

Legal Integration of Private Law in Europe and in the United States of America – Comparative Remarks* §

LUISA ANTONIOLLI

PROFESSOR OF COMPARATIVE LAW AT THE UNIVERSITY OF TRENTO

FRANCESCA FIORENTINI

ASSISTANT PROFESSOR OF COMPARATIVE LAW AT THE UNIVERSITY OF TRIESTE

SUMMARY

1. LEGAL INTEGRATION OF PRIVATE LAW: COMPARING TWO MODELS. – 2. THE IDEA OF LEGAL INTEGRATION: HISTORICAL OVERVIEW. – 3. ADVANTAGES AND DRAWBACKS OF LEGAL INTEGRATION. – 4. FORMS AND FORMANTS OF LEGAL INTEGRATION. – 5. LEGAL INTEGRATION IN THE UNITED STATES: INSTITUTIONAL AND CULTURAL FACTORS. – 6. LEGAL INTEGRATION IN THE UNITED STATES: FORMS AND FORMANTS. – 7. LEGAL INTEGRATION IN THE EU: CULTURAL AND INSTITUTIONAL FACTORS. – 8. LEGAL INTEGRATION IN THE EU: FORMS AND FORMANTS. “EUROPEAN” SCHOLARS. – 9. LEGAL INTEGRATION IN THE EU: FORMS AND FORMANTS. THE EU INSTITUTIONS. – 10. INCONSISTENCIES IN EU LAW-MAKING ACTIVITY. THE NEW DIRECTIVE ON CONSUMER RIGHTS. – 11. THE EUROPEAN LAW INSTITUTE. – 12. LEGAL INTEGRATION IN THE U.S.A. AND IN THE EU: SIMILARITIES AND DIFFERENCES.

*The topic analysed in the paper has been presented by Luisa Antonioli in two lectures given at the University of Trieste in May 2012. The content and structure of the paper have been defined together by both authors. Luisa Antonioli has written paragraphs nos. 7, 8, 9, 10. The others have been written by Francesca Fiorentini.

§ This paper has been submitted to an external referee.

ABSTRACT

The increasing convergence of law, particularly private and commercial law in the Western legal systems is among the most debated issues in comparative law studies. This paper analyzes legal integration of private (and commercial) law in the U.S. and in the EU legal systems, and aims at comparing – in a nutshell – actors, methods, strategies and outcomes of this phenomenon in the two different institutional settings. Legal integration initiatives are part of a coherent plan to support economic transactions with a legal structure that encourages enterprise and reduces costs. The motivation for these changes is economic, but the engine driving legal integration is essentially political and cultural, and therefore is closely linked to the institutional setting and the legal tradition(s) in which legal integration takes place.

KEYWORDS

COMPARATIVE LAW – LEGAL FORMANTS – LEGAL TRADITIONS – LEGAL INTEGRATION – PRIVATE LAW – EUROPEAN LEGAL SYSTEMS – U.S. LEGAL SYSTEM(S)

1. LEGAL INTEGRATION OF PRIVATE LAW: COMPARING TWO MODELS

The issue of the increasing convergence of law, particularly private and commercial law in the Western legal systems is among the most debated questions in comparative law studies¹. In Europe this phenomenon is strictly interconnected with the existence of a *sui generis* supra-national organization like the European Union. In order to create an internal market – which is the central aim of the EC/EU since the beginning – it has exercised its legislative competence in many fields of member States' private and commercial law, thereby accelerating the approximation of member States' national laws. The increasing bulk of EC/EU law is one of the main causes of the creation of a European private law and this phenomenon of "Europeanization" of national laws lies at the very core of European legal integration which happens through the interplay among many actors, particularly EU and national legislators, EU and national judges, law professors. The role played by scholars has been particularly prominent in recent years. Their engagement at the EU level has led in 2009 to the drafting of a sort of European civil code, named "The Draft Common Frame of Reference" (DCFR)². Although this product has not been adopted so far by the EU institutions as binding leg-

1 MERRYMAN, *On the Convergence (and the Divergence) of the Civil Law and the Common Law* (1987) 17 *Stanford J of Int L* 357; GORDLEY, "Common law" v. "Civil law". *Una distinzione che va scomparendo?*, in Cendon (cur.), *Scritti in onore di Rodolfo Sacco: la comparazione giuridica alle soglie del 3° millennio*, I, Giuffrè, Milano, 1994, 559 ff.

2 STUDY GROUP ON A EUROPEAN CIVIL CODE/RESEARCH GROUP ON EC PRIVATE LAW (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference* (Full Edition), Sellier, Munich, 2009.

isolation³, it certainly is the most notable step of the EU private law integration project. Besides the traditional actors, new ones are emerging, such as the European Law Institute (ELI), an independent organization set up in 2011 that aims to enhance the quality of the European legal integration process.

At first glance, there seems to be a similarity of actors, trends and possibly results of EU legal integration with the similar process that has developed in the U.S.A., especially in the Twentieth century. There, the allocation of legislative and judicial competences, divided between federal and state level, formally attributes competence in private law matters to the states. However, many factors, such as the extensive interpretation by the federal Supreme Court of the constitutional clauses relating to competences impinging on private and commercial law; the existence of a common legal education that creates a homogeneous mentality among lawyers throughout the nation; the unity of the legal language; the “restating” activity successfully carried out by the American Law Institute (ALI) under the initiative of prominent law professors and practitioners; and many other factors have led to a very high degree of harmony in the field of private and commercial law.

We believe that a comparison between the two experiences of legal integration – pointing out similarities and differences – can be extremely useful in order to understand the current issues and future perspectives of the legal integration process in the EU as well as in the rest of the world. This paper analyzes legal integration of private (and commercial) law in USA and EU and aims at comparing – in a nutshell – actors, methods, strategies and outcomes of this phenomenon in the two different institutional settings. The general assumption is that legal integration initiatives are part of a coherent plan to support economic transactions with a legal structure that encourages enterprise and reduces costs. The motivation for these changes is economic, but we will show that the engine driving legal integration is essentially political and cultural, and therefore is closely linked to the institutional setting and the legal tradition(s) in which legal integration takes place⁴.

³ Yet, on 26 April 2010 the EU Commission set up an Expert Group on a Common Frame of Reference in the area of European Contract Law. This Group was entrusted with the task of carrying out a Feasibility Study exploring the possibility of a future European contract law instrument, using the DCFR as the starting point. This Feasibility Study was published on 3 May 2011. On this basis the EU Commission drafted a Proposal for a Regulation on a Common European Sales Law (COM/2011/635 final), which was presented on 11 October 2011. This proposal for an Optional Instrument contains rules applicable to cross-border transactions for the sale of goods, for the supply of digital contents and for related services, in cases where the parties to a contract agree to do so. As such, the proposal represents a significant scaling back of the original DCFR proposal, thus limited to a significantly narrower spectrum of transactions.

⁴ ROSETT, *Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law* (1992) XL *Am. J. Comp. L.* 683 f.

2. THE IDEA OF LEGAL INTEGRATION: HISTORICAL OVERVIEW

In these pages the expression “legal integration” is used as a “*locution valise*” applying to different forms of production of legal rules, by which similar, convergent or uniform legal solutions have historically emerged in the field of law, private and commercial, among different legal systems. As such, legal integration has been the response to the need to overcome the unavoidable fragmentation of the law among the world’s people and nations throughout history. Indeed, the diversity of the law governing different societies is a fact which relates to the essence of any legal order and is supported by a variety of driving forces such as tradition, history, the specificity of each national culture, the absence of a supra-national legislative authority in the international community, the absence of a universal legal language.

The need to develop common ways to handle practical problems of people from different countries, regulated by different laws, has been felt since ancient times and was once dealt with by making recourse to Roman law. In the Middle Ages, *jus commune* developed from Justinian texts was used throughout Europe as common law, overcoming local diversities of the law, as well as a basis for trans-national commercial law.

The call for legal approximation has been subsequently further fostered by the formation of the nation States in Europe. The first efforts to contrast national diversities in the law started in the Nineteenth century and were focused on the approximation of the conflict of law rules. Indeed, in a context of growing legal nationalism, the only way to handle international legal problems was to find the right national rule applicable to the case. In a cultural context dominated by legal positivism, any activity of legal integration was eminently focused on legislative law⁵.

At the turn of the Nineteenth and at the beginning of the Twentieth century the growth of trans-border commercial relationships, facilitated by technical progress in communication and transport, made the quest for legal uniformity among nations more pressing. The first relevant steps in this direction were a series of international conventions on intellectual property (1883 and 1886), carriage of goods by rail (1890), collisions between vessels (1910), conflict of law rules concerning marriage (1902) and divorce (1902), the guardianship of minors (1905), etc. Supported by faith in the progress of humankind, which prevailed in positivistic ideology, legal integration was regarded as an aim in itself and some scholars even advocated the drafting of a universal codification of private law, envisaged as “*Weltprivatrecht*” (Zitelman) or as “*droit commun législatif*” (Lambert).

World War I swept away these utopian visions, but not the need for legal integration and unification of private law. This idea regained importance when relevant international bodies, existing before the first World War, like the Hague

⁵ FERRERI, *Unificazione, Uniformazione*, in *Dig. IV, Disc. Priv., Sez. civ.*, XIX, Utet, Torino, 1999, 504 ff.

Conference on Private International Law (1893) or the *Comité Maritime International* (1897), resumed working on it, supported by the newly set up League of Nations (1919) to which at that time belonged both the International Labour Organization (ILO, 1919) and the *Institut international pour l'unification du droit privé* (UNIDROIT, 1926).

It was only after World War II that the legal integration activities became more difficult. The international context was radically changed. The U.S.A. substituted Europe as the leading world's economy. The ideological opposition between East and West, together with the economic contrasts between the rich North and the poor South of the world, reshaped the contours of the concept of legal integration of private law. The latter could be now conceived only with reference to international relations between the Western capitalistic economies, sometimes taking into account the special needs of the developing countries, and with a much stronger involvement of the U.S. (who had stepped out of the negotiations in previous uniform laws). When later on socialist legal systems were added to the scope of legal integration activities, these had to take into account many political issues beside the technical ones. As a consequence, the limits of legal integration and unification activities became more evident.

These problems are well reflected in the preparation of a uniform law for the international sale of goods, one of the most important topics in the perspective of the international business. This enterprise started in 1929 under the initiative of Ernst Rabel and culminated first with two uniform laws in 1964 (Uniform Law for the International Sale of Goods, ULIS and Uniform Law of the Formation of Contracts for the International Sale of Goods, ULFIS). These were dominated by the problem of overcoming divergences between the civil law and common law traditions. The dissatisfaction with these two conventions that were not widely adopted led to the UN Convention for the International Sale of Goods of Vienna (CISG, 1980), drafted by the United Nations Commission of International Trade Law (UNCITRAL, set up in 1966). This time the preparatory works of the convention took place with the socialist and the developing countries. In the UN convention many traces have been left of the political questions underpinning the convention and relating to the necessity to combine the needs of widely different legal traditions – questions that could not be solved in a always clear-cut way, such as the principle of freedom of form, or the requirement of the determination of the price for a valid contract and many others⁶.

The end of the Twentieth century has witnessed the fall of the Berlin wall and the failure of the socialist political and economic systems. The opening of the former socialist countries (China is one of the prominent examples) to a market economy – a phenomenon which is related to globalization in its manifold forms – has boosted legal integration as never before. In the field of private and com-

6 BONELL, *Comparazione giuridica e uniformazione del diritto*, in Alpa et alii, *Diritto privato comparato*, 3rd edn, Laterza, Roma-Bari, 2004, 63 ff.

mercial law, legal integration fostered by globalization implies a spontaneous phenomenon of imitation of Western legal models by non-Western legal traditions. This circulation of legal models is not radically different from the one that took place in the Nineteenth and Twentieth century with reference to the European codifications or doctrines. The French civil code or German Pandectistic doctrine have been transplanted in many European and non-European countries by way of political imposition (e.g., Napoleonic conquests, colonialism) or because of their intrinsic cultural prestige (Germanic pandectistic school in Western Europe, Eastern Europe and Russia, U.S.A., Latin America, etc.; Code Napoléon in Italy after the end of the Napoleonic domination)⁷. Despite the wide-spread rhetoric centred on the need for a democratization of non-Western nations, today the driving forces of the current global legal integration are far more economic than political or cultural, and are centred in the efforts of imitation of a economic version of the “rule of law” concept by many non-Western legal cultures⁸.

3. ADVANTAGES AND DRAWBACKS OF LEGAL INTEGRATION

We have anticipated that the motivation of legal integration has always been economic: the need to govern economic transactions between people regulated by different laws pushed towards legal integration. Today, global legal integration purpose uniformation of the law is highly considered. Legal differences are decreasing even between Western and non-Western systems, at least in economically sensitive topics. In addition, many lawyers around the world think that legal integration and uniformation is the natural end of comparative law. The advantages of legal integration have clearly an economic nature. Yet, faith in this process is no longer absolute, as the critical eyes of the legal anthropologist have guarded against the risks that may derive from uniformation of the law. Law as a cultural product of human societies is not only different in every society, but changes and evolves continuously, just as language and culture do. Its living dimension is variety and change, and this holds true also for harmonized or uniformed legal rules and models. In order to fulfil their goal of encouraging international business, they need to be open to modifications. Legal variety and change necessarily imply competition of legal models in the global arena. This is an asset for legal evolution, because it facilitates the prevalence of the rule or model that better fits the changing needs of law users. The risk of an increasing and all-encompassing uniformation of the law is that it reduces the models available for legal competition and development. In addition, any imposed uniformity bears the risk that the dominant rule be that of the stronger culture, with an evident (but unjustified) sacrifice of

7 SACCO, *Introduzione al diritto comparato*, in *Trattato di diritto comparato* diretto da Sacco, Utet, Torino, 1992, 147 ff.

8 BUSSANI, *Il diritto dell'Occidente. Geopolitica delle regole globali*, Einaudi, Torino, 2010, 48 ff.

the weaker ones. It must be noted that these risks have not only a cultural value, but also a technical one: A ‘poor’ uniformation (because grounded on a limited set of competing models, or imposed without sufficient attention to the cultural tradition in which it should apply) may lead to a misunderstanding of the uniform rule and thereby to its operative failure⁹.

4. FORMS AND FORMANTS OF LEGAL INTEGRATION

First of all, the many forms of legal integration and their specific terminology need to be distinguished¹⁰. The word “unification” refers to forms of *legislative legal integration* in which usually a supra-national body with regional geographic relevance produces rules that shall be applied uniformly in a plurality of national systems. This uniformity of operational outcomes is guaranteed by the activity of a supra-national body, whose decisions shall be binding in all the domestic systems under consideration. As such, legal unification is the most powerful means of legal integration, whereby the risk of diverging application of the single rule in the different legal systems is reduced. A noteworthy example is given by the EU legislative competence to issue Regulations that “shall be binding in [their] entirety and directly applicable in all member state” (Art. 288 TFEU). The uniform judicial application of Regulations is guaranteed by the European Court of Justice.

The operational result is not the same when other legislative integration techniques are used. When it comes to “uniformalion”, uniform legal rules are produced by a supra-national body, or voluntarily by a multiplicity of States belonging to the international community, but the application of the rules is left to national courts. Therefore, the application of the same rule can vary from one jurisdiction to another. This is mostly the case of the international conventions that are stipulated between nations: after ratification they become binding domestic law of the contracting States and are applied by national courts.

Finally, “harmonization” technically refers to a law-making activity establishing only a general uniformity of legal rules among different legal orders which allows some variations between jurisdictions, but the differences are not so deep as to alter the basic, harmonized legal model. The classical example of harmonization is represented by the EU legislative competence to issue Directives that “shall be binding, as to the result to be achieved, upon each member state to which [they are] addressed, but shall leave to the national authorities the choice of form and methods” (Art. 288 TFEU)¹¹.

9 SACCO, *Antropologia giuridica*, Il Mulino, Bologna, 2007, 59 ff.; Id., *Introduzione al diritto comparato*, cited above, 132 ff.

10 BENACCHIO, *Diritto privato della Unione Europea*, 5th edn, Cedam, Padova, 2010, 15 f.

11 Differently from Regulations, Directives need to be implemented by national legislations. However, if they are badly implemented or not implemented, and if they are framed in a par-

Legal unification, uniformation and harmonization presented so far refer to positive law rules (*legislative legal integration*). However, these techniques do not represent the entire legal integration process, as much as positive law does not represent law as a whole. Comparative law studies show that convergence or divergence of legal solutions does not depend only on black-letter rules, but rests on other legal formants. Among them, judges and scholars play a major role. The activity of these subjects is determined by (and is a product of) the scholarly tradition of each legal system that impacts on the interpretation of positive law¹². Therefore, we can also distinguish *judicial legal integration* and *scholarly legal integration*.

Judicial legal integration is crucial especially in the EU institutional setting, because it guarantees uniform application of EU law not only through the activity of the European Court of Justice, but also through the duty imposed upon national judges to apply its principles when interpreting both EU and national law¹³. The EU system is also influencing the convergence of the legal cultures of national judges¹⁴. The importance of judicial legal integration is felt also with reference to national judges and international arbitrators applying international uniform law conventions. They are entrusted with the task of interpreting international conventions in a uniform way. Yet, in this case the judicial assignment is more difficult, because only in few cases court or arbitral decisions on international conventions are reported and therefore available to the international judicial community¹⁵.

Scholarly contribution to legal integration can be measured not only in the drafting activity of international conventions and uniform laws, but also in the preparation of restatements or bodies of principles of the law, deemed to be used as harmonizing tools by legislators or practitioners, as well as in the field of legal education. The U.S. Restatements of the Law, sponsored by the American Law Institute (starting from 1923), in Europe the Principles of European Contract Law written by the Lando Commission (2000, 2003), and later the Principles of European Law by the Study Group on a European Civil Code (from 1998), the DCFR (2009) as well as, at international level, the UNIDROIT Principles of International Commercial Contracts (1994, 2004, 2010), are only some of the most notable products of *scholarly legal integration*.

particular way so as to confer autonomous rights to citizens and other requirements are met, they can have direct vertical effect according to the case law of the European Court of Justice: CRAIG, DE BURCA, *EU Law: Texts, Cases and Materials*, 5th edn, OUP, Oxford, 2011, 139 ff., 178 ff.

12 SACCO, *Legal Formants: A Dynamic Approach to Comparative Law*; Inst. I (1991) 39(1) *Am.J.Comp.L.*, 1 ff.; Inst. II (1991) 39(2) *Am.J.Comp.L.*, 343 ff.

13 RÖSSLER, *Interpretation of EU Law*, in J. Basedow, K.J. Hopt, R. Zimmermann (eds), *Max Planck Encyclopaedia of European Private Law*, II, OUP, Oxford, 2012, 979-982.

14 MATTEI, *Il modello di common law*, 3rd edn, Giappichelli, Torino, 2010, 82 ff.

15 Yet, for the UN Convention for the International Sale of Goods (Vienna Convention, CISG, 1980) reports of case law and arbitral awards are available on-line: see UNILEX database, set up by Pace University (<http://www.cisg.law.pace.edu>), which also contains bibliographical references and scholarly writings on case law interpretation.

Another important source of spontaneous legal integration is international business practice. It works in an unofficial way, without any endorsement by national authorities, through the development and use of uniform contractual forms and customs tailored on specific business transactions, or standardized so as to fit the need of delocalization of international contracts. Notable examples of this private law-making are the model contract terms elaborated by UNCITRAL, or the banker's rules dealing with documentary letters of credit (*Uniforms Customs and Practice for Documentary Credits*, International Commercial Chamber, last edn 2006) or the *International Commercial Terms* dealing with the delivery and risks in sales contracts (INCOTERMS, International Commercial Chamber, last edn 2010). This kind of harmonization can be termed *contractual legal integration*. As it happens with international conventions or uniform laws, also the text of the international contracts needs to be interpreted by national judges or international arbitrators, therefore the same remarks as for the judicial legal integration apply.

Finally, and in addition to the four dimensions of legal integration mentioned so far (i.e. the legislative, judicial, scholarly and contractual ones) other meta-legal factors deserve attention because they have a powerful impact on law, such as policy considerations, economic and/or social factors, the social context and values, and the structure of the legal process in each institutional setting. Therefore, the process of legal integration is a complex interplay of different levels that must be analyzed taking into account the practical and cultural dimension in which positive law operates.

5. LEGAL INTEGRATION IN THE UNITED STATES: INSTITUTIONAL AND CULTURAL FACTORS

Legal integration in the United States cannot be approached without a preliminary sketch of the institutional setting which characterizes this important common law system. First of all (and differently from England and from the EU), the U.S. are a federal system. In the U.S. federalist organization, federation and states have been assigned by the federal Constitution (1787; Bill of Rights, 1791) different spheres of competence, the boundaries of which, however, are not completely clear-cut. The major synthesis of the allocation of powers between federation and states is stated in the X Amendment of the federal Constitution: "the powers not delegated to the United States [i.e. the federation] by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people". Consequently, the competence of the states is the rule, whereas federal competence is the exception. This is true with reference to both legislative and judicial competence. The legislative competence of the federation (Congress; see Art. I) covers matters related to tax law, common defence and general welfare of the U.S.A., the power to coin money, maritime law, interstate and foreign commerce (*commerce clause*). In these matters, Congress shall have the power to "make all laws which shall be necessary and proper for carrying into execution the [...] pow-

ers vested by this Constitution in the Government of the United States” (*necessary and proper clause*). In U.S. history, the extensive interpretation of the “necessary and proper clause” and the “commerce clause” have been a powerful instrument to enlarge the legislative competence of the federation. To our purposes, it must be stressed that, in accordance with this constitutional construction, most of private law is a competence of the states (statutes and case law), and not of the federation (as it is, e.g., in Germany). However, determining what competence belongs to the states and what is left to the federation, needs closer examination also with regard to the allocation of the judicial competences between federal and states courts. Federal courts have limited jurisdiction, i.e. only when the Constitution explicitly recognizes it. According to Art. III of the Constitution, there is federal jurisdiction in two instances: (i) “*federal question*”, i.e. when the judge shall apply the federal Constitution or other federal law; and (ii) “*diversity jurisdiction*”, i.e. in cases affecting ambassadors, other public ministers and consuls, or in cases of admiralty and maritime jurisdiction, in controversies to which the United States shall be a party and to controversies between two or more states, between a state and a citizen of another state and between *citizens of different states*. Also the problem of the delimitation of judicial competences is in fact much more complex than the letter of the constitutional text, if one only considers that – according to the case law of the federal Supreme Court – federal courts can apply also state law (statutory and case law) and that this has been frequent especially in matters relating to “diversity jurisdiction”. Without going into the details of this complicated system, suffice here to point out that federal courts also play a role in interpreting and applying state laws (statutes and case law), and that this adds to the legal integration of private law throughout the nation, counterbalancing the image of a U.S. private law highly fragmented in 50 jurisdictions.

Besides these institutional aspects, a series of cultural factors have been fostering legal integration of private law in the U.S. In this perspective, the emergence of a common legal education based on the universities must be first acknowledged. This phenomenon is linked to the name of Christopher Columbus Langdell, who in the second half of the Nineteenth century adapted to the U.S. context the Blackstonian legacy of the need for academic teaching of the law. Langdell elaborated a method for the academic analysis and teaching of the law based on the *case books*, named *case method*. In these books (that started a new literary genre typical of the U.S. legal education system) a selection of relevant cases is offered by the author, together with a brief presentation of the facts and the full opinion. No personal comment or interpretation of the court decision was added by the author. Thereby students were educated to the first-hand work on cases. This method emphasized the influence of case law for legal education (not only for practice, which was obvious in a common law system) and to assign to law schools a leading role in legal education throughout the U.S. Appointed as Dean of the Harvard Law School in 1870, Langdell reformed its teaching method; on this model all other U.S. law schools have been shaped. Law professors play a

crucial role for the success of this method. To be sure, this technique is centred on case law, but it cannot work without the critical contribution of the scholar who selects from a bulk of cases those having scientific relevance, which can be regarded as “making the law”. In this way, also the student is trained to a critical use of case law and, more in general, to a critical way of thinking.

A common legal education is the reason for the development of a common legal literature that, beside the case books, is based on a successful law reporting system. The latter is a particularly relevant factor in the formation of a legal mentality, because it influences the approach of lawyers to cases and, indirectly, also to the other types of legal literature. Before the Nineteenth century, in the U.S. there were relatively few courts, and even fewer published reports. In 1819 there were 18 volumes of American case reports. By 1848 they had grown to 800, and to 3.800 in 1885¹⁶. During the last quarter of the Nineteenth century a commercial publisher, the West Publishing Company, created a system for reporting and indexing in an economical and accessible way the court decisions from all the states. Since the full text of court decisions is reported, the success of the system depends on an ingenious indexing, known as “key number”, that, coupled with recent technological electronic development, enables lawyers to find quickly cases on a particular point of law from all jurisdictions. This of course increases the knowledge of any lawyer about other states’ law. Communication among jurisdictions is certainly a key strategy for creating a harmonized approach to the common law.

Another relevant factor that has pushed U.S. private law towards convergence is connected with (and is a consequence of) the common legal education, namely the emergence of a common legal profession. In theory, any question relating to the legal profession is, again, competence of the states. However, the American Bar Association (ABA), a private, non-governmental organization representing lawyers in the whole nation has a strong role in defining professional regulations. Usually the rules proposed by the ABA are approved by states’ Supreme Courts with no objection by their judges. This is due to the high degree of homogeneity between lawyers and judges, who feel they belong to the same group. Furthermore, the ABA carries out its activities together with the Association of American Law Schools (AALS), another private organization gathering the law schools. In this way, the U.S. legal practice has a strong impact on the university curricula and gives prestige to the academy (rather than the other way round). It is ABA that grants accreditation to the law schools for the bar exam. This is the state-based exam that all graduate students (after three years of law school) have to pass in order to become lawyers (attorneys at law). Despite the state competence on the bar examination, and the diversity of states’ private laws, it is an exam based on the “general principles of the law” that are taught at any law school in the U.S.

16 ROSETT, *Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law*, cited above, 691 f.

Last but not least, the existence of a common legal education and literature implies a common legal language throughout the U.S., which is of course highly facilitated by the use of English as the national language.

6. LEGAL INTEGRATION IN THE UNITED STATES: FORMS AND FORMANTS

We have already mentioned that by the end of the Nineteenth century the growth of case law and the consequent confusion caused by the increasing difficulty in solving contradictions between different decisions needed to be countered in order to preserve legal certainty. This happened through the use of the case method in legal analysis and education, but also by setting up in 1923 an institution specifically designed to promote clarification and simplification of U.S. common law and law reform: the *American Law Institute (ALI)*¹⁷. Membership in the ALI is limited to 4000 judges, lawyers and legal scholars from all the United States. Since its creation the ALI contributes to the harmonization of U.S. private and commercial law with three types of activity: Restatements, Model Laws and Principles.

Restatements. Restatements are “codification-like” bodies of written law that seek to inform judges and lawyers about general principles of common law in different areas of private and commercial law. The first series of Restatements appeared between 1923 and 1944 on topics such as Contracts, Torts, Property, Restitution, Agency, Suretyship, Judgments and Conflict of Laws. In 1952 the Restatement Second was started (covering subjects not included in the first Restatement, as well as new updated editions of the original Restatements), and in 1987 the Restatement Third, which is still going on. Theoretically, purpose of the Restatements is to state private and commercial law how it is in reality, without any modifications, distilling commonalities among the decisions of the various jurisdictions. However, reality has sometimes been rather different. Since state laws are different, sometimes the drafters have chosen the “best rule”. With regard to the style of the Restatements, the first of them consisted of a series of abstract statements on the law (while the current generation of restatements comprises comments and notes that do not always add to clarity which was the original *raison d'être* of the work). Because of this abstract style and their systematic organization the (especially first) Restatements resemble continental codifications – some authors have called them “unofficial codifications”.¹⁸ Yet, their role in the system of the U.S. sources of law is not comparable to that of the European civil law codifications. Being essentially a product of scholars and practitioners, i.e. a private law-making product, they cannot have official authority as source of the law. Yet, in practice they enjoy a degree of authority, because they

¹⁷ See: www.ali.org/.

¹⁸ VON MEHREN, *The U.S. legal system: between the common law and the civil law legal traditions*, Centro studi e ricerche di diritto comparato e straniero, Roma, 2001, 11.

are often applied by courts “as if” they were sources of the law. In its turn, this practical authority rests of a widespread *consuetudo* and *opinion necessitatis* that they represent the actual law or rules that are acknowledged to be “good law”.

Model laws. While Restatements codify the law “how it is”, model laws represent the law “how it should be”. Model laws represent the efforts of ALI towards law reform: They seek merely to inform and provide a model for states legislatures. The latter are encouraged to consider it, but are not obliged to adopt it, not to adopt it without modifications. A classic example is the Model Penal Code of 1962 (and its subsequent reforms), which has been adopted almost *in toto* in only four states, but whose influence is clearly evident in the penal code reforms of most states.

Principles. They are the result of the ALI efforts of analysis of legal areas thought to be in need of reform and consist of recommendations for change in the law published in the form of principles of the law. They have been issued for subjects such as Aggregate Litigation, Corporate Governance, Family Dissolution, Software Contracts, Transnational Civil Procedure, Transnational Insolvency, and Transnational Intellectual Property. Principles aim at stating “the law as it ought to be” and this explicit purpose differentiate them from the Restatements, representing “the law as it is”.

Besides the ALI, since 1892 the *National Conference of Commissioners on Uniform States Law* (NCCUSL)¹⁹, composed by states’ representatives, drafts *Uniform Laws* as well as legislation that aims to lead to clarity and stability in crucial areas of state statutory law. Differently from model laws, uniform laws are specifically designed for state legislative adoption. As such, they have a significant harmonizing potential, but also some problems. In fact, despite the large number of laws that have been produced so far, they have led to few uniformity, and sometimes they have been a failure. Many of them have been adopted by few, if any, states. In some cases they have been influential for state law reforms, where legislatures have picked up selectively some aspects of them. The reasons for such failure are sometimes related to state legislatures and governments which often lack a professional staff or a group of trained civil servants able to draft well-conceived laws on private law matters; sometimes there is a lack of the political will to conform to the choices made in the uniform laws.

The best example of both the potential and problems with uniform laws in the U.S. is certainly the *Uniform Commercial Code* (1952, and subsequent amendments), which contains a comprehensive regulation of interstate commercial law, covering transactions such as sale of goods, contracts, leases, security interests, etc. It is a joint product of the ALI and the NCCUSL, not federal law, but it has adopted by all 50 jurisdictions, although sometimes with state variations. The UCC has been of tremendous significance in reforming the law. Proof of this is the case of Article 9 of the UCC, dealing with security interests over movable assets. The original text was a brilliant and innovative product in the 1950s of one of

¹⁹ See: <http://www.uniformlaws.org/>.

the central drafters of the UCC, Prof. Karl Llewellyn, which completely reshaped the legal categories and taxonomies in a crucial topic for business transactions, where legal certainty and uniformity are essential. Yet, the process of state adoption of the code had just started when the Permanent Editorial Advisory Committee started working for the revision of Art. 9. Its new version was completed in 1972 and it has taken 15 year to be adopted by the states. In the meantime, two versions and a number of local variations have been in force.

All these elements are part of a top down process of legal integration of private and commercial law which has certainly been influential. Yet, it does not represent the entire picture, nor can it be regarded as the only driving force of legal harmonization in the U.S.A. The substantive harmony without uniformity of U.S. private and commercial law rests above all in a shared commercial culture, which moves bottom up. The common national economic market and the high mobility of the U.S. population have favoured an harmonious development of the law. In this context, any success of top down harmonization efforts is due to the homogeneity of the business practice, as much as to the technical quality of uniform and model acts or to concepts and choices of the legal profession. American lawyers are positively aware of this: "Whatever we do, the process of harmonization appears inexorable, precisely because of the power of the forces for expansion and coordination of commercial markets within our nations"²⁰.

7. LEGAL INTEGRATION IN THE EU: LEGAL TRADITIONS AND INSTITUTIONAL FACTORS

Legal integration in Europe is a recent phenomenon that builds on the creation of the European Community in the 1950s and cannot be analyzed separately from it. Indeed, as far as private law is concerned, the European landscape at that time was more fragmented than that of its U.S. counterpart. To be sure, the European civil law legal tradition has been developed on the grounds of the common foundations of Roman law as it had been worked out in the age of the *jus commune*. Yet, the formation of the national states was based on a (at least) formal, proud partition from the common heritage, represented in the crystallization of variations in the national codifications of civil and commercial law. Political fragmentation in the nation states implied a variety of institutional and cultural elements that strongly impacted on the style of each legal system. It is true that differences in style and in declaration of principles did not affect the deep layers of the common Roman law tradition, but the impressions of an observer approaching the private laws of Europe were puzzling. First of all, the diversity of languages did not help the understanding of the legal languages developed in the different legal traditions: common law in England; civil law on the Continent, in its variations of Ro-

²⁰ ROSETT, *Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law*, cited above, 695.

man and Germanic traditions; the Nordic legal traditions. For each of these traditions, a variety of sources of the law could be found. Even though the codification was the centripetal legal source on the continent, different styles and languages of codifications existed and their interpretation and application was left to different judicial organizations and styles. In the same period of national codifications legal education systems in Europe also began to diverge. The European nation states wanted to break off from the past, therefore abandoned the unity of the university teaching method developed in the *jus commune* age on the basis of the study of the Roman sources, setting up their own university model. Diverse legal education systems necessarily led to the development of different legal literatures.

This was the background of legal fragmentation in which the EC was created with economic motivations, but aimed in the long run at creating political integration in Europe in order to guarantee stability and peace in the region. The first economic goal for the EC was the setting up of a common economic market – the single, now internal market. This was fostered by competition, increasing the general wealth of the people living in this region. The pattern of legal integration of private law in the EU is strongly linked to the policy of the internal market, which has always been a cornerstone of the EC/EU²¹.

The creation of an internal market by the EC/EU institutions implies the allocation of competences between Community/Union and member States. The EC/EU Treaty formally establishes that the Community/Union has attributed competences, i.e. it can act only when the Treaty specifically confers power to it, linked to the objectives set by the Treaty (art. 5(1) TEC, now art. 5(1)(2) TEU). If this principle is taken literally, there is no EU competence to legislate generally on private law. Yet, numerous legislative acts that are related to contract and private law have been enacted, based on the need to establish the internal market and make it work. The argument goes that the existence of different national rules in areas related to the internal market (such as contract law) may hinder the working of the internal market, and consequently legal harmonization is needed in order to overcome these obstacles. Although this choice is usually seen as a merely technical move, in fact it implies shaping of a species of “European private law”. This harmonization process has been based on arts. 94 and 95 TEC (now arts. 115 and 114 TFEU) concerning the internal market, whose scope is so wide as to make it virtually impossible to set definite and rigid boundaries. In fact, they have also been employed to justify the expansion to “bordering” areas, which were linked but not amenable to the internal market: this has been the case, for instance, of consumer law, where the member States have been willing to shift their regulatory competence to the EC/EU by using the legal base related to the internal market. This has determined a creeping erosion of national competences, which is not easily reconciled with the principle of enumerated competences of the EU.

21 ANTONIOLLI in ANTONIOLLI, FIORENTINI (eds), *A Factual Assessment of the Common Frame of Reference*, Sellier, Munich, 2011, *Introduction*, 28 ff.

In spite of the fact that EC/EU legislation is selective, i.e. it only addresses specific issues, leaving the general legal framework at the national level, this affects the way in which member states regulate these areas. A very broad reading of the Treaty rules related to the internal market can encroach on subject matters which are external to it, but which may interfere with it, thereby reshaping the scope of action for the states. The conflicts of competences between EC/EU and member states have been addressed also by the European Court of Justice (ECJ), as in the area of free circulation of goods, where its very broad reading of arts. 28 and 30 TEC (now arts. 34 and 36) in the 1970's and 1980's has determined a situation where theoretically any national rule potentially affecting the circulation of goods (such as e.g. rules on opening hours of shops) could be considered as infringing EC law. In the 1990's, with the leading decision *Keck and Mithouard* (C-267, 268/91 [1993] ECR I-6097), the ECJ has tried to limit this encroachment to rules that are directly related to the free circulation of goods and the internal market and have a discriminatory nature. It means that states can argue that national rules related to social needs can be justified even though they may affect the way in which the internal market works. The definition of the boundaries between what member states can legitimately do and what is prohibited because it contrasts with EC/EU rules is defined by the EC/EU institutions themselves, not by the member states. In the famous Tobacco advertising case of 2000 (*Germany v. Parliament and Council*, C-376-98 [2000] ECR I-8419) the ECJ held that legal diversity *per se* does not justify harmonization by EC institutions, unless it is sufficiently proven that different national legal rules create an obstacle to the working of the internal market, and that the harmonized rules are needed to cure the problem. This means that EC institutions do not possess a general law-making power related to the internal market, but must specifically show the obstacles to it that the EC rules aim to remove. When applied to the private law context, this reasoning seems to imply that the EC/EU institutions cannot harmonize the whole of private law, but rather must limit their intervention to selective issues in which it is demonstrated that regulatory differences adversely affect the internal market. This seems also to be in line with the principle of subsidiarity, according to which in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the member states, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level (Art. 5(3) TEU).

The existence of shared competences of the EU and member states in the area of private law implies the existence of a *multi-level system*, where the EU and States must cooperate in order to reach a satisfactory regulatory framework. One way in which this is done is through the use of the mechanism of *minimum harmonization*: EC/EU directives often provide for a minimum level of harmonization, which can be lawfully increased by member states, for reasons related, e.g., to social justice considerations. This is what has happened in the area of consumer

protection, but it must be emphasized that at the moment the Commission has shifted its strategy and decided that in order not to hamper the working of the internal market, *maximum harmonization* is required (see *infra*, n. 10, with regard to the new directive on consumer rights). Again, this is motivated purely on the basis of technical considerations (the need to provide for proper harmonization and to avoid fragmentation), but in fact it has an important “constitutional” effect, since internal market considerations become paramount, and may impede the pursuit of other legitimate and relevant interests at national level, such as, e.g., those related to social justice .

Within this complex framework of allocation of competences between EC/EU and member States there has been a gradual, but constant increase of EU law-making activity through Regulations and Directives (see *supra*, n. 4) in the core fields of private law, such as contract and tort law – as well as labour and company law. This has promoted an approximation of national legal systems that, although far from being complete and systematic, could not have been anticipated at the time when the European Communities were established.

Yet, the making of EU law suffers from well-known limits that may impair its performance. Not only is EC/EU legislation sectoral and fragmented in its contents and form, and limited by the narrow institutional boundaries sketched above, but it is placed upon – and often overlaps with – a variety of national and local legislations that are related with local social patterns. Moreover, also case law is fragmented. Indeed, the ECJ is far from being a Supreme Court of the European Union, since its intervention is only interstitial in guaranteeing the application of EU law, and its action is consequently inadequate to produce uniformity in all relevant areas. In addition to that, legal doctrine in Europe is still largely limited to traditional municipal law and legal education and legal literature are still mainly concerned with national law.

These limits have not stopped the progress of Europeanization of the law and the academic debate on the building of a “European” private law. From a structural point of view, lurking behind the debate on the development of European private law is a fundamental issue of policy, i.e. determining who should be in charge of defining the content and the contours of this emerging “common” law. As mentioned above, formally it is the EU institutions who have the task to establish new binding rules, a process which is dialectically linked to the definition of the scope of the EU competencies in relation to the member States, which retain residual competencies outside the areas devolved to the EU. Yet, the substance of European private law, particularly in the last decade, has been deeply influenced by the academic debate developed by European scholars. This process has contributed to the strengthening of a class of scholars that everywhere in Europe had gradually lost its social prestige starting from the age of national codifications.

The EU legal integration process develops along two tracks: on the one side, "hard law" and officially produced by the EU institutions; on the other side, "soft law", mainly related to the scholarly activity. What deserves attention is the role played by these two formants, and the products of their activity. Beginning with the academic side, since the 1980's scholars coming from different European countries have embarked on the study of national private laws of Europe with the aim of fostering legal harmonization. They gathered initially in research groups that were the result of the private initiative of academics, which had different working methods and tried to give substance each to their own idea of harmonization, but shared the opinion that harmonization had to be carried out through the creation of a set of European black letter rules.

The first enterprise of this kind has been the so-called "Lando Commission", set up in 1982 under the direction of Prof. Ole Lando of the University of Copenhagen to prepare a body of rules on general contract law and, partially, the general law of obligations: the Principles of European Contract Law (PECL). These Principles have reached a remarkable degree of success as an authoritative reference for the development of national legal systems in Europe. In the mind of their authors, the PECL were deemed to serve a variety of goals, such as being the initial basis for a European Civil Code, or a model law to be referred to by national legislators aiming to modernize their law; they could be also used as model both for future EU legislation and for judges and arbitrators in the adjudication of legal disputes, or as the governing law which could be chosen by the parties in private agreements, according to the applicable rules of international private law.

Later, the Study Group on a European Civil Code has been established in 1998 as the successor of the "Lando Commission", under the leadership of Prof. Christian von Bar of the University of Osnabrück. The name itself of this Group shows that its initial goal was to develop the idea expressed by the European Parliament to foster the creation of a European Civil Code. The comprehensiveness of the codification scheme led this undertaking to enlarge the scope of the research from the general law of obligations and contracts to most of private patrimonial law. Therefore, the work of the Study Group includes not only specific contracts, but also benevolent intervention in another's affairs, unjustified enrichment, tort law, and some matters relating to property law, such as transfer of movables, security rights over movables and trust. The overall aim is to elaborate a basic set of rules for Europe, composed of principles deriving from comparative research and distillation of the best rules by way of scholarly analysis. At the root of the project is the belief that European law can emerge only as *Professorenrecht*, a belief that is reflected in the method of the Study Group's work, developing a shared legal culture in Europe.

The codification idea has been adopted also by another academic group, the *Académie des Privatistes Européens*. Since 1992 this Group is working on a *Code Eu-*

ropéen des Contrats, under the coordination of Prof. Giuseppe Gandolfi of the University of Pavia. The *Académie* chooses the traditional concept of codification used in continental Europe, as a set of specific rules, intended to leave less scope to interpretative activity. The provision of the *Code Européen des Contrats* employ as a starting point the Italian Civil code, but are sometimes open to solutions coming from other civil law systems and the common law tradition. Also the official language of the text is peculiar: English, now working as a global language, is superseded by French.

Beside these major enterprises targeted at legislation, another aspect of the academic debate and activity on European private law has grown significantly, focusing on broader cultural aspects of this process. The starting point of many European scholars is that there is not yet sufficient comparative knowledge of legal systems to form a sufficiently solid ground for a legislative endeavour, particularly if intended as a codification in the continental meaning. In this vein, the primacy of legal research (at least in terms of timing) over legislative drafting should be acknowledged, the building of a European legal culture being a prerequisite for a European legislation aspiring to be uniformly applied. Without a truly shared common culture, no black letter rule approach could really serve the purpose of convergence of legal systems. Moreover, a significant number of scholars not only deems that a Civil code is not feasible at present, but also that it is not desirable, because legal pluralism enriches, rather than limit, European law. Though with different nuances among the various groups, this “cultural” perspective is advocated by several leading projects. The Common Core of European Private Law is a project that has been launched in Trento in 1995 under the direction of Prof. Busani (University of Trieste) and Mattei (University of Torino and Hastings, USA), which brings together nearly two hundred scholars coming from all the EU member States, Eastern European and Mediterranean countries, and from the US and Canada. It seeks to unearth the “common core” of European private law, i.e. what is already common among the different legal systems of Europe, subdividing the research area in the general categories of contracts, torts and property. The Society on European Contract Law (SECOLA) has been founded in 2001 by Prof. Bianca (university of Rome), Collins (London School of Economics) and Grundmann (Humboldt University of Berlin) in order to foster research and academic debate in the area of contract law; to this purpose it has also set up a journal, *European Review of Contract Law*. The Social justice group is a looser group of European scholars, whose work is often connected to some of the European comparative law projects, who advocate for a more socially-oriented development of European law. Finally, the “*Ius Commune Casebooks for the Common Law of Europe*”, whose project leader is Prof. van Gerven (University of Leuven), gathers a network of scholars working on a series of textbooks devoted to specific areas of European law, which are meant to be used in University teaching and as reference materials, thus fostering the development of a common European legal culture.

Simultaneously to the developments in legal doctrine, from the end of the 1980's also the European Community institutions started expressing their interest for the harmonization of private law as a means to achieve a single market among member States. Initially, at the end of the 1980's, the driving force was the European Parliament, which voted a number of Resolutions (which are politically, not legally, binding) advocating the start of a process which could lead to a codification of European private law. The Commission joined to the Parliament initiatives in a series of Communications between 2001 and 2004, and it finally decided to finance research activities for the elaboration of a Common Frame of Reference within the Sixth Framework Programme for Research and Technological Development. Under that call, the "Joint Network on European Private Law - Network of Excellence" (CoPECL) started working in 2005, the widest research network ever created in Europe. This group gathered two among the most prestigious academic research groups in Europe, the Study Group on a European Civil Code and the Research Group on the Existing EC Private Law ('Acquis Group'), together with the Project Group on a Restatement of European Insurance Contract Law and some other supporting groups. The task of the Network was to deliver to the EU Commission the "Common Principles of European Contract Law" (CoPECL), that would constitute a possible basis for a future Common Frame of Reference of European Union law. These Principles have been published in 2009, and their drafters called them the "academic" Draft (i.e. not final) Common Frame of Reference (DCFR), in order to distinguish the results from what was termed the "political" (and final) Common Frame of Reference (CFR), i.e. the tool – whatever its form, scope and purpose – that the EU institutions could possibly adopt in the future, as a consequence of a political decision. The DCFR is in all but name a codification-like effort. Other features aside, it is sufficient to look at its scope, which is as wide as that of many national codifications, covering contractual and non contractual obligations, specific contracts and some matters relating to property of movables.

Yet, shortly after its completion it has become apparent that the DCFR would not constitute the last step nor the final word in the EU legal integration process. Indeed, the EU Commission made clear that after many years of elaboration and after having spent a large amount of European research funds, the political agenda changed to a much more limited scope of intervention. In April 2010 the EU Commission set up the Expert Group on a Common Frame of Reference in the area of European Contract Law which was entrusted with the task of carrying out a Feasibility Study and making further progress on the development of a possible future European contract law instrument, starting from the DCFR. This Feasibility Study was published on 3 May 2011 and from it the EU Commission made a Proposal for a Regulation on a Common European Sales Law (COM/2011/635 final), which was presented on 11 October 2011. This proposal for an Optional Instrument contains rules applicable to cross-border transactions for the sale of

goods, for the supply of digital contents and for related services, if the parties to a contract agree to do so. From the wide scope of the DCFR, the path towards European legal integration in the field of private law has now led to a much more limited spectrum of transactions, making thus clear that in this phase most of the DCFR will not become European legislation.

10. INCONSISTENCIES IN EU LAW-MAKING ACTIVITY.

THE NEW DIRECTIVE ON CONSUMER RIGHTS

In the field of consumer contracts the Commission proposed in 2008 an important directive which would merge and reform some of the most important directives concerning consumer contracts (COM (2008) 614 fin.). The aim of the proposed directive was to eliminate some discrepancies and gaps in the existing directives and to update them, but the most significant feature was that, in line with the most recent position of the Commission, the proposal was based on a *maximum harmonization* model, which was considered as a necessary element in order to make the internal market work (see *supra*, n. 7). This choice was criticized in many quarters, and the discussion among the stakeholders, the member States and the EU institutions lasted for several years. Finally, a compromise solution was found in October 2011, when directive 2011/83/EU was approved. The directive, which must be transposed by December 2013 (but the new rules will apply from June 2014), employs an approach of *selective maximum harmonization*, which means that some elements are now fully harmonized, while for others member states can still keep more protective national rules. Yet, in spite of the compromise choice for selective (targeted) full harmonization, the fundamental structure is still formulated according to it: art. 4 states that “Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive”. Full harmonization concerns consumer information and the right of withdrawal in distance and off-premises contracts. These are clearly very important issues, yet the final result is far from the comprehensive application of maximum harmonization that was initially envisaged by the Commission. In the Commission’s view, full harmonization increases legal certainty, because both consumers and traders can rely on a single unified regulatory framework, thereby eliminating the barriers to the working of the international market stemming from the fragmentation of legal rules. Yet, it must be remembered that all aspects that are not specifically addressed by the directive remains under national law, so harmonized rules, even those which are fully harmonized, must still be inserted in a legal framework concerning the rules applicable to contracts and obligations (such as validity, conclusion, remedies, representation, etc.) which is fragmented according to national lines.

The structure of the new directive reveals a striking lack of coordination with the DCFR, which is not even mentioned in the document, and whose solutions have not been employed in the new rules. Since the establishment of the CoPECL network and the drafting of the DCFR was officially motivated by the need to provide the EU institutions with a set of principles, definition and solutions (the “frame of reference”), a task which involved considerable work and money, this result is hard to explain and indeed puzzling.

Also in relation to the proposal on an Optional instrument for European sales law, there is a significant difference: the Directive achieves maximum harmonization only for some aspects, namely pre-contractual information and right of withdrawal, while important elements of consumer protection remain under a minimum harmonization standard, which means that the states can still keep more protective rules. On the contrary, the idea behind the Optional instrument is that the choice is only on the contractual parties: once they have opted for the European regime, the level of consumer protection is uniform and cannot be derogated by national law, which implies a sort of “*optional full harmonization*” decision. As a consequence, ensuring that the consumer makes an informed choice in opting for the European sales law becomes crucial, since it may imply renouncing to a higher level of protection guaranteed by the otherwise applicable national law²².

11. THE EUROPEAN LAW INSTITUTE

The incoherencies and contradictions that characterize European legal integration are important materials for the scholarly discussion. It is indeed the scholarly circuit which is best equipped to analyze these problems and suggest solutions. Taking into consideration that European private law, particularly in the last decade, has been deeply influenced by the academic debate developed by European scholars, which in recent times have been directly involved in the drafting of the materials from which the EU institutions have derived new legal instruments, it is hardly surprising that scholars have advocated the creation of the *European Law Institute (ELI)*²³ in June 2011, as an independent non-governmental organization aiming at technical and cultural guidance of European legal development. For the time being, membership to ELI covers, beside distinguished legal scholars, also members of the legal profession coming from different EU member states. The ELI aims “to improve the quality of European law, understood in the broadest sense. [...] it seeks to initiate, conduct and facilitate research, to make recommendations, and to provide practical guidance in the field of European legal develop-

22 ANTONIOLLI, *The evolution of European contract law: a brand new code, a handy toolbox or a jack-in-the-box?*, in Reifner, Nogler (eds), *Social Long-Term Contracts in European Law*, EuSoCo, forthcoming 2012.

23 See: <http://www.europeanlawinstitute.eu/>.

ment” [...] ; it “will study and stimulate European legal development in a global context”. “Building on the wealth of diverse legal traditions, its mission is [...] the enhancement of European legal integration”²⁴.

It is not difficult to see behind this initiative the model of the American Law Institute. Yet, it is difficult to predict today whether the ELI will be able to achieve a role in European legal integration comparable to that of the ALI in the U.S. Moreover, both institutions are basically in the hands of law professors (although the ALI is also strongly influenced by practitioners), but one must bear into mind the different degree of unity of lawyers in the U.S.A. and in Europe. European lawyers are much more divided among themselves than their U.S. counterparts (language and cultural difference are deeply rooted in European lawyers’ mentality), therefore they are a much less strong and cohesive class of “stakeholders”, and much less influential in forging the EU legal development according to their visions. These are the main reasons why the resemblance between these institutions can only be superficial.

ELI activities are divided in *Projects*, *Instruments* and *Statements*.

Projects. The ELI governance system decides what projects to carry out. Any project must be at the service of the European citizen by improving the law or facilitating its application; it has to strive for practical impact through rules, comments on rules or guidelines; it must be produced through the cooperation between jurists working in academia and legal practice; and take a genuinely pan-European perspective, as well as taking into consideration the achievements of the various legal cultures.

Instruments. Projects carried out under the auspices of the ELI will often take the form of medium- to long-term projects, the added value of which is to provide, through the independence, excellence and diversity of the project teams and the on-going critical guidance by a very broad constituency of jurists, well-founded solutions that are supported by the European legal community. ELI will appoint one or more reporters, either on its own initiative or after having carried out a call for tender. It will normally appoint advisors or consultants and establish a Members Consultative Committee.

Statements. Projects carried out under the auspices of the ELI may also take the form of short-term reactions to current developments, the added value of which is to coordinate, and so far as possible to reconcile, the views taken by various European constituencies. If a quick reaction of the ELI is required, the ELI will appoint a project team, as well as advisors or consultants²⁵.

The establishment of this institution is relevant because it can be seen as a potential tool in the hands of the European law professors and practitioners in

24 See: <http://www.europeanlawinstitute.eu> and its *Manifesto* available there.

25 So far only two Statements have been published, the S-1-2012 “Statement on Case Overload at the European Court of Human Rights” of July 2012 and the S-2-2012 “Statement on the European Commission’s Proposal for a Common European Sales Law” of September 2012.

order to strengthen their role as leading actors of European legal development. It is a role that they had gradually lost everywhere in Europe, after the age of national codifications. Yet, the relationship between scholars and the bureaucratic technocracy in the EU legal process is complex, and far from linear: in this situation legal doctrine is clearly a very important player, but its role in the creation of legal rules is variable and sometimes ambiguous.

12. LEGAL INTEGRATION IN THE U.S.A. AND IN THE EU: SIMILARITIES AND DIFFERENCES

This short overview enables us to sketch some comparative observations on legal integration in the two institutional settings of the EU and U.S. Despite the significant differences existing between them (a federal nation vs a supra-national *sui generis* organization like the EU), in both private and commercial law is formally a competence of the states, and this pushes towards legal fragmentation. Yet, in both cases the *mise en oeuvre* of the constitutional allocation of competences in private and commercial law has led to a substantial level of convergence. Of course, the ways used to reach this result are significantly different in the U.S.A. and in the EU, but this does not diminish the relevance of the outcome. If the institutional setting certainly directs the main lines of legal integration in any system, their analysis alone is not sufficient to explain the complexity of the phenomenon. The impact of cultural factors, such as legal language and mentality, the characteristics of legal education, the relevance of law reform, are only some of the most important cultural elements that may determine the success or failure of legal integration. It is exactly in the cultural dimension that the two experiences of legal integration that are most heterogeneous.

We have shown that the existence of a shared common and legal language in the U.S., coupled with the development of a unique legal education system, immensely facilitated the mutual understanding among lawyers of the different states. Thereby a common legal mentality, based on a common approach to the sources of law and on a strong homogeneity of lawyers (scholars, judges and practitioners), leading to the perception by U.S. lawyers of a common private and commercial law. The historical impact of cultural factors in the European region has been different. There, the cultural factors before the creation of the EU were dividing the national legal traditions: different (legal) languages, different legal education systems, a wider variety in the spectrum of the sources of the law and – above all – in their approach made the legal integration enterprise more difficult. The institutional impetus to the start in this direction has been the EC/EU internal market policy. The new institutional, supra-nation setting created in the 1950s pushed towards legal integration of private and commercial laws, because it conceived of legal diversity among member States' law as an obstacle to the economic and political goals of the EC/EU. The new institutional momentum

represented by the EC/EU for European legal integration has, in its turn, fostered and reinforced also the cultural factors that may enhance harmonization of private law in Europe. It is the case of scholarly activity, which thanks to the endorsement by the EU is increasingly sensitive to the “Europeanization” of private law and focused on a variety of “restatement-like” projects. Slowly, but steadily, European private law is emerging as a new discipline and gaining momentum in some of the more advanced university curricula throughout Europe.

This is the general context in which institutional and cultural factors operate in the two legal integration experiences, and a closer look at the technical means that have been used in the U.S. and in Europe in order to support legal harmonization reveals some differences that must be underlined and that may prove useful for further analysis. One of these is the different meaning and use of codifications and restatements of private law in the two analyzed areas. In the U.S., Restatements have been a powerful factor of unification: they clearly aim at stating “the law as it is”, and not “the law as it ought to be” (and this holds true despite of the difficulty of a clear-cut delimitation between the two approaches). For this reason, and also on the basis of the prestige of their drafters, Restatements have gained the role of *de facto* authority among the sources of law, thereby producing legal integration. Differently, in Europe the most relevant Restatement-like work, i.e. the DCFR of 2009, has adopted both the “common rules” approach (i.e. a selection of the rules shared by the member States’ laws) and the “best rule” approach (i.e. the formulation of a new rule by the drafter, regarded by them as the rule better fitting European needs). This has added to the ambiguity of the results of the DCFR with regard to its suitability to become “hard law”. On the one hand, it is apparent that if a “Restatement” or a “Common Frame of Reference” does not reflect the commonalities existing in the region, it is not apt to gain a sufficient degree of acceptance *vis-à-vis* its addressee. On the other hand, if this instrument should be designed as model for law reform, then the rules selected on the basis merely of their existence in the EU states would not necessarily guarantee the selection of the “best” rule. This is why it has been voiced that Europeans should learn for the Americans that a clearer distinction of legal integration activities between initiatives aiming to state “the law how it is” and those aiming to state “the law how it should be” would be beneficial to EU legal integration. This holds true especially for the future ELI activities²⁶.

As for the relationship between codification and legal integration in Europe, it can be pointed out that codes have never been a successful means to reach legal integration; rather, they performed the function of crystallizing the legal diversity that had been emphasized by the Nineteenth century’s legal ideology.

Another diversity in legal integration in the U.S. and the EU emerges if we consider the degree of involvement of scholars and other legal professionals in

26 SCHULTE-NÖLKE, ‘Restatements’ in Europe and in the US: Some Comparative Lessons, in Brownsword, Micklitz, Niglia and Weatherill (eds), *The Foundation of European Private Law*, Hart, Oxford, 2011, 11 ff.

these activities. In the U.S., practitioners have taken the leadership together with law professors. In Europe it is the scholars who are currently playing a major role in legal harmonization. Yet, a more significant involvement of the legal professions and of other stakeholders would be advisable (and could be fostered in the newly created ELI), especially given the lower degree of homogeneity existing among European scholars, and in general in the legal professions, if compared to that of their U.S. colleagues.

In conclusion, in both Europe and U.S. there is a general assumption that legal integration initiatives are part of a coherent plan to support economic transactions with a legal structure that encourages commercial transactions and reduces costs. The reasons for these changes is economic, but the engine driving legal integration is essentially political and cultural, and therefore is strictly linked to the institutional setting in which legal integration operates. Moreover, it cannot be overlooked that in both the U.S. and the EU systems it is nowadays the globalized financial and business practice that really drives legal integration, moving beyond the variety of institutional settings and cultures. Especially the financial interconnection existing among the worlds' economies – recently visible in the global financial crisis – makes it clear that the new frontier of Western legal integration of private and commercial law cannot be confined to the classic regional dimensions of the U.S. and the EU, but urgently calls for a supra-regional dimension, able to promote regulations that cross the national boundaries between West and East, North and South of the world.

SELECTED BIBLIOGRAPHY

- L. ANTONIOLLI, F. FIORENTINI (eds), *A Factual Assessment of the Common Frame of Reference*, Sellier, Munich, 2011
- G. BENACCHIO, *Diritto privato della Unione Europea*, 5th edn, Cedam, Padova, 2010
- M. J. BONELL, *Comparazione giuridica e uniformazione del diritto*, in Alpa et alii, *Diritto privato comparato*, 3rd edn, Laterza, Roma-Bari, 2004, 63 ff.
- M. BUSSANI, *Il diritto dell'Occidente. Geopolitica delle regole globali*, Einaudi, Torino, 2010
- P. CRAIG, G. DE BURCA, *EU Law: Texts, Cases and Materials*, 5th edn, OUP, Oxford, 2011
- S. FERRERI, *Unificazione, Uniformazione*, in *Dig. IV, Disc. Priv.*, Sez. civ., XIX, Utet, Torino, 1999, 504 ff.
- J. GORDLEY, "Common law" v. "Civil law". *Una distinzione che va scomparendo?*, in Cendon (cur.), *Scritti in onore di Rodolfo Sacco: la comparazione giuridica alle soglie del 3° millennio*, I, Giuffrè, Milano, 1994, 559 ff.
- U. MATTEI, *Il modello di common law*, 3rd edn, Giappichelli, Torino, 2010
- J. H. MERRYMAN, *On the Convergence (and the Divergence) of the Civil Law and the Common Law* (1987) 17 *Stanford J of Int L* 357 ff.
- H.-W. MICKLITZ (ed.), *The Many Concepts of Social Justice in European Private Law*, Elgar, Cheltenham, 2011
- A. ROSETT, *Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law* (1992) *XL Am. J. Comp. L.* 683 ff.
- H. RÖSSLER, *Interpretation of EU Law*, in Basedow, Hopt, Zimmermann (eds), *Max Planck Encyclopaedia of European Private Law*, II, OUP, Oxford, 2012, 979 ff.
- R. SACCO, *Antropologia giuridica*, Il Mulino, Bologna, 2007
- R. SACCO, *Introduzione al diritto comparato*, in *Trattato di diritto comparato diretto da Sacco*, Utet, Torino, 1992
- R. SACCO, *Legal Formants: A Dynamic Approach to Comparative Law*; *Inst. I* (1991) 39(1) *Am. J. Comp. L.*, 1 ff.; *Inst. II* (1991) 39(2) *Am. J. Comp. L.*, 343 ff.
- H. SCHULTE-NÖLKE, 'Restatements' in Europe and in the US: Some Comparative Lessons, in Brownsword, Micklitz, Niglia and Weatherill (eds), *The Foundation of European Private Law*, Hart, Oxford, 2011, 11 ff.
- STUDY GROUP ON A EUROPEAN CIVIL CODE/RESEARCH GROUP ON EC PRIVATE LAW (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference* (Full Edition), Sellier, Munich, 2009
- A. T. VON MEHREN, *The U.S. legal system: between the common law and the civil law legal traditions*, Centro studi e ricerche di diritto comparato e straniero, Roma, 2001
- T. WILHELMSSON, *Varieties of Welfarism in European Contract Law*, (2004) 10 *Eur. L. J.* 712 ff.