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TOWARDS A EUROPEAN LAW?

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(1) Introduction[1]

1. The United States of America has been described as having "perhaps the most complicated legal structure that has ever been devised and made effective in man's effort to govern himself."[2] When Erwin Griswold wrote that in 1964 the European Union (EU) was still a distant dream, or to Eurosceptics a distant nightmare; it was then still three separate bodies: the European Coal and Steel Community (the ECSC); the European Economic Community (the EEC); and the European Atomic Energy Community (Euratom). At that time it would have made little, if any, sense to talk of European law, its complexity or efficacy.

2. The world today is rather different. The ECSC, EEC and Euratom are now part of the EU's pre-history. The Treaty writers have travelled from Paris, via Rome, Luxembourg, Brussels, Maastricht and Nice, to Lisbon. We have moved from a community of six

[1] I wish to thank John Sorabji for all his help in preparing this lecture.
[2] Griswold, *Law and Lawyers in the United States, The Common Law Under Stress*, (1964) at 238, cited in Zweigert & Kotz (eds), *An Introduction to Comparative Law*, (Oxford) (1998) at 249.

nations to a union of 27 nations. And in the process, we have created a European law, with what was European Community law, and is now European Union law, with the Luxembourg Court as the ultimate arbiter of all issues of EU law across the Union. EU law not merely exists, but it is also in a state of development, and not just in the way in which all law develops - to reflect changing social political and technological changes - but it is also expanding because it is still relatively confined, both in the areas in which it applies, and in the extent to which it applies in those areas.

3. And, while the European Union has been on its journey, European human rights law, founded on the Convention, has been developed by the Strasbourg Court. The Convention is of course a product of the Council of Europe and not the European Union, but it was intended, at least by one of its progenitors, to form a Bill of Rights for a United Europe[3].

4. Since the 1950s then two strands of European law have slowly been developing, and they may well shortly converge for three reasons. First, the Lisbon Treaty requires the European Union to accede to the Convention and the Stockholm programme requires this to be achieved in short order[4].Secondly, Article 6(3) of the Treaty of European Union (the TEU) states that '*Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.*' Thirdly, and somewhat confusingly, the TEU also incorporates the EU's own Charter of the Fundamental Rights.

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[3] Bates, The Evolution of the European Convention on Human Rights, (OUP) (2010) at 5ff.

[4] Article 6(2) Treaty of European Union (TEU) and The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizen, Council 16484/1/09 at [2.1]; see Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform*, (Oxford) (2010) at 201ff

5. It would have made no sense in 1964 to challenge Griswold's remark about the complexity and efficacy of the law of the United States, but, now in 2011, European law gives the United States a run for its money in the complexity, if not yet the efficacy, stakes. Indeed, we on the eastern side of the Atlantic may well have the edge over those on the western side. The US may have individual state law, but it is, both nationally and at State level, a common law jurisdiction (excepting Louisiana). However, not content with encompassing both EU law, with its overriding Treaty, Directive and Regulation obligations, and European human rights law, with its overriding Convention obligations, the EU is, at national level, a plethora of jurisdictions steeped in many legal traditions - common law, Romano-Dutch, Code Civile, Nordic, and, of course, the German tradition, the influence of which stretches from Berlin, to Vienna, to Zurich and even Lisbon. When this is added to Union and human rights law, it puts Europe ahead, probably way ahead, of the United States in the legal complexity stakes.

6. To add to the confusion, in some fields, such as trade marks, competition, and value added tax, we do not merely have super-imposed EU directives or regulations: we effectively have a single common EU law, and in patents, there is a European Convention, which apples to most, but not all, EU member states, but also includes some non-members.

7. In reality, then, the question is not whether we are, or should move towards a European law. EU membership, and therefore EU law, is a reality for 28 nations and the Convention extends now to 47 nations, so European law is a present reality for many millions. The real question for this century is, assuming that the Euro crisis and other problems do not blow the European ship out of the water, how should European law develop? I begin my answer to that question by considering how the common law has developed.

(2) The Development of the Common Law

8. Harold Potter (the real life legal historian, not the fictional boy wizard) once described English law as being,

   " …. *like a river. The channel widens and deepens as it flows throughout the course of years and tributaries join it from time to time. It was first fed by the springs of the common law, but the fountain of equity and the wells of the law merchant and ecclesiastical law have increased the waters of the growing current. And upon the tide is borne the ship which is the soul of England.*[5]'

9. My most famous 20th century predecessor, Lord Denning, adopted similar imagery soon after the UK's accession to the Treaty of Rome, when he described the effect which Community law was beginning to have in England. He said this,

   "*The Treaty does not touch any of the matters which concern solely England and the people in it. These are still governed by English law. They are not affected by the Treaty. But when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute.*[6]"

   Four years later, he warmed to his theme, observing that

   "*the flowing tide of Community law is coming in fast. It has not stopped at high-water mark. It has broken the dykes and the banks. It has submerged the surrounding land. So much so that we have to learn to become amphibious if we wish to keep our heads above water.*[7]"

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[5] Potter's Outlines of English History (5th ed) (Kiralfy ed.) (London) (1957) at 1 cited in van Caenegem, *The Birth of the English Common Law*, (2nd ed) (CUP) (1988) at 99.
[6] *H. P. Bulmer Ltd. and Another v J. Bollinger S.A. and Others* [1974] Ch. 401 at 419.
[7] *Shields v E Coomes (Holdings) Ltd* [1978] 1 WLR 1408 at 1416.

10. Lord Denning's metaphors articulate the notion that the common law of England is no longer quite what it was; that it has been contaminated by continental learning and ideas. That it has lost its purity.

11. It seems to me that that notion, like Lord Denning's image of the common law being submerged by an inexorable tide of European law, rests on a misunderstanding. As Potter's original description makes clear, the common law, like Oscar Wilde's truth, has never been either pure or simple. It is the product of many different sources, and all the better for that. It has always developed as a synthesis, or, if you prefer, as a discriminating magpie, picking up the best from other legal systems. Its development, in the light of its recent reception of EU and European Convention law is therefore entirely in keeping with its historical traditions.

12. The very term, "the common law" is continental in origin. It is, as Maitland put it, '*a phrase . . . borrowed from the canonists – who (used) 'jus commune' to denote the general law of the Catholic Church.*[8]' We did not merely borrow the name; we also borrowed the system which it described. It was brought to England by William the Conqueror, the descendent of Norsemen and a liegeman of the King of France. Indeed, according to Professor van Caenegem, the common law operated with "*equal vigour in the Duchy of Normandy.*"[9] It was as he put it, a '*species of continental feudal law developed into an English system by kings and justices of continental extraction.*[10]' At the earliest, it could only be said to have become truly English after the loss of Normandy by William's great great grandson, King John.

[8] Maitland, *Equity: a course of lectures*, (Cambridge) (1909, 2011 reprint) at 2.
[9] van Caenegem (1989) at 57.
[10] van Caenegem (1989) at 110.

13. The common law was, of course, invigorated and complemented by equity. But equity did not start as free born English: it was a product of Roman and ecclesiastical – hence civilian – law and learning. Discovery (or as we now call it in England, disclosure) may seem essential to our common law approach to litigation, but it was borrowed from ecclesiastical procedure[11]. The same is true of the writ of subpoena. And admiralty law, whose contribution to the common law cannot be underestimated, has long been seen as a very English construct: indeed, it is difficult to see how England could have developed as a great trading and seafaring nation without it. Yet, admiralty law is a true European *ius commune*[12] and a product of civilian law.

14. Equally, the development of English commercial law owed much to the civilian law of the *lex mercatoria*, a truly international instrument which has been around from the Middle Ages onwards[13]. Thus, "the facts show that the rules applied by the Mayor's Court of London from 1655 to 1700 in mercantile disputes were practically identical with the rules of the Civil Law."[14] We should not be surprised then that as it evolved the common law, under the expert tutelage of Chief Justice Coke and then Lord Mansfield, absorbed the *lex mercatoria*, from which, as Professor Goode has pointed out, Mansfield fashioned English commercial law[15].

15. Given his central role in the birth of English commercial law, insurance law, and restitution, it is particularly significant that Lord Mansfield drew his influence from far

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[11] Coing, *English Equity and the Denunciatio Evangelica of the Canon Law*, (1955) 71 Law Quarterly Review 223

[12] Van Caenegem, *European law in the past and the future*, (Cambridge) (2002) at 20 – 21.

[13] Goode, *Commercial Law*, (Penguin) (2004) at 3ff.

[14] Anderson cited in Oldham, *English Common Law in the Age of Mansfield*, (University of North Carolina Press) (2004) at 99 – 100.

[15] Goode (2004) at 6ff.

and wide - from Justinian[16], to more contemporary civilian learning. In Professor Goode's words, Mansfield combined a mastery of the common law with a profound knowledge of foreign legal systems and a deep insight into the methods and usages of the mercantile world.[17]' His mastery and the shaping of the common law which he embarked upon shows the English law at its most fruitful, and underlines how its evolution has been a product of synthesis.

16. Even Mansfield's unsuccessful attempt to eradicate the doctrine of consideration from English contract law owed much to his acquaintance with other legal traditions. Paradoxically, while our continued adherence to that doctrine today is a unique feature of our contract law, it can be said to based on Pothier's *Traite des Obligations*[18], as a brief look at the early 19th century case of *Cox v Troy* (1822)[19] demonstrates. Pothier's influence did not stop there. During the common law's brief flirtation with codification during the 19th Century, Sir Mackenzie Chalmers – the draftsman of the Sales of Goods Act 1893 – was (again as Goode puts it) 'profoundly influenced by Pothier's *Traite du Contrat de Vente*'[20]. Codification of the common law approach to consumer contracts was then influenced by continental scholarship and ideas. (As an aside, it is interesting, and a little ironic, to note that it was only after the European Communities Act 1972 that none other than Lord Denning rejected Pothier's influence on the common law, in *Lewis v Averay*.[21])

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[16] Oldham at 2, 99.
[17] Goode (2004) at 7
[18] Baker, *An Introduction to English Legal History*, (Butterworths) (2002) at 352 – 353.
[19] 5 B & Ald 474
[20] Goode (2004) 7, fn 22.
[21] [1972] 1 QB 198 at 206, '*What is the effect of a mistake by one party as to the identity of the other? It has sometimes been said that if a party makes a mistake as to the identity of the person with whom he is contracting there is no contract, or, if there is a contract, it is a nullity and void, so that no property can pass under it. This has been supported by a reference to the French jurist Pothier; but I have said before, and I repeat now, his statement is no part of English law. I know that it was quoted by Lord Haldane in Lake v. Simmons [1927] A.C. 487, 501, and, as such, misled Tucker J. in Sowler v. Potter [1940] 1 K.B. 271, into holding that a lease was*

17. Examples of civilian and continental influence could be multiplied, but the central point is this: the common law is a product of many sources, and it is not the autochthonous product of one part of the British Isles. Indeed, the most senior English judges are and have long been exposed to civilian law: the Law Lords, of course, hear Scottish appeals, and from time, when they see something the Scots do which we do not, or something the Scots do differently, they have been known to adapt the common law to incorporate the Scots, i.e. the civilian, version. An example is the law relating to *forum non conveniens*. And, for the same reason, it is right to add, Scots law learns from English law.

18. Thus, the strength and flexibility of the common law over the centuries has stemmed from its ability to incorporate good principles and concepts from many different sources. If we close our minds to other sources of inspiration, we reject the very attitude which made the common law a truly successful system of law, which has taken root and flourished across the world. Rather than dwelling on the idea that English law was being submerged by a torrent of European law, Lord Denning would have been nearer the mark if he had focussed on how the common law should be invigorated by yet another external influence in a thousand years of external influences.

(3) Learning from the Past – Developing the Future

19. I now want to consider three important lessons we can draw from this point: first, practical utility; second; the need for an effective judicial system; third, clarity, simplicity and synthesis.

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void whereas it was really voidable. But Pothier's statement has given rise to such refinements that it is time it was dead and buried together.'; for comment see Baker (2002) *ibid*.

(i) Practical Utility

20. When considering what is meant by practical utility, I would, appropriately, refer to what was said here in Berlin around 170 years ago by one of the great German jurists, Rudolf von Jhering. In lectures which would become known as the *Geist des römischen Rechts – On the Spirit of Roman Law* - he said this,

"*The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine because it didn't grow in his back garden.*"[22]

In other words, do not reject legal institutions (or laws) simply because they are alien, and judge all such institutions, if I can borrow Jeremy Bentham's phrase and give a fittingly utilitarian caste to von Jhering's work[23], on the grounds of their utility.

21. As just outlined, the common law has consistently acted this way. It has adopted many foreign legal institutions on grounds of utility, and no doubt has rejected others on grounds of lack of utility. Perhaps one of the reasons why the civilian view of good faith in contracts never gained traction in English contract law – one of Lord Mansfield's few failures – was the existence of the much simpler and clearer, if rather more formulaic, doctrine of consideration. This indicates that the first criterion for a proposed development of European law: does it offer an improvement over and above what already exists? If it does not, that should be the end of it.

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[22] v. Jhering, *Geist des römischen Rechts, Part 1* (9th ed) (1955) at 8 cited in Zweigert & Kotz (eds), *An Introduction to Comparative Law*, (Oxford) (1998) at 17.
[23] As noted by W.M Geldart, Vinerian Professor of English Law in 1913, see his introduction to von Jhering, *Der Zweck in Rhecht* (On Purpose in Law) (1913) (The Boston Book Company) at xxxv (http://socserv2.mcmaster.ca/~econ/ugcm/3ll3/ihering/LawMeansEnd.pdf).

22. Consider the European Commission's proposals for an optional EU contract law instrument[24]. Work on a European contract law has, in various ways, been ongoing now for at least two decades. The Commission will soon be considering the responses to the latest consultation on its latest draft instrument. History, and van Jhering tell us that such consideration should be informed by assessing the "usefulness and need" for such an instrument. Is it better than the quinine that grows in the gardens of each of the Member States? It might be doubted whether it would be, given the long-established contract law systems in place in each of the Member States.

23. Utility should also be assessed in the same way as common law trial by jury was justified. Jury trial may now have hardly any role to play in English civil justice, but its legacy cannot be underestimated, just as its living importance in criminal justice cannot be underestimated. It has been described as lying at '*the heart of the common law*'[25]. This was because in the common law's early years it was seen to be a 'more reliable, acceptable and reasonable' means to resolve disputes that trial by ordeal or trial by battle. Judgment by peers, who had first-hand knowledge of the dispute before the court, was seen to be a fairer way of resolving disputes. It was, crucially, understood to be better able to produce justice[26]. Academic writers also describe jury trial as being more efficient and economical than trial by ordeal or trial by combat; that may have been true in the 12th and 13th centuries, but today I am not so sure.

24. Jury trial was so successful a feature of the common law because of the practical advantages it had over the alternatives. Efficiency, economy and, above all, justice: three things which anyone designing a justice system should readily take to their heart. They

[24] http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf
[25] van Caenegem (1989) at 71.
[26] Ibid 71ff, esp 81 – 82.

remain the goal of justice reformers today. In each respect jury trial won out, a point made by Glanvill, who recorded how trial by jury was,

"*. . . based above all on equity and justice, which is seldom arrived at by battle even after many and long delays, is more easily and quickly attained through its use . . . [and through trial by jury] people are generally saved trouble and the poor are saved money. Moreover, in proportion as the testimony of several suitable witnesses (that is the jury itself at that time) in judicial proceedings outweighs that of one man so this constitution relies more on equity than does battle; for whereas battle is fought on the testimony of one witness [i.e., the champion], this constitution requires the oaths of twelve men.*"[27]

25. If a proposed development of European law does not pass the utility test, if it would not promote efficiency, economy and justice, it should be rejected. If European law is to develop properly in the future, it seems to me that any developments must be scrutinised on this basis. If this happens, I suspect there will be less, but better, European law. It might also be expected that a European law which demonstrated greater utility and was developed in response to genuine need i.e., to solve real problems, and which promoted efficiency, economy and justice would, like jury trial in the Middle Ages, be more readily taken to heart by the citizens of Europe.

(ii) An Effective Judicial System

26. Unlike the laws of physics, civil and criminal laws are not self-executing. The effective implementation of European law requires an effective justice system. In this regard we might usefully compare the United States with the European Union.

27. The thirteen states which declared their independence from Britain this day in 1776 each had a common legal background. They were each steeped in the common law. Each state's legal system would no doubt have differed from others in certain respects. But

[27] Glanvill as cited in van Caenegem (1989) at 81 – 82.

their development post-independence grew from a common source, language and historical tradition. And after “big bang” 235 years ago, the US grew organically as the frontier moved west. The Australian experience, if I dare to lecture this audience on the topic, has been similar so far as the common experience and expansion into substantially virgin legal territory are concerned.

28. The EU member states also have a common historical tradition, at least up to a point, and particularly if you count fighting each other as part of our tradition. But they do not share a common language or a common legal tradition, and the expansion has incorporated countries all with long-established structures and systems. The same is true of the signatories to the European Convention So their starting point cannot be seen as akin to that of the US. Developing a common European legal tradition has been, and will no doubt continue to be, a much more difficult exercise than the development of the common law tradition in the US, and certainly more difficult than in Australia which, at the time of the creation of constitution was more homogenous than the US, and remains so today, I think.

29. Having acknowledged that the task is going to be more difficult, how might it be achieved more effectively in future? Like the Australian constitution and your High Court, the framers of the US Constitution secured the creation of a US Supreme Court with federal jurisdiction. In a way we might say the European Court of Justice is in an analogous position. Article 3(1) of the US Constitution also provides that the US Congress can establish a federal judiciary – again, not unlike Australia, I think. At the present time there is nothing genuinely similar to this in the European Union. The closest it gets to the US/Australian model is through member state courts becoming European courts when

they request a preliminary ruling on an issue of European law, or decide trade mark disputes. As Advocate-General Maduro said in *Cartesio Oktató és Szolgáltató bt (a limited partnership)*[28],

"*The possibility for a lower court in any member state to interact directly with the Court of Justice is vital to the uniform interpretation and the effective application of Community law. It is also the instrument that makes of all national courts Community law courts. Through the request for a preliminary ruling, the national court becomes part of a Community law discourse without depending on other national powers or judicial instances: Sarmiento, Poder Judicial e Integración Europea (2004), p 58. The Treaty did not intend that such a dialogue should be filtered by any other national courts, no matter what the judicial hierarchy in a state may be.*"[29]

30. Advocate-General Maduro's observation highlights the limitation which exists in contrast to the position in the US or Australia: a member state court only becomes a EU court when it is making a preliminary ruling. It has no jurisdiction as a European Union court otherwise. The only truly European Union court is the Luxembourg court, the ECJ. Unlike the US, where its appellate federal courts deal with some 90,000 cases per year, and I can only imagine how many first instance cases they deal with, there is no comparable filter mechanism in the EU. The US Supreme Court hears some 80 cases per year[30]. The ECJ, by contrast, has to deal with more than 500 such cases per year[31].

31. The task of the EU's judicial institutions must be more difficult than that faced by the courts of the nascent US, let alone the nascent Australia. They simply had to deal with the interpretation and application of statute law enacted in light of a common jurisprudential tradition; a tradition which enunciated its legal concepts in a common language. That is not the case for the EU's institutions. Securing a common interpretation and common

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[28] [2009] Ch 354
[29] [2009] Ch 354 at [19].
[30] Breyer, *America's Supreme Court*, (Oxford) (2011) at 221ff.
[31] http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-05/ra2010_stat_cour_final_en.pdf

application of European law can be seen as justifying the ECJ's singular role. But that places great pressure on the ECJ; it creates a time-consuming and expensive system of justice. As the EU continues to develop, as new laws are created, the need for clear judicial guidance on their interpretation will surely increase.

32. It need not be this way. If EU law is to develop more effectively and efficiently, things could be very different. Let me take a practical example. It has been the dream of many to introduce a European Civil Code, which would cover all aspects of private law. Its provisions would have to be interpreted consistently throughout the Union member states. As Professor Coing once said

> ". . . *unification of the law cannot come about simply by laying down uniform rules, as was sometimes thought in the nineteenth century.*"[32]

Uniform rules need uniform interpretation and application. Such a Code would undoubtedly give rise to much litigation. I fear that delay and expense would be endemic, and that justice would be out of reach for almost everybody. That is, of course, the nightmare scenario. The increase in EU legislation post-Lisbon may well take us close to that limit though.

33. I do not suggest there should be a European federal judicial system based on the US or the Australian model. Only a federal state could properly have a federal judiciary, and the EU is not a federal state. It might however be feasible to give the senior first instance and appellate courts of the EU member states authority to hear and decide questions of interpretation which would have persuasive or even binding effect. Such a system exists for some aspects of the Community trade mark. Might the answer be for a decision of the

[32] Coing cited in cited in Zweigert & Kotz (eds), *An Introduction to Comparative Law*, (Oxford) (1998) at 29.

English Court of Appeal on a point of interpretation of EU law be persuasive on equivalent courts, and binding on lower courts, throughout the EU. That way, the ECJ would then only have to rule on appeals from such decisions and resolve conflicts of interpretation between appellate courts in different member states.

34. Such a step would require some difficult questions to be addressed. The US and Australian judiciary both operate against a background of a single language. Is this a necessary condition of a common approach? It will also need a common judicial culture, which would require increased judicial training to ensure that all judges who exercise the European jurisdiction are able to do so properly. But the development of a common judicial culture requires more than simply training. It requires, as in the United States and Australia, a commonality of background and experience. That takes time, education, and effort. As with education, to a degree that has already taken place, but greater efforts and investment will be needed.

35. I would add to practical utility then, the need for a reformed European judicial system, to ensure the effective development of EU law in the coming decades. There is, however it seems to me, at least for today's purposes, one more ingredient.

(iii) Clarity, Simplicity and Synthesis

36. The final ingredient can be put quite shortly. It is clarity, simplicity and synthesis. May I deal with this by way of an example taken from the European Commission's feasibility study regarding the draft optional contract code. Article 48(1)(a) of the draft code deals with the situation where a party may seek to avoid a contract for unfair exploitation. It says this:

"*A party may avoid a contract if, at the time of the conclusion of the contract ... the party was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill; . . .*'

This is in addition to avoidance for duress, which is in draft Article 47. As presently drafted Article 48 is certainly compendious. But I wonder whether it is clear, or simple, or easy to apply. How, for instance, are we to interpret lack of bargaining skill? Cannot any person say that they lack bargaining skill if they enter a bad bargain? Equally we might ask why should urgent need excuse entry into a contract. Why should improvidence? How are these akin to ignorance or inexperience? What relation, might we ask, do each of the grounds for avoidance have to each other, if any? How is a court, or more importantly a contracting party and their legal adviser to interpret these provisions?

37. Contrast draft Article 48 with the following provision taken from the Indian Contract Act 1872, which, with modifications, was a codification of the English common law of contract. Section 16(1) of that Act, which addresses a similar issue to that in draft Article 48, defines undue influence in the following way,

'*(1) A contract is said to be induced by " undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.*'

38. It seems to me that the right approach is that taken by the draftsman of the Indian Contract Law – it is an approach which distils the existing law into a principle of general application, and ensures clarity and simplicity. It is the best means by which the courts can develop the law. It is an approach which is all the more important where the law in question operates against a diverse background of legal traditions and member state laws. Clarity and simplicity require a synthesis of those traditions. A comparative approach to

law shows us the approaches taken by different legal traditions to the same questions, their differences and similarities. But, as Professor von Bar rightly put it in Paris recently, comparative law is not enough. We must go beyond it[33]. A synthesis of those traditions is necessary if we are to identify general principles which underpin the different traditions of the European member states. And once that is done, they should be assessed according to their practical utility, and if implemented they should be capable of effective judicial interpretation.

(4) Conclusion – Pathways to European Justice

39. Turning back to the question I posed at the outset, how should European law develop in the 21st century, my answer is that its development should learn from the common law (just as the common law will, as it has always done, learn from European law). European law should develop only as far as utility and necessity require. In some areas this may call for a greater degree of uniformity. In other areas, such development will require a much greater degree of faith in the principle of subsidiarity. If it is to be broader in its reach and more effective in its results, European law will require a degree of reform of the European justice system. It will also require clarity and simplicity in drafting, which carries with it greater collaboration between lawyers, academics and judges. If European law is to develop its full potential in the future, it needs a fresh approach: it needs a common law approach.

[33] I paraphrase what was said during a speech given by Professor von Bar at the European Law Institute Conference (Paris) (June 2011)