Professor Hugh Collins, London

Does ‘Fragmented Europeanisation’ Require a European Civil Code?

I have been extremely fortunate in having worked with Thomas Wilhelmsson on several projects. He initiated our collaborative scholarly efforts by inviting me to Helsinki to participate in a fascinating conference on critical perspectives about contract law, which led to the path breaking book Perspectives of Critical Contract Law.¹ A follow-up project between British and Finnish colleagues produced the book Welfarism in Contract Law.² In subsequent years, as the momentum for harmonised European contract law developed, we met frequently at conferences.³ Given his eminent stature and always thoughtful contributions, it was inevitable that he was a vital contributor to the path-breaking Manifesto on Social Justice in European Contract Law.⁴ He has certainly been one of the greatest influences on the development of my own ideas with regard to the project for a European civil code. Ultimately, however, our conclusions about a project for a European civil code, though sharing much common ground and similar values, seem to point in opposite directions.

In his published opinions, Thomas Wilhemsson appears less than enthusiastic about the idea of creating a code of European private law. In a series of essays, he rejects projects for comprehensive traditional codes in a European context.⁵ He favours instead ‘fragmented Europeanisation’, which prefers continuing diversity in national legal systems. He argues in favour of pluralism in cultures and law in Europe. He wants to promote mutual learning from our national and regional differences. In contrast, my own work provides general sup-

port for the project of a European civil code, albeit as a long term goal and in a rather different form from traditional national civil codes. My argument supports a set of common principles of European private law, like a code, comprehensive in their coverage of the relations in civil society, but at a higher level of abstraction than traditional nineteenth century civil codes.

As we shall see below, the sharp contrast I have painted between Wilhelmsson’s ‘fragmented Europeanisation’ and my own recommendation for a ‘code of principles’ is probably not as great as it first appears. Indeed, I shall have the temerity to argue that the goal of ‘fragmented Europeanisation’ is not achievable without a ‘code of principles’ along the lines of my own proposals. The differences between us may have some deep roots, such as his relative confidence in the ability of the institutions of the welfare state to achieve social justice and his perspective on the best organisation of the relation between state, market and civil society, but, broadly speaking, I think we share similar values and goals. I suspect that the disagreement concerns means rather than ends. Although it may not be entirely appropriate in the present context, in which we celebrate the enormous contribution of Thomas Wilhelmsson to legal scholarship, this paper tries to understand some of the causes of some of these differences of opinion and the role and value of a European civil code. I will focus on three issues, where we agree a diagnosis of the problem, but differ in the proposed solution and the potential contribution of a European civil code. These three issues are: (1) the problem of the inevitable tilt of a European civil code towards libertarian values; (2) the issue of whether a code is necessary or at least helpful in the promotion of the idea of a common European identity; and (3) the allegation that a code as unified law will petrify private law and inhibit experimentality and mutual learning between legal systems.

1. The Libertarian Tilt of a European Civil Code

One ground for Thomas Wilhelmsson’s scepticism about the benefits of a European civil code is his prediction that it will produce a rather libertarian or liberalist set of rules and principles. He argues persuasively that the nineteenth century European codes were founded on a shared set of values that emphasised individualism and freedom. These values were translated into private law in the form of rules that facilitated and protected freedom of contract, protected property rights, and curtailed the liabilities of businesses for damage caused to

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others and the environment. Since that time, private law has been adjusted to reflect new standards such as protection of consumers against deceptive practices and unfair standard form contracts. These adjustments change the ‘colour’ of national private law systems, in the sense of reorienting their values more towards fairness, protection of the weaker party, and access to justice. But these adjustments have normally taken the form of qualifications to the original nineteenth century codes based on libertarian values. Consumer law, for instance, typically provides its protections through a separate code, a distinct part of the code, or entirely different legislation. As a consequence, the protection for the weaker party embodied in national consumer law has usually not required an adjustment to the general principles of private law. The civil codes of continental Europe have rarely been rewritten from scratch in order to take into account these new values and principles.

Accordingly, when comparative law scholars meet to find common ground between their laws, what they discover is that their private law systems share to a considerable extent a common core of libertarian values, but the later modifications and qualifications to those values developed in the twentieth century differ considerably in their approaches and techniques. This pattern of similarity and difference creates the risk that consensus on principles of European private law will be confined to the libertarian values that underpin the original codes, excluding the more recent introduction of such values as fairness and protection of the weaker party. For example, though there are differences between national private law systems, it seems likely that common principles could be negotiated on the issue of ‘agreement’ in contract law, since all European private law systems share a broadly similar analysis of ‘offer’ and ‘acceptance’, which is designed to protect individual freedom from unwanted contractual obligations. In contrast, it might prove extremely difficult to find common ground on rules permitting consumers to withdraw from transactions for the reason that they have made a mistake or have changed their minds now that they have hung up the phone on the persuasive sales representative. Thomas Wilhelmsson argues cogently that the likely outcome of a quest for a code of civil law based on the search for common principles will end up with a document that is limited to those fields where there is common ground, that is, the older nineteenth century principles of freedom of contract, and which excludes modern rules that protect consumers and other weaker parties.

As a result, Wilhelmsson predicts that the probable substance of any proposed civil code for Europe will be one that restates the libertarian values of the
nineteenth century civil codes, omitting or relegating to the margins all the ma-
jor reforms of the twentieth century that serve to protect weaker parties to con-
tracts and to redistribute the risk of losses arising in the course of business. I
agree that such a risk of a return to libertarian codes exists. Where I part com-
pany with Thomas Wilhelmsson is not in the diagnosis of the problem, but rather
in the appropriate treatment. I am less convinced that the inevitable conclusion
of the diagnosis of this risk is a decision not to pursue the idea of a civil code.
The alternative route is to carry on with the project for harmonising private law
whilst taking steps to minimise the risk that it will be tilted towards libertarian
values.

One such step is to insist that the European civil code should reflect the
values of the *acquis communautaire*. The bulk of the legislation emanating from
the European Community that affects private law has so far been mostly desig-
ned to protect consumers and workers by setting minimum standards for the
whole of the internal market. If these Directives are integrated into the project
for devising a European private law, that step will necessarily curtail the liber-
tarian values that provide the common ground between national private law
systems. In the case of consumer protection measures, for instance, the existing
Directives need to be integrated into the general body of the civil law.

The draft Common Frame of Reference (DCFR),11 to which Thomas Wil-
helmsson contributed, attempts to perform this task of integration of traditional
principles of the law of obligations with modern protective regulation of parti-
cipants in the market. The resulting model rules can be criticised, partly for the
reasons articulated above, that the European Directives tend to be rather nar-
rowly specific, such as regulating doorstep sales, rather than articulating general
principles of private law, so it is hard to integrate these bodies of rules with dif-
ferent characteristics. The issues become whether it is possible to generalise
from these sector-specific instances of regulation and indeed whether it is even
possible to bring together into one document traditional principles of private law
and narrowly framed examples of market regulation.12 Nevertheless, the draft
Common Frame of Reference does make some bold attempts to achieve such a
synthesis. For instance, in Book II, 3:101, there is an attempt to generalise the
idea, which is found in many of the consumer protection directives,13 of a duty
to disclose material information, that is, a duty to disclose such information

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11 Study Group on a European Civil Code/Research group on the Existing EC Private Law
(Acquis Group) (eds), Principles, Definitions and Model Rules on European Private Law –
2(2), 213.
13 E.g. Dir. 87/102 concerning consumer credit [1987] OJ L042/48; Dir. 90/314 on package
tavel, package holidays and package tours [1990] OJ L158/59; Dir. 94/47 on the purchase of
the right to use immovable properties on a timeshare basis [1994] OJ L280/83.
concerning the goods or services as the other person can reasonably expect to be given. This provision is combined with a wide range of remedies drawn from the consumer acquis for breach of the disclosure obligation (or ‘information duty’). These generalisations from the more narrowly framed rules of the existing consumer protection legislation at least indicate an attempt to combat the risk that a European civil code will largely endorse libertarian values.

It is clear that the DCFR has achieved some success in this respect, at least judging by some of the responses to the text. For legal scholars who wish to preserve the nineteenth century values, to minimise paternalism and to maximise freedom of contract and the protection of absolute property rights, some of the proposals of the DCFR are plainly an anathema. For example, having blasted the DCFR for the vagueness of many of its rules and provisions, especially the references to good faith in performance and a duty of co-operation, a group of German legal scholars offers the following comment on the values included in the DCFR.

‘The DCFR-provisions furthermore dwarf the amount of regulation and bureaucracy thus far accomplished by Community Directives in respect of private law. For essentially, these Directives are limited to business-to-consumer (b2c) transactions, and they apply only in specific situations which are sufficiently predictable for the parties. The DCFR, in contrast, puts in place global and incalculable limitations on the scope of the freedom enjoyed by the parties under private law.’

For these scholars, the DCFR is regarded as deeply unsatisfactory precisely because it belies Wilhelmsson’s prediction that it would embrace a libertarian stance. Undaunted, Wilhelmsson is quoted as having described the DCFR as a ‘law for big business and competent consumers’, suggesting that the draft code (as it plainly is, despite the misleading description of ‘common frame of reference’) lacks sufficient protections for smaller businesses and exceptionally weak consumers. Martijn Hesselink reaches the different conclusion, which I suspect most people will find convincing, that the DCFR has a mix of values and ideas of social justice, being neither extremely libertarian nor socialist in its orientation.

This conclusion that the DCFR contains a balance of values can be tested by reference to an illustrative example. With regard to the control over unfair

14 Art. II – 3:107 of DCFR.
terms in contracts, one can describe a spectrum of perspectives according to political values from right to left. At the libertarian or conservative extreme, the view would be that the courts should uphold freedom of contract and therefore enforce any terms in contracts no matter how unfair provided that the terms were reached by a genuine consensual agreement untainted by fraud or coercion. At the other socialist or leftist extreme, every term including the price should be reviewed for its fairness and justice, both as between the parties and as part of the general scheme for distribution of wealth throughout society. Few lawyers hold these extreme positions. In practice, the battle is likely to be fought over the question whether there should be any control over terms in contracts beyond those found in the small print of standard forms issued by businesses to consumers. In other words, the question is whether there should ever be control over commercial contracts between businesses. The libertarians would say that such a control over commercial contracts is wrong in principle, because it interferes with freedom of contract, and dangerous in practice, because it undermines the certainty and reliability of business transactions. Those who emphasise the social justice dimension of contract law would say, to the contrary, that a general oversight of unfair terms in commercial contracts is necessary to protect smaller businesses and to prevent the market from being used as an instrument of unfairness and exploitation. How does the DCFR come down in this debate? It seems to me to offer a deliberate compromise:

‘A term in a contract between businesses is unfair for the purposes of this Section only if it is a term forming part of standard terms supplied by one party and of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.’ 19

Although the proposal permits judicial review of unfair terms in commercial contracts, this control is confined to standard form contracts and sets a low standard of ‘gross deviation’ from good commercial practice. It tries to steer a middle course between the libertarian and socialist extremes.

Of course, the DCFR is only a draft written by academic lawyers. When (and if) it is tested against raw political criticism and subjected to the lobbying of big business, the document may be revised towards more libertarian principles. Even so, the initial pessimism about the likely outcome in view of the strong risk of a libertarian tilt does appear to have been too extreme. The evidence drawn from the DCFR does not warrant the conclusion that we should reject the project for a European civil code, but merely that we should approach the project cautiously, on our guard, with respect to the values that are likely to be endorsed.

Furthermore, in my opinion, to reject the project for a civil code creates an equal and probably greater risk that the European Union will be driven towards a libertarian stance in the regulation of markets.\(^{20}\) This risk arises from the legal foundations of the European Union, as inscribed in the Treaties that establish the European Community. These Treaties establish an economic constitution that gives priority to the fundamental economic and market freedoms: free movement of goods, services, capital and labour. Using these legal principles, the European Court of Justice can strike down large swathes of national market regulations on the ground that such laws inhibit cross-border trade. These regulations can only be saved if the national government can argue persuasively that the national rules, though presenting an obstacle to cross-border trade, pursue a legitimate social purpose in a proportionate manner.\(^ {21}\) The Treaties provide scant guidance as to what social purposes are legitimate for national governments to pursue through market regulation. In particular, in the absence of a binding legal statement of fundamental rights, including social and economic rights, the European Court of Justice is left to decide on its own the desirability of such social goals as promoting collective bargaining in order to enable workers to achieve higher rates of pay.\(^ {22}\) In short, the Economic Constitution of the European Union is fundamentally unbalanced and incomplete owing to the absence of principles regarding social justice. This legal framework therefore presents the danger of a permanent tilt of European institutions towards the libertarian end of the spectrum. I have argued that the development of European private law along the lines of the compromise presented in the DCFR can contribute to the establishment of a more balanced Economic Constitution for the European Union, one that qualifies market freedoms with principles of social justice. In tandem with a constitutional statement of rights, including social and economic rights, a code of private law can provide the basic rules for social justice in the European Union.

2. A Code and European Identity

A second reason for Thomas Wilhemsson’s scepticism with regard to the project of a European civil code concerns questions of identity. Within the European Union, as articulated in the Treaties, the aspiration is somehow to balance na-
tional identity with a European identity. In other words, it is hoped that indi-
viduals will feel that they are both a member of their own national society, but at
the same time also citizens of a broader European polity. It is widely recognised
that without such a shared identity as Europeans, it will be extremely difficult
to achieve co-operation between Member States on the range of issues that could
best be tackled at a transnational level, whether those be banking problems or
global warming. Without a common perception of a shared identity as Europe-
ans, citizens of Member States will be reluctant to pool sovereignty with other
states to tackle these urgent, supra-national problems. But how can we build a
sense of common European identity?

In the past, a civil code was one of the methods used by state-builders. The
task of bringing together small principalities into nation states or removing re-
gional autonomy was achieved in part by the enactment of a national civil code.
The civil codes of France, Germany, and Italy, for instance, were self-consci-
ously statements regarding a common national identity as well as serving the
useful market-oriented function of unifying private law within the territory.
Some supporters of the project for a European civil code perceive a similar role
for this code in establishing a single polity or European identity. The code can
provide common rules, respected by all, across the whole of the continent of
Europe, which will serve to bind this commonwealth together.

Thomas Wilhelmsson regards this use of a European civil code to build a
unified European state as misguided. Whilst accepting the need for co-operation
between the Member States, which in turn requires the popular acceptance of a
European identity, he argues against the need for uniform laws to achieve this
goal. As he writes,

‘The debate on the unification of private law as well as on the promotion of
a European contract law has, in fact, emphasised their effects in strengthe-
ning European identity. One may, however, question this starting point.
Does European identity really require unified systems of law – or unified
social and cultural structures in general? Is not the prevailing European
identity the opposite one? Is not the core of European identity an attitude
which recognises the plurality of languages, social structures and cultures,
and which regards the interplay between the different elements as one of the
strengths of Europe?’

In short, Wilhelmsson wants to promote a pluralist, post-national, and perhaps
post-modern European identity.

Whilst I agree that cultural diversity is vital to the spirit and energy of the
European Union, the problem remains of trying to build ties between the citizens
of Member States such that they will be willing to pool sovereignty in order to
achieve shared goals. In my view, such ties to bind Europeans together are un-

likely to be achieved by political fiat, by top-down measures imposed by political elites, such as Constitutional Treaties and common employment strategies. Instead, the sense of a common identity as Europeans has to come from below, from the perception of ordinary citizens that in their daily lives they do share common values, aims, and aspirations with the citizens of other Member States, despite their differences in culture, language and history. It seems to me that sharing a common private law system is one way to promote this attitude of a common European identity.

‘Rather than having unity imposed from above, a Civil Code empowers citizens to construct their own interpretation of how the ever closer union of peoples in Europe should evolve. By weaving the fabric of a civil society that extends beyond the borders of nation states through routine transactions of everyday life, such as buying goods, travelling, renting accommodation, and studying in schools and universities, citizens will become more receptive to regarding themselves as having in part a shared polity or political society. They will become more willing to accept a political and social identity of being in part European, of sharing an identity in common with other Europeans, of being part of a wider political community or polity, whilst at the same time retaining their national and local cultures and allegiances.’

In my view, the desirability of a European civil code derives from the need to facilitate the construction of a transnational civil society, in which national boundaries appear less significant as social and economic ties cross these artificial borders through associations and increasingly dense networks of economic transactions. The emergence of a transnational civil society will help to diminish and discredit the kind of pluralism that so often rears its head in Europe at present: destructive nationalism, mutual suspicion, weak co-operation.

But would a uniform private law for Europe destroy its valuable cultural diversity? This is a crucial question and cannot be simply dismissed on the ground that the law is merely a technical piece of regulation with no cultural dimensions whatsoever. Much depends, in my view, on how tight a straight-jacket is imposed by a European private law system. If a European Civil Code were enacted that contained detailed rules on every aspect of civil society, perhaps in greater detail even than the nineteenth century civil codes, that course might well serve to diminish cultural diversity. But such a measure, though perhaps serving a market integration purpose, is not necessary to help to form the kind of transnational civil society described above. Like our international agreements on declarations of human rights, we could achieve the goal of bringing European citizens closer together by merely setting common principles of private law, whilst leaving Member States a considerable margin of appreciation in how to achieve compliance with those principles in the context of a particular

legal system. It is for this reason that I conclude that we should embrace the project of a European Civil Code, provided that it is a code of principles rather than detailed rules.

3. The Petrification of Private law

A third criticism voiced by Thomas Wilhelmsson against the project for a European civil code concerns the likely effect of a civil code, namely the petrification of private law. This criticism is an argument against codes in general, which certainly possess a tendency to remain static whilst the world changes rapidly about them. Because codes are committed to the idea of presenting a coherent and comprehensive set of legal rules to govern civil society, it proves harder to change them in comparison with isolated pieces of legislation. To alter a code, all kinds of additional formal questions need to be posed: in what part of the code should the reforms be placed, what are the knock-on effects on other aspects of the code, and finally, a matter which seems to fascinate some legal scholars, should the provisions of the code be renumbered in some respects? Particularly if it takes the form of a traditional nineteenth century set of rules like those contained in the DCFR, a European civil code, will present additional hurdles to reform and change, which are only exacerbated by its transnational scope.

A further threat of transnational law to innovation is that it imposes uniformity and therefore prevents national divergence and experimentation. In turn, this straightjacket seems likely to inhibit the evolution of new ideas and deprive us of the opportunity of mutual learning through comparative studies of national legal systems. A related argument, again advanced by Thomas Wilhelmsson, is against full harmonisation directives, which prevent local experimentation as well as forcing some levelling down of worker and consumer protection in some Member States, particularly Nordic countries.

The argument against uniform laws based on the loss of potential for innovation is an important consideration. The economic analysis of this argument, known as the economics of federalism, suggests, in brief, that we need to measure the efficiency benefits of the reduction of transaction costs achieved by harmonisation of legal rules against the losses of efficiency caused by stifling the evolutionary potential derived from local evolution and mutual learning. Whilst these efficiency considerations are certainly relevant, Wilhelmsson is surely right to broaden the analysis to consider the links between national innovation in law and the broader cultural practices of differing communities. But

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all these arguments seem to me to be flawed by the assumption that we are presented with a choice between stark opposites: between uniform federal law on the one side, and disparate national laws on the other.

In practice, as our experience of harmonisation initiatives in Europe amply shows, uniform rules do not produce uniform results. The legal system of each Member State receives the uniform laws into its body of national rules and legal practices, and then translates this innovation in ways that make sense within the national legal framework. Transplanted legal rules are never quite the same as they were in their country of origin. The retention of national diversity becomes greater to the extent that the uniform rules employ broad standards and abstract concepts such as good faith. In other words, the rigidity of uniform transnational rules is overstated. Common rules diminish differences between national legal systems, but do not eliminate them, and indeed, as Gunther Teubner has observed,\textsuperscript{26} may end up creating simply new differences.

It may be objected that the institutions of the European Union have the power to compel uniform interpretation and application of the law within national legal systems. Certainly, the Commission may require Member States to implement European Community laws correctly. Furthermore, it is possible for national courts to refer questions of law to the European Court of Justice for a final interpretation of the meaning of the uniform federal law. Despite these mechanisms for compelling harmonisation, it is clear that these institutions cannot compel uniformity in practice. In particular, national courts are not required to refer questions of interpretation of European law to the European Court of Justice, so that, if national courts prefer, they can retain their own, perhaps idiosyncratic, interpretations of European measures.\textsuperscript{27} Furthermore, even if a question is referred to the European Court of Justice, it is likely only to offer general guidance on the meaning of the European legislation.\textsuperscript{28} It will refer back to the national courts the problem of applying the interpretation of the law to the particular facts, thereby remitting to national courts ample scope for discretion in the application of European law. In the absence of a hierarchical federal court system, the institutions of the European Union lack the capacity to ensure uniformity in the interpretation and application of European laws. As a result, uniform laws, though inhibiting diversity, do not prevent it from evolving. Thus the fear of the damage to innovation and mutual learning is overstated.

Furthermore, I would suggest that in fact mutual learning between national legal systems is likely to be enhanced rather than inhibited by uniform laws. At

\textsuperscript{27} Art. 234 EC; C-350/03, Schulte v Deutsche Bausparkasse Badenia AG (25.10.2005) ECJ, para. 43; cf C-341/01 Plato Plastik v Caropack [2004] ECR I-4883.
present, the problem in Europe is often that it is extremely hard to make serious comparisons between national private law systems, not only because of differences in language and concepts, but also because of different pre-conceptions of starting points. For example, it seems to me that civil law systems always try to find ‘fault’ before imposing liability, whereas common law systems insist in a rather formalistic way to try to find a breach of the rule defining the obligation (in many instances, the terms of the contract). Another contrasting assumption is that in the common law of contract, all the legal rules are presumed to comprise default rules that apply only in the absence of express or implicit agreement to the contrary, whereas the civil codes start from the opposite assumption that their rules have a mandatory quality. Given such differences in starting-points, it becomes hard to make valuable comparisons, and difficult to engage in mutual learning. In this context, the presence of a uniform set of principles, a common set of starting points, could facilitate meaningful and constructive comparisons between legal systems, leading to beneficial mutual learning.

4. Diagnosis and Prescription

The above remarks reveal how much I have learned from Thomas Wilhelmsson’s diagnoses of the risks presented by the project for unification of European private law through a civil code. He has made a profound and lasting contribution to the debates about the future of the European Union. Where I take issue with him is on the prescriptive side, the best way forward. Many of the dangers he has identified can, I believe, be avoided by limiting the specificity of the harmonised European civil code. A code of principles can leave the national legal systems some scope for variation and experimentation, thereby preserving the capacity for innovation whilst facilitating mutual learning between legal systems. Similarly, a code of principles, like a statement of constitutional rights, can bind a polity together without imposing a straightjacket that impairs cultural diversity. Finally, it seems to me possible to combat the danger of the dominance of libertarian values in a harmonised private law by practical steps such as writing critical commentaries of proposed unifying laws. Indeed, in my view, obstructing the evolution of a European private law creates the greater danger of preserving the unbalanced Economic Constitution of Europe that favours a relatively unrestrained free market order. In my view, the values in contemporary Europe that Thomas Wilhelmsson justly cherishes, such as tolerance of diversity, celebration of cultural difference, social justice, and enhancing opportunities for innovation, will be facilitated by a code of principles of private law. In short, ‘fragmented Europeanisation’ requires a European civil code.