4. Three years ago, English businessmen, who spoke out in favour of the European harmonization of private law, witness the empirical research by Stefan Vogenauer and Stephen Weatherill.⁷ Now that even English authors pronounce themselves favourably, the 'way forward' indeed seems open.

Ewoud Hondius
Co-Editor-in-Chief

⁷ Stefan Vogenauer & Stephen Weatherill (eds), *The Harmonisation of European Contract Law/Implications for European Private Laws, Business and Legal Practice* (Oxford: Hart, 2006), 105–143.

