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"A EUROPEAN CIVIL CODE IN ALL BUT NAME": DISCUSSING THE NATURE AND PURPOSES OF THE DRAFT COMMON FRAME OF REFERENCE

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"*What's in a name? That which we call a rose*
By another name would smell as sweet."
(Romeo and Juliet, II, ii, 1–2)

In February 2008, an Interim Outline Edition of the Draft Common Frame of Reference (DCFR) for European private law was published, and in February 2009 the definitive Outline Edition.[1] By the end of 2009, the full work (i.e. model rules, comments and comparative notes) was available in print, consisting of six volumes comprising about 6,100 pages. The DCFR project was launched and sponsored by the Commission of the European Union. Ever since the enigmatic term "Common Frame of Reference" (CFR) was coined in a Communication from 2003, commentators have been trying to figure out what it might be intended to mean. The Commission itself has repeatedly stated that the CFR is supposed to be a "tool box" for future legislation in the field of *contract law*. But the CFR might also conceivably serve as an "optional instrument", i.e. a set of rules which parties to a transnational contract can agree upon to govern their transaction. Yet, the main part of the DCFR constitutes a fully-fledged draft code of *patrimonial* law at large. For its scope reaches far beyond (general) contract law. It has a book with rules on obligations in general, and it comprises specific types of contract (including mandate and donation), non-contractual obligations (including "benevolent intervention in another's affairs", i.e. *negotiorum gestio*), a property law regime concerning movables as well as a book with no less than 116 articles on trust law.

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[1] Christian von Bar, E. Clive, Hans Schulte-Nölke *et al.* (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference. Interim Outline Edition (DCFR)* (Munich 2008); Christian von Bar, Eric Clive, Hans Schulte-Nölke *et al.* (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference Outline Edition (DCFR)* (Munich 2009). On the content and origin of these documents, see Reinhard Zimmermann, "The Present State of European Private Law" (2009) 57 American Journal of Comparative Law 479 ff.; *idem*, "Common Frame of Reference", in Jürgen Basedow, Klaus J. Hopt and Reinhard Zimmermann (eds.), *Handwörterbuch des Europäischen Privatrechts* (Tübingen 2009), pp. 276 ff.

The DCFR, obviously, is a comprehensive body of rules systematically covering a central field of private law and intended to be applicable to transnational disputes.[2] Nonetheless, in two recent publications the coordinator of the network responsible for compiling the DCFR, Hans Schulte-Nölke, has argued that those who refer to the DCFR as a draft code are labouring under a "popular mistake".[3] The DCFR, he writes, is intended to be nothing more than "a point of reference for a European discussion concerning contract law and patrimonial law which, above all, attempts to draw a picture of the existing legal systems in all their beauty and diversity, nothing more and nothing less",[4] an "academic project producing insights".[5] It is designed "to increase our knowledge in the field of comparative law" rather than to be a political document shaping the future course of private law in Europe.[6] These statements are supposed to counter the criticism that was raised against the Outline Edition[7] and, at the same time, to determine the parameters of a "fruitful discussion".[8] They are, however, surprising in view of the fact that the working group mainly responsible for the DCFR is operating under the label "Study Group on a European Civil Code" (Study Group ECC). Christian von Bar, the chairman and founder of the Study Group ECC, has always advocated a codification of European patrimonial law in its entirety,[9] and he has

[2] "… a kind of 'basic law' in the field of patrimonial law for the States of the European Union": Christian von Bar, "Die Study Group on a European Civil Code", in Peter Gottwald (ed.), *Festschrift für Dieter Henrich* (Bielefeld 2000), p. 3 (referring to the working programme of the Study Group on a European Civil Code, founded by von Bar, that has decisively shaped the DCFR).

[3] Hans Schulte-Nölke, "Die Acquis Principles (ACQP) und der Gemeinsame Referenzrahmen: Zu den Voraussetzungen einer ertragreichen Diskussion", in Reiner Schulze, Christian von Bar and Hans Schulte-Nölke (eds.), *Der akademische Entwurf für einen Gemeinsamen Referenzrahmen: Kontroversen und Perspektiven* (Tübingen 2008), pp. 47 ff., 67 f.; *idem*, "Arbeiten an einem europäischen Vertragsrecht: Fakten und populäre Irrtümer" [2009] NJW 2161 ff. Cf. also, in this context, Hans Schulte-Nölke, "Ziele und Arbeitsweisen von Study Group und Acquis Group bei der Vorbereitung des DCFR", in Martin Schmidt-Kessel (ed.), *Der gemeinsame Referenzrahmen: Entstehung, Inhalte, Anwendung* (Munich 2009), pp. 9 ff.; as well as *idem*, "Restatement – nicht Kodifikation: Arbeiten am 'Gemeinsamen Referenzrahmen' für ein Europäisches Vertragsrecht", in Oliver Remien (ed.), *Schuldrechtsmodernisierung und Europäisches Vertragsrecht* (Tübingen 2008), pp. 25 ff. See also, along similar lines, Hugh Beale, "The Nature and Purposes of the Common Frame of Reference" (2008) 14 Juridica International 10, 11.

[4] Schulte-Nölke, "Die Acquis Principles" (note 3 above), pp. 67 f.

[5] Schulte-Nölke, "Ziele und Arbeitsweisen" (note 3 above), p. 14.

[6] Schulte-Nölke, [2009] NJW 2161.

[7] Reiner Schulze, "The Academic Draft of the CFR and the EC Contract Law", in *idem* (ed.), *Common Frame of Reference and Existing EC Contract Law* (Munich 2008), pp. 3, 13 ff.; *idem* and Thomas Wilhelmsson, "From the Draft Common Frame of Reference towards European Contract Law Rules" [2008] European Review of Contract Law (E.R.C.L.) 154 ff.; Stefan Grundmann, "The Structure of the DCFR – Which Approach for Today's Contract Law?" [2008] E.R.C.L. 225 ff.; Horst Eidenmüller, Florian Faust, Christoph Grigoleit, Nils Jansen, Gerhard Wagner and Reinhard Zimmermann, "The Common Frame of Reference for European Private Law – Policy Choices and Codification Problems" (2008) 28 O.J.L.S. 659 ff.

[8] Schulte-Nölke, "Die Acquis Principles" (note 3 above), p. 47.

[9] Cf., e.g., Christian von Bar, "Die Study Group" (note 2 above), pp. 1 ff.; *idem*, Ole Lando and Stephen Swann, "Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code" (2002) 10 European Review of Private Law (E.R.P.L.) 183, paras. [87] ff.

never renounced that ambition.[10] A Continental (as well as an English!) lawyer might also, incidentally, find it somewhat difficult to identify the 116 articles on "Trusts" contained in the DCFR as a reflection of the existing European legal systems "in all their beauty and diversity".

Still, however, the questions concerning the character of the DCFR as a political document and as a draft codification are important and deserve further discussion. That is all the more true in view of the fact that Schulte-Nölke's opinion is not even shared by others involved in the preparation of the DCFR. Martijn Hesselink, for example, one of the leaders of the Working Team responsible for the rules on commercial agency, franchise and distributorship, and a member of the Coordinating Group of the Study Group ECC, has recently emphasized (with some satisfaction and invoking the views of a great variety of other commentators): "In other words it [the DCFR] is a European civil code in all but name."[11]

I. Restatement?

In his desire to provide a more accurate explanation of the aims of the DCFR Schulte-Nölke refers to the model of the American Restatements.[12] Yet, considering Schulte-Nölke's emphasis on the purely academic nature of the project, this reference is also surprising. For the Restatements were conceived not as purely academic but as genuinely political documents. The American Law Institute is not, and has never been, an organization of a purely scholarly character. It is very widely regarded as a "quasi-legislator".[13] From its inception it brought together the elite of the American legal profession – judges of the Supreme Court, leading practitioners and public officials and also,

[10] Christian von Bar, "Die Funktionen des Gemeinsamen Referenzrahmens aus der Sicht der Verfasser des wissenschaftlichen Entwurfs", in Schmidt-Kessel (ed.), *Der gemeinsame Referenzrahmen* (note 3 above), pp. 23, 28 f.; *idem*, "A Common Frame of Reference for European Private Law – Academic Efforts and Political Realities" (2008) 23 Tulane European and Civil Law Forum 37, 39 f.

[11] Martijn Hesselink, "The Common Frame of Reference as a Source of European Private Law" (2009) 83 Tulane L.R. 919, 923; with a long footnote containing references supporting that view. See also *idem, CFR and Social Justice* (2008), p. 11, also with a host of further references. For Hesselink, the choice of the term "Common Frame of Reference" is a "clever trick" designed to conceal the true nature of the project: "The European Commission's Action Plan: Towards a More Coherent European Contract Law?" (2004) 12 E.R.P.L. 397, 402. (That fact has also been noted by other observers; see, for example, Gerhard Wagner, "Die soziale Frage und der Gemeinsame Referenzrahmen" (2007) 15 Zeitschrift für Europäisches Privatrecht (ZEuP) 180, 182 f.); Simon Whittaker, "A Framework of Principle for European Contract Law?" (2009) 125 L.Q.R. 616, 623 ff., 645. Cf. also von Bar, (2008) 23 Tulane European and Civil Law Forum 40: "There is … no reason against also calling the Common Frame of Reference a 'Code'" (though adding that to his mind the question is practically irrelevant).

[12] Schulte-Nölke, "Restatement – nicht Kodifikation" (note 3 above), pp. 26 ff.; *idem*, [2009] NJW 2162; cf. also von Bar, "Funktionen" (note 10 above), p. 25.

[13] Joachim Zekoll, "Das American Law Institute – ein Vorbild für Europa?", in Reinhard Zimmermann (ed.), *Nichtstaatliches Privatrecht: Geltung und Genese* (Tübingen 2008), pp. 101, 117 with further references concerning the American discussion.

of course, well-known professors – in their entirety. The Restatements are not, of course, acts of legislation. But for the founding fathers of the Institute it was a core aim that they were to be attributed such authority "as is now accorded a prior decision of the highest court of the jurisdiction".[14]

For common law lawyers that was certainly something more than merely a contribution to an academic discussion. The Restatement project was about establishing authoritative texts contributing to legal certainty; and that means that it was about rule-making. At the beginning of the 20th century the common law was generally seen to be in a desolate condition.[15] As a result of countless contradictory precedents and laws it had become completely unclear and confusing, even for professional lawyers. About 50% of all decisions from courts of first instance were reversed in the second instance.[16] None the less, several attempts to codify the law had been abortive. In that situation the Restatements were supposed to provide a remedy[17] and it may be said that they have in fact served their purpose rather well. For many areas of the law the Restatements are today generally regarded as authoritative reference texts which provide the basis for law school courses and for doctrinal discussion, and which are applied by the courts as if they had the force of statutes.[18] Is this what is meant when the Restatements are referred to as a model for the DCFR? Leading members of the Study Group ECC do indeed take that view.[19] But does it then not have to be acknowledged that we are dealing here with an eminently political

[14] "Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute…" (1923) 1 Proceedings of the American Law Institute 1 ff., 25, cf. also p. 29.

[15] "Report of the Committee Proposing the Establishment of an American Law Institute" (note 14 above), pp. 6 ff., 66 ff., 69 ff., 77 f. Further references in Ralf Michaels, "Restatements", in Basedow, Hopt and Zimmermann, *Handwörterbuch des Europäischen Privatrechts* (note 1 above), pp. 1295 ff.; Nils Jansen, *The Making of Legal Authority: Non-legislative Codifications in Historical and Comparative Perspective* (Oxford 2010), pp. 50 ff.

[16] American Bar Association, "Report of the Special Committee Appointed to Consider and Report Whether the Present Delay and Uncertainty in Judicial Administration Can be Lessened, and If So, By What Means" (1885) 8 Annual Report of the American Bar Association 323, 329 ff.

[17] Benjamin Cardozo, *The Growth of the Law* (New Haven 1924), p. 9. For more recent literature, see Lawrence M. Friedman, *A History of American Law*, 3rd edition (reprinted New York 2007), p. 304; Arthur T. von Mehren, "Some Reflections on Codification and Case Law in the Twenty-First Century" (1998) 31 University of California at Davis L.R. 659, 668 f.; Nils Jansen and Ralf Michaels, "Private Law and the State: Comparative Perceptions and Historical Observations", (2007) 71 Rabels Zeitschrift für ausländisches und internationales Privatrecht 345, 387 f.

[18] See Melvin A. Eisenberg, "The Concept of National Law and the Rule of Recognition" (2002) 29 Florida State University L.R. 1229, 1251 ff.; Zekoll, "Das American Law Institute" (note 13 above), pp. 115 ff.; further, e.g., Arthur T. von Mehren, *Law in the United States: A General and Comparative View* (Deventer 1988), pp. 21 f.; John P. Frank, "Law Institute 1923–1998" (1998) 26 Hofstra L.R. 615, 638 ff.; Max Rheinstein, "Leader Groups in American Law" (1971) 38 University of Chicago L.R. 687, 692 f.; David V. Snyder, "Private Lawmaking" (2003) 64 Ohio State L.J. 371, 381 f.

[19] Hesselink, (2009) 83 Tulane L.R. 925, n. 23; von Bar, Lando and Swann, (2002) 10 E.R.P.L. 183, paras. [61] ff.

document and not merely with a contribution to an academic discussion?

II. Restating the Law?

Whoever refers to the Restatements as a model for European legal scholarship may also, however, have something quite different in mind. For he may want to allude to the method pursued by the draftsmen of the Restatements, i.e. to their essentially descriptive approach.[20] It can, of course, be an entirely sensible scholarly endeavour to lay down the law in the form of a body of specific rules. The well-known English scholar Albert V. Dicey,[21] for example, had done that with regard to the common law of procedure and conflicts of law and he had, in that respect, inspired the method of the Restatements. Dicey, however, did not have in mind a common set of rules for different legal systems but a rational reconstruction of the English common law; and by adding a question-mark he always indicated doubts as to a rule drafted by him. His concern was indeed a conscientious presentation of the law in force.

In Europe, according to Schulte-Nölke, the Restatements are supposed to provide "a method to establish commonalities against the background of diversity of laws".[22] Qualifications, as we find them in Dicey's work, would then appear to be necessary to a much greater extent. Yet, in the DCFR one looks for them in vain. The same holds true for the American Restatements. But then, the American Restatements were not, initially, intended to serve either a scholarly or a merely descriptive purpose. That is why their draftsmen had deliberately refrained from adding arguments and comparative notes: "It seemed that the Restatement would be more likely to achieve an authority of its own … if exact rules were clearly stated without argument."[23] The Notes were included only in the Restatements' second series. They merely reflect the view of the reporter and give references; they are not supposed to provide a comprehensive comparative overview.

Nonetheless, of course, it would be interesting to find out whether, and to what extent, it may be possible to formulate a set of rules which are recognized, at least in principle, everywhere in Europe. That is what

[20] See Schulte-Nölke, [2009] NJW 2163.

[21] Albert V. Dicey, *A Treatise on the Rules for the Selection of the Parties to an Action* (London 1870); *idem*, *The Law of Domicile as a Branch of the Law of England in the Form of Rules* (London 1879). The immediate model was, apparently, Albert V. Dicey, *A Digest of the Law of England with References to the Conflict of Laws*, 2nd edition (London 1908).

[22] Schulte-Nölke, "Restatement – nicht Kodifikation" (note 3 above), p. 26.

[23] Samuel Williston, "The Restatement of Contracts: Statement by Samuel Williston" (1932) 18 American Bar Association Journal 775, 777. Williston was the "reporter" (i.e. the author) of the first Restatement on Contracts. For the same reason, incidentally, the UNIDROIT Principles of International Commercial Contracts do without comparative notes and legal reasoning supporting the model rules.

the Lando-Commission attempted to do when it set out to draft its Principles of European Contract Law (PECL),[24] and in contract law that approach does not appear to be implausible. For the rules of general contract law and of the law of sale do indeed display a considerable degree of commonality, resulting, *inter alia*, from the fact that the European legal systems are based on the same historical and philosophical foundations,[25] that the stock of fundamental concepts and common evaluations has not been deeply affected by the era of legal nationalism, and that there has always been an exchange of ideas across national borders. In addition, it must be taken into account that these have been the fields on which scholarly endeavours towards legal harmonization in the first half of the 20th century have focused. The foundations for CISG (and thus also for the European Consumer Sales Directive) have, as is well-known, been laid by Ernst Rabel with his historical and comparative monograph *Das Recht des Warenkaufs* (1936/1958).[26]

Other fields of private law (even closely related ones) are not marked by a similar degree of common ground:[27] a fact that cannot be undone by simply conjuring up a set of rules. The point hardly needs to be emphasized with regard to the 116 rules on trust law. As far as the rules on "benevolent intervention in another's affairs" (*negotiorum gestio*) are concerned, it has been argued elsewhere that they do not reflect the law in any individual legal system in Europe.[28] But the same is also true as far as unjustified enrichment and "non-contractual liability arising out of damage caused to another" (i.e. delict/tort and strict liability) are concerned. For the latter field, the competing European Group on Tort Law, after having drafted their own Principles of European Tort Law, has aptly stated: "The Principles are not a restatement of the law of torts in Europe. After all and despite many similarities, there are too many differences among the respective national legal systems. So there is not yet a solid basis for "restatement."[29] The same can also be said for the law relating to many specific

[24] Ole Lando and Hugh Beale (eds.), *Principles of European Contract Law, Parts I and II* (The Hague 2000); Ole Lando, André Prüm, Eric Clive and Reinhard Zimmermann (eds.), *Principles of European Contract Law, Part III* (The Hague 2003). On the PECL, see Reinhard Zimmermann, "Principles of European Contract Law", in Basedow, Hopt and Zimmermann, *Handwörterbuch des Europäischen Privatrechts* (note 1 above), pp. 1177 ff.

[25] See James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford 1991).

[26] For an overview of sales law, see Peter Huber, "Comparative Sales Law", in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford 2008), pp. 937 ff.; on general contract law, see E. Allan Farnsworth, "Comparative Contract Law", *loc.cit.*, pp. 899 ff.

[27] Nils Jansen, *Binnenmarkt, Privatrecht und Europäische Identität* (Tübingen 2004), pp. 23 ff.

[28] Nils Jansen, "*Negotiorum Gestio* and *Benevolent Intervention in Another's Affairs*: *Principles of European Law*?" (2007) 15 ZEuP 958 ff.; Lukas Rademacher, "Die Geschäftsführung ohne Auftrag im europäischen Privatrecht" [2008] JURA 92 ff.

[29] European Group on Tort Law, Jaap Spier, "General Introduction", in *Principles of European Tort Law: Text and Commentary* (Vienna 2005), para. [31]. The same applies to the law of unjustified

types of contract, e.g. service contracts. Whether the approach adopted by the DCFR (i.e. to replace the traditional taxonomy by a typology of "basic activities") may be hailed as "just about a stroke of genius"[30] or be assessed as completely misguided,[31] it is at any rate completely novel.[32] And concerning lease of goods Kåre Lilleholt, the chairman of the respective Working Team of the Study Group EEC, has clearly stated: "… the principles are not some sort of restatement of European lease law."[33] Others who have participated in the DCFR-project have expressed similar views.[34]

All in all, therefore, it may not be wrong to surmise that the idea of a "restatement" of European law, plausible for general contract law and for the law of sale, is being strategically abused, in the present context, in order to provide the DCFR with a semblance of what is acceptable, or even accepted, throughout Europe. At any rate, it has to be asked what the drafters of the DCFR mean when they refer to that document as a "restatement". It cannot be the method of the (American) Restatements.

III. Scholarly Aims?

But possibly one should abandon any such attempt to find one's bearing in the ambiguous concept of a "restatement" and rather ask more directly what the drafters of the DCFR have set out to achieve. According to Hans Schulte-Nölke, the DCFR is to be a foundational work which is "to unearth, to an extent hitherto unprecedented, knowledge about the commonalities of, and differences between, the private laws in Europe."[35] The DCFR, he claims, constitutes

enrichment which is full of neologisms and startling inventions and which does not follow any of the established, national taxonomies: see Christiane Wendehorst, "Ungerechtfertigte Bereicherung", in Schulze, von Bar and Schulte-Nölke (eds.), *Der akademische Entwurf für einen Gemeinsamen Referenzrahmen* (note 3 above), pp. 215 ff.; Jan M. Smits, "A European Law of Unjustified Enrichment?", in Antoni Vaquer (ed.), *European Private Law Beyond the Common Frame of Reference* (Groningen 2008), pp. 151 ff. According to Swann, one of the architects of the DCFR's law of unjustified enrichment, its drafting is bound to create the impression "of constructing a castle in the air": "The Structure of Liability for Unjustified Enrichment: First Proposals of the Study Group on a European Civil Code", in Reinhard Zimmermann (ed.), *Grundstrukturen eines Europäischen Bereicherungsrechts* (Tübingen 2005), pp. 157, 158.

[30] Christiane Wendehorst, "Das Vertragsrecht der Dienstleistungen im deutschen und künftigen europäischen Recht" (2006) 206 Archiv für die civilistische Praxis (AcP) 205, 290 ff., 292.

[31] Hannes Unberath, "Der Dienstleistungsvertrag im Entwurf des Gemeinsamen Referenzrahmens" (2008) 16 ZEuP 745, 759 ff., 774.

[32] Wendehorst, (2006) 206 AcP 205, 290 ff.; Unberath, (2008) 16 ZEuP 759 ff.

[33] Kåre Lilleholt, "A European Law of Lease?", in Vaquer (ed.), *European Private Law* (note 29 above), pp. 55, 59.

[34] von Bar, Lando and Swann, (2002) 10 E.R.P.L. 183, para. [62]: "… a formulation of shared law in terms of a mere reflection of the existing rules is not feasible in view of the existing multitude of systems of private law in Europe. … a mere description of deviations from the existing national legal systems is insufficient. What is called for is the composition of uniform basic rules ('Principles'), …. which overcome the existing substantive differences".

[35] Schulte-Nölke, [2009] NJW 2161; cf. also Beale, (2008) 14 Juridica International 13 f.

"a means of presentation" which enables its drafters to draw "much more exactly than has thus far been possible, a map of the European legal systems."[36] That is why the really important part of the DCFR is the comparative notes rather than the model rules.[37]

The attractive metaphor of a map of the legal landscape has an old tradition in comparative scholarship. Thus far, however, it has not been associated with sets of model rules such as those contained in the PECL, or the DCFR, but with methodically antithetical projects such as the ambitious *Common Core* research of the so-called Trento-Group.[38] There we find comparative studies, focusing on individual problem situations and based on detailed country reports. Their authors seek to establish how courts in the different European countries would decide hypothetical cases. The Trento volumes, therefore, aim at a comparative exposition of the law, not at the drafting of rules that may be more or less innovative. Indeed, the metaphor of a map of the law was used by the Trento-Group in order to distance their project from the "city planning model" of the Lando-Commission.[39] Christian von Bar and Ole Lando appear to have been quite happy with that distinction.[40]

And indeed, whoever was to use the PECL as a legal map of European private law might not arrive at his destination. That applies not only to Germany, where the comparative notes are out of date because they reflect the law before the modernization of the law of obligations in 2002. For other countries, too, there are gaps and inaccuracies. To establish a correct documentation of just about all fields of patrimonial law in all 27 member states of the European Union, and to keep that documentation up to date, would be a task with which even large international groups of scholars could hardly cope. (The Lando-Commission, in the end, counted only 23 members). The PECL do not claim to provide such a map but only a rough survey of basic principles recognized in the legal systems of the EU member states. The draftsmen of the PECL normally openly disclose where one of their rules does not find a basis in some or other legal system. But their notes are hardly comprehensive. They are merely intended to make plausible the claim that PECL, on a relatively general level, represent a (sometimes more, sometimes somewhat less) common core of European

[36] Schulte-Nölke, [2009] NJW 2162.
[37] Schulte-Nölke, "Restatement – nicht Kodifikation" (note 3 above), pp. 27 ff.; *idem*, "Die Acquis Principles" (note 3 above), p. 63; cf. also von Bar, "Funktionen" (note 10 above), p. 26.
[38] Mauro Bussani and Ugo Mattei, "The Common Core Approach to European Private Law" (1997/98) 3 Columbia Journal of European Law 339, 340; Mauro Bussani, "Current Trends in European Comparative Law: The Common Core Approach" (1998) 21 Hastings International and Comparative L.R. 785, 786 f.
[39] Bussani, (1998) 21 Hastings International and Comparative L.R.787.
[40] von Bar, Lando and Swann, (2002) 10 E.R.P.L. 183, para. [62]: The Principles of European law "construct a building plan for a future European legal system".

contract law.[41] Were one to read the PECL as a map of the law, one would recognize mountain ranges, big rivers and cities, and possibly even one or two trunk roads, but hardly any more detailed features. How, indeed, could it be possible to list, within a comparatively limited space, the particulars of all the problems relevant in legal practice, as we find them in the commentaries to some national legal systems?

The DCFR's Full Edition presents no different picture.[42] True, there are references also to the legal systems of the European Union's New Member States, but those references are on the same general level as in the PECL, and in the fields of law already covered by the PECL, the DCFR's references use the Notes to the PECL often even without updating them. A detailed analysis that would be helpful for legal practice would require, in the first place, multi-volume national commentaries, as they have begun to appear with regard to the PECL.[43] Yet, not even the more spacious volumes published in advance by the Study Group ECC, e.g. on "benevolent intervention in another's affairs", did provide a reliable map of the European private laws.[44] There is also, incidentally, the question why the drafters of the DCFR have published the bare model rules nearly two years ahead of the comparative notes, first in an Interim Outline Edition and then in its final form, if they regard the comparative notes as the essence of their work. Why did they organize large conferences, immediately after the Interim Outline Edition of those model rules had appeared,[45] if their work was to be judged by the quality of the, at that stage, not yet published comparative notes? And why have the rules-only Interim Outline and Outline Editions been thrown on the market at prices that make their acquisition affordable even for students, while the main work appears to be destined, at a price of 798 €, to eke out a living in a number of specialized university libraries? Why does a group of academics ostensibly pursuing academic aims behave like a legislator who publishes first draft rules, then the rules in their final form, and ultimately also the

[41] See Lando and Beale, *Principles of European Contract Law, Parts I and II* (note 24 above), p. xxii: "The Principles are intended to reflect the common core of solutions to problems of contract law".

[42] But see Schulte-Nölke, [2009] NJW 2165. The reference to the former President of the German Federal Supreme Court, Hirsch, "Erwartungen der gerichtlichen Praxis an einen gemeinsamen Referenzrahmen für ein Europäisches Vertragsrecht" [2007] Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis 937, incidentally, leads astray; Hirsch does not explore such a function of the CFR, or of comparative notes, in his article.

[43] Luisa Antoniolli and Anna Veneziano (eds.), *Principles of European Contract Law and Italian Law: A Commentary* (The Hague 2005); Harriët N. Schelhaas *et al.* (eds.), *The Principles of European Contract Law and Dutch Law: A Commentary* (The Hague 2002–2006). See also Hector L. MacQueen and Reinhard Zimmermann (eds.), *European Contract Law: Scots and South African Perspectives* (Edinburgh 2006).

[44] Jansen, (2007) 15 ZEuP 963 ff., 980 ff.; Rademacher, [2008] JURA 92, 93 ff.

[45] Cf. Schulze, von Bar and Schulte-Nölke (eds.), *Der akademische Entwurf für einen Gemeinsamen Referenzrahmen* (note 3 above); Schmidt-Kessel (ed.), *Der gemeinsame Referenzrahmen* (note 3 above). Martin Schmidt-Kessel, together with Hans Schulte-Nölke and Christian von Bar, is professor at the European Legal Studies Institute of the University of Osnabrück, and, within the framework of the DCFR, chairs the Working Team on gratuitous contracts.

documentation of the material that was supposed to have backed, and informed, the drafters of those rules?

And ultimately: Do we not have at our disposal (apart from the general encyclopaedias of comparative law) the comprehensive studies of the Trento-Group,[46] the textbooks on *European Private Law* by Hein Kötz[47] and on *Europäisches Obligationenrecht* by Filippo Ranieri,[48] or the series of Casebooks on the Common Law of Europe?[49] Do the reference texts published thus far, such as PECL, PETL and the drafts published by the Study Group ECC, provide no satisfactory basis for comparative comment?[50] Can we not already avail ourselves of a substantial commentary to the UNIDROIT Principles of International Commercial Contracts exploring the comparative terrain?[51] Has the comparative tort law landscape not been explored, in exemplary fashion, by Christian von Bar's *The Common European Law of Torts*,[52] by Cees van Dam's *European Tort Law*[53] and by the comprehensive studies published under the auspices of Helmut Koziol's Centre of European Tort and Insurance Law?[54] And do we not have equally seminal works for other fields of law, such as unjustified enrichment?[55] Over the past ten to fifteen years a rich and complex body of literature on European private law and its tradition has come into being.[56] Did the academic

[46] Mauro Bussani and Vernon V. Palmer (eds.), *Pure Economic Loss in Europe* (Cambridge 2003); James Gordley (ed.), *The Enforceability of Promises in European Contract Law* (Cambridge 2001); Michele Graziadei *et al.* (eds.), *Commercial Trusts in European Private Law* (Cambridge 2005); Eva-Maria Kieninger *et al.* (eds.), *Security Rights in Movable Property in European Private Law* (Cambridge 2004); Thomas Möllers and Andreas Heinemann (eds.), *The Enforcement of Competition Law in Europe* (Cambridge 2007); Barbara Pozzo (ed.), *Property and Environment* (Bern and Durham USA 2007); Ruth Sefton-Green (ed.), *Mistake, Fraud and Duties to Inform in European Contract Law* (Cambridge 2005); Franz Werro and Vernon V. Palmer (eds.), *The Boundaries of Strict Liability in European Tort Law* (Cambridge 2004); Reinhard Zimmermann and Simon Whittaker (eds.), *Good Faith in European Contract Law* (Cambridge 2000).

[47] Hein Kötz, *European Contract Law* (Oxford 1997).

[48] Filippo Ranieri, *Europäisches Obligationenrecht*, 3rd edition (Vienna 2009).

[49] Hugh Beale, Arthur S. Hartkamp, Hein Kötz and Denis Tallon (eds.), *Cases, Materials and Text on Contract Law* (Oxford 2002); Walter van Gerven, Jeremy Lever and Pierre Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law* (Oxford 2000); Jack Beatson and Eltjo Schrage (eds.), *Cases, Materials and Texts on Unjustified Enrichment* (Oxford 2003).

[50] For comparative commentaries on the PECL, see note 43 above.

[51] Stefan Vogenauer and Jan Kleinheisterkamp (eds.), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford 2009).

[52] Christian von Bar, *The Common European Law of Torts* (Oxford 1998–2000).

[53] Cees van Dam, *European Tort Law* (Oxford 2006).

[54] In the meantime, apart from the Principles of European Tort Law previously mentioned, and the European Tort Law Yearbook (from 2001), more than thirty individual volumes have appeared. In addition a Digest on European Tort Law has been tackled (the first volume of which has appeared in 2007).

[55] Peter Schlechtriem, *Restitution und Bereicherungsausgleich in Europa* (Tübingen 2000–2001).

[56] Overview in Reinhard Zimmermann, "Comparative Law and the Europeanization of Private Law", in Reimann and Zimmermann, *Oxford Handbook* (note 26 above), pp. 548 ff.; Jansen, "Europäisches Privatrecht", in Basedow, Hopt and Zimmermann, *Handwörterbuch des Europäischen Privatrechts* (note 1 above), pp. 548 ff. For the common tradition of European private law see Jansen, "Ius commune", in Basedow, Hopt and Zimmermann, *Handwörterbuch des Europäischen Privatrechts* (note 1 above), pp. 916 ff.; Johannes Liebrecht, "Rechtsgeschichte", *loc.cit.*, pp. 1245 ff.

community, therefore, really have to wait for the DCFR in order to quench its thirst for knowledge in the field of comparative law?

IV. Systematizing the Law

It was a central concern for the founding fathers of the American Law Institute to create, in their Restatements, a counterpart to the European codifications. The really distinctive feature of the Restatements, however, was not so much the descriptive approach adopted by their draftsmen: for lawyers in the United States were probably aware of the fact that even the Continental codifications were usually supposed to lay down, in the form of easily accessible rules, the law that had hitherto applied as common law.[57] The BGB, for example, has been said to be a codification "which does not contain the source of law in itself but has its source in the legal scholarship from which it was created."[58] Equally significant, at least, was the fact that the Restatements were not based on, and did not reproduce, a comprehensive systematic design. They were supposed to provide structure, but not to ossify the law under systematic auspices.[59] That is why they have never been published as a set of rules comprehensively covering the American common law, but only for individual areas of the law: the general law of contract, torts, trusts etc.

The DCFR, in contrast, aspires to be a codificatory system[60] in the strict sense of the early modern and modern European legal tradition.[61] What was designed as general contract law in the PECL has been re-conceptualised, systematically, into a doctrine of legal acts ("Contracts and other juridical acts": Book II) on the one hand, and a general part of the law of obligations ("Obligations and corresponding rights": Book III) on the other.[62] Everything is interconnected: everywhere we find cross-references; the rules on non-conformity are conceived from the point of view of the general remedies for non-performance; and

[57] For France, Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung*, 3rd edition, (Tübingen 1996), 78 ff., 84 ff.; for Germany *loc.cit.*, pp. 137 ff., 142 ff.; Paul Koschaker, *Europa und das römische Recht*, 4th edition (Munich 1966), p. 205; Reinhard Zimmermann, "The German Civil Code and the Development of Private Law in Germany", in *idem*, *The New German Law of Obligations: Historical and Comparative Perspectives* (Oxford 2005), pp. 10 ff.

[58] Horst Heinrich Jakobs, *Wissenschaft und Gesetzgebung im bürgerlichen Recht nach der Rechtsquellenlehre des 19. Jahrhunderts* (Paderborn 1983), p. 160. The BGB can thus, at least to some extent, be seen to be a restatement of the Roman-law based rules as they were applicable in 19th century Germany.

[59] See the "Report of the Committee Proposing the Establishment of an American Law Institute" (note 14 above), p. 28; cf. also Zekoll, "Law Institute" (note 13 above), pp. 112 ff.

[60] Whittaker, (2009) 125 L.Q.R. 623 ff., 645.

[61] On which see, most recently, Jan Peter Schmidt, "Kodifikation", in Basedow, Hopt and Zimmermann, *Handwörterbuch des Europäischen Privatrechts* (note 1 above), pp. 986 ff. On the phenomenon of transjurisdictional codification, see Jürgen Basedow, "Transjurisdictional Codification" (2009) 83 Tulane L.R. 973 ff.

[62] For criticism, see Schulze, "The Academic Draft" (above note 7), pp. 13 ff.; cf. also *idem* and Wilhelmsson, [2008] E.R.C.L. 154 ff.

even within individual components of the DCFR, e.g. the one concerning service contracts, we find a subdivision into general and special parts. The DCFR thus claims indivisible and uniform recognition for the comparatively well-established rules on general contract law contained in PECL, for the highly innovative rules on trusts and for the peculiar rules on "benevolent intervention in another's affairs". The application of the DCFR is not supposed to be limited to individual parts of it which may be regarded, by and large, as acceptable;[63] it will hardly be possible to adjust only parts of it to the ongoing legal development as happens, as a matter of course, with regard to the American Restatements, and the DCFR presupposes a system where it certainly does not (yet) exist, i.e. for patrimonial law in Europe in its entirety. If the draftsmen of the DCFR had really wanted to follow the example of the Restatements: why did they pursue aspirations of a systematic grand design which the Americans, with very good reasons, rejected and which the authors of the PECL also did not want to pursue?[64] The objective to create a "tool box" for the European legislature would,[65] at any rate, have been much better served, had definitions and individual rules, or clusters of rules, been formulated that could have been referred to, and evaluated, in isolation.[66] And if the DCFR is supposed to be a starting point, rather than the conclusion, of the academic discussion in Europe,[67] why did its drafters establish a closed and comprehensive system, as it is known in the form of the BGB in Germany –

[63] It may be possible, as the authors of the DCFR in their Introduction to the *Outline Edition* (note 1 above), para. [74], emphasize (but do not recommend!) to "recontractualize" the content of Books II and III. One would then, however, end up again with the PECL on the one hand, and, on the other hand, with the so-called Acquis Principles, i.e. an attempt, on the part of a Research Group on the Existing EC Private Law (Acquis Group), to lay down in a systematic fashion the *acquis communautaire* in the field of consumer contract law (on these Acquis Principles, see Nils Jansen and Reinhard Zimmermann, "Restating the *Acquis Communautaire*? A Critical Examination of the 'Principles of the Existing EC Contract Law' (2008) 71 M.L.R. 505 ff.; Hans C. Grigoleit and Lovro Tomasic, "Acquis Principles", in Basedow, Hopt and Zimmermann, *Handwörterbuch des Europäischen Privatrechts* (note 1 above), pp. 12 ff.). These Acquis Principles would, incidentally, no longer be up to date if the European Commission should decide to pursue its project of a new Consumer Rights Directive, drafted completely independently of both Acquis Principles and DCFR (see note 66 below).

[64] See Ole Lando, "The Structure and the Legal Values of the Common Frame of Reference (CFR)" [2007] E.R.C.L. 244, 250.

[65] That is what the Commission of the European Union (i.e. the body that has financed the preparation of the DCFR out of funds from the 6th Framework Programme for Research) envisages: see "European Contract Law and the Revision of the Acquis: The Way Forward", COM(2004) 651 final (under 2). For a comment, from the point of view of the Study Group ECC, see Christian von Bar, (2008) 23 Tulane European and Civil Law Forum 43.

[66] It may not, therefore, be entirely accidental that the Proposal for a Directive on Consumer Rights (COM(2008) 614 final) appears to have been conceived and drafted quite independently of the DCFR. Thus, the DCFR has not been used as a "tool box": see Zimmermann, (2009) 57 American Journal of Comparative Law 486 ff.; Peter Rott and Evelyne Terryn, "The Proposal for a Directive on Consumer Rights: No Single Set of Rules" (2009) 17 ZEuP 456 ff.; Hans-Wolfgang Micklitz and Norbert Reich, "Crónica de una muerte anunciada: The Commission Proposal for a 'Directive on Consumer Rights'" (2009) 46 Common Market Law Review 471, 472.

[67] This is what Schulte-Nölke, [2009] NJW 2164, emphatically states.

where, however, it constitutes the result of the academic discussions of half a century?[68]

V. No Political Text? What is the DCFR really aiming at?

The DCFR essentially consists of a systematic body of rules of private law which can, and are supposed to be, applied in practice; apart from that it contains a catalogue of more than 150 definitions as well as four "underlying principles" with comments.[69] These rules, and the concepts used by them, definitions and underlying principles are intended to shape European private law. They are designed to constitute a central point of reference for European legal scholarship, to be drawn upon by those engaged in legislation, and to harmonize international legal practice. Therefore, the DCFR is also to become the subject-matter of law school teaching in its own right.[70] In view of this Professor Schulte-Nölke is quite right when he doubts whether a narrowly conceived "political CFR", focusing on general contract law and the law of sale, "would have an added value, as a tool box, *vis-à-vis* the DCFR."[71] In that respect both instruments are functional equivalents. A "political" CFR could only have an added value if it were to become an "optional instrument". Schulte-Nölke, incidentally, regards this as an attractive prospect,[72] and the drafters of the DCFR also, of course, have that objective in mind.[73]

What the DCFR, then, is really supposed to achieve is to establish a kind of conceptual and definitional sovereignty in European private law:[74] an authoritative text in the form of a non-legislative codification. As the first American Restatements, the DCFR is not intended to be a contribution to an academic discussion but to be applied by the legal community to which it is addressed.[75] For there is one feature of the

[68] See, most recently, Filippo Ranieri, "Die deutsche Pandektistik: Europäischer Aufstieg und Niedergang eines rechtswissenschaftlichen Modells", in Joachim Lege (ed.), *Greifswald – Spiegel der deutschen Rechtswissenschaft 1815–1945* (Tübingen 2009), pp. 417 ff.; Wolfgang Ernst, "Zur Struktur des CFR", in Schmidt-Kessel (ed.), *Der Gemeinsame Referenzrahmen* (note 3 above), pp. 55 ff., 70, suspects that in view of the structural similarity of the DCFR with the BGB it may one day be said that the DCFR is "a BGB translated into English".

[69] These are: Freedom, Security, Justice, and Efficiency.

[70] Schulte-Nölke, [2009] NJW 2164 f.; *idem*, "Die Acquis Principles" (note 3 above), pp. 64 ff.; von Bar, Lando and Swann, (2002) 10 E.R.P.L. 183, paras. [69]–[77].

[71] Schulte-Nölke, [2009] NJW 2161 ff.

[72] Hans Schulte-Nölke, "EC Law on the Formation of Contract – from the Common Frame of Reference to the 'Blue Button'" [2007] E.R.C.L. 332 ff.; *idem*, "Restatement – nicht Kodifikation" (note 3 above), pp. 41 ff. Cf. also von Bar, "Funktionen" (note 10 above), pp. 30 f.; Dirk Staudenmayer, "European Contract Law – What Does It Mean and What Does It Not Mean", in: Stefan Vogenauer and Stephen Weatherill (eds.), *The Harmonization of European Contract Law* (Oxford 2006), pp. 236 ff.; Basedow, (2009) 83 Tulane L.R. 995 f.

[73] von Bar, Beale, Clive and Schulte-Nölke, "Introduction", in von Bar, Clive and Schulte-Nölke, *Outline Edition* (note 1 above), para. [80].

[74] That is, essentially, acknowledged also by Hesselink, (2009) 83 Tulane L.R. 961 ff.

[75] In another publication, Schulte-Nölke actually acknowledges that: Hans Schulte-Nölke, "Wovon Europas Juristen träumen …" (2009) 17 ZEuP 673, 674: "European model rules are supposed … to

DCFR characteristically setting it apart from the existing body of literature on European private law (above, *sub* 3.): While the traditional literature typically combines a comparative exposition of the legal systems prevailing in Europe with legal reasoning concerning the preferability of one solution vis-à-vis another, the DCFR – just as the American Restatements, the UNIDROIT Principles of International Commercial Contracts and, predominantly, also the PECL – contains model rules but hardly any legal reasoning supporting or motivating them.[76] Comments and illustrations are designed to elucidate the rules but they do not offer legal arguments. *Lex iubeat, non disputet*.

Such an approach was justified, as far as the Restatements were concerned, by the urgent need for applicable rules that had remained unsatisfied by the political legislative bodies.[77] And it may be accepted with regard to the PECL because in general contract law there is considerable common ground, reflecting the results of long-lasting academic discussion. The drafters of the DCFR, on the other hand, largely had to develop new rules and novel concepts, such as "benevolent intervention in another's affairs", the European trust, or the "basic activities" concerning service contracts (above, *sub* 2.). Is that really acceptable without legal reasoning exploring the pros and cons of the various solutions and approaches available? Of course, it may be subject to considerable discussion what elevates law to the status of a scholarly discipline. But one should have thought that the use of legal reasoning constitutes a minimum threshold. Or is rule-making going to become the modern, post-discursive form of European legal scholarship?

If, then, the DCFR is to be regarded as a political document, this is due also to "a proximity of that project to the political actors hitherto hardly imaginable."[78] That has repeatedly been emphasized even by those participating in the preparation of the DCFR, but it is concealed by the assertion that the scholarly and political agendas are strictly separated.[79] Such an assertion, therefore, is hardly conducive to a

be applied"; similarly Beale, (2008) 14 Juridica International 17. Schulte-Nölke's focus, therefore, is now no longer on "beauty" (cf. *supra*, note 4 above), but on "functionality".

[76] See, in the context of the rules regarding "benevolent intervention in another"s affairs", James Gordley, "The State's Private Law and Legal Academia", in Nils Jansen and Ralf Michaels (eds.), *Beyond the State: Rethinking Private Law* (Tübingen 2008), pp. 219, 222 f.

[77] See generally Jansen, *Non-legislative Codifications* (note 15 above), esp. pp. 17, 42 ff., 65 ff., 130 ff.

[78] Martin Schmidt-Kessel, "Europäisches Zivilgesetzbuch", in: Basedow, Hopt and Zimmermann, *Handwörterbuch des Europäischen Privatrechts* (note 1 above), pp. 551, 554. Christian von Bar has also, repeatedly, emphasized the "involvement in a political process" on the part the DCFR-network: see (2008) 23 Tulane European and Civil Law Forum 48; cf. also (still, at that time, hesitating) *idem*, "Ein gemeinsamer Referenzrahmen für das marktrelevante Privatrecht in der Europäischen Union", in Heinz-Peter Mansel (ed.), *Festschrift für Erik Jayme* (Munich 2004), vol. II, p. 1230: "Only the future can show whether this alliance between the promotion of research and politics is a felicitous idea".

[79] Schulte-Nölke, [2009] NJW 2161 ff.

"fruitful discussion". Hitherto, at any rate, the discussion was characterized by a somewhat greater degree of openness.[80]

What needs to be established is, on the one hand, whether lawyers in Europe are prepared to accept a systematic body of legal rules, drafted on the model of a codification, as a text of reference carrying an authority similar to that of the American Restatements. On the other hand it has to be debated whether the European bodies responsible for legislation should endorse or adopt the draft as a "political" CFR, or as an optional code. Those discussions can no longer revolve around individual rules, concepts, doctrinal arguments, or even individual parts of the DCFR, after it has found its definitive form as a rigidly systematized, non-legislative codification of patrimonial law in Europe. "Fruitful" criticism has to recognize this and to point out the deficits that militate against an application of the DCFR, in whatever form.[81]

[80] See, especially, the contributions by Christian von Bar and Martijn Hesselink, notes 9–11 above.

[81] See, e.g., (2007) 15 ZEuP 109–323; *4th European Jurists Forum (Section 1)* (2008), pp. 185–204; Eidenmüller, Faust, Grigoleit, Jansen, Wagner and Zimmermann, (2008) 28 O.J.L.S. 659 ff.; Simon Whittaker, "The 'Draft Common Frame of Reference': An Assessment commissioned by the Ministry of Justice", available online at: http://www.justice.gov.uk/docs/eu-contract-law-common-frame-reference.pdf; the contributions by Thomas Pfeiffer and Wolfgang Ernst in (2007) 207 AcP 227–282; Schulze and Wilhelmsson, [2008] E.R.C.L. 154 ff.; Grundmann, [2008] E.R.C.L. 225 ff.; Schulze, von Bar and Schulte-Nölke (eds.), *Der akademische Entwurf für einen Gemeinsamen Referenzrahmen* (note 3 above, especially the contributions by Faust, Eidenmüller, Wagner and Wendehorst); Schmidt-Kessel, *Der gemeinsame Referenzrahmen* (note 3 above), especially the contributions by Wolfgang Ernst and Helmut Koziol; (2008) 16 ZEuP 677–812, especially the contributions by Ulrich Huber and Hannes Unberath; Jan M. Smits, "A European Law of Unjustified Enrichment?" (above note 29); Zimmermann, (2009) 57 American Journal of Comparative Law 484 ff.; as well as the contributions in Gerhard Wagner (ed.), *The Common Frame of Reference: A View from Law & Economics* (Munich 2009).