PRAVNI FAKULTET U KRAGUJEVCU

Centar za pravo Evropske unije i
Institut za pravne i društvene nauke

NAČELA EVROPSKOG UGOVORNOG PRAVA I JUGOSLOVENSKO PRAVO

PRILOG HARMONIZACIJI DOMAĆEG ZAKONODAVSTVA

priredio

Radovan D. VUKADINOVIĆ

Kragujevac, 2001.

NAČELA EVROPSKOG UGOVORNOG PRAVA
I JUGOSLOVENSKO PRAVO -
Prilog harmonizaciji
domaćeg zakonodavstva

Zbornik referata sa Savetovanja održnog 15. i 16. 11. 2001. godine
na Pravnom Fakultetu u Kragujevcu

Izdavač
Pravni fakultet u Kragujevcu
Jovana Cvijića 1.
tel. 034 370 232

Recenzenti: prof. dr Zoran Ponjavić i prof. dr Dušica Palačković

Za izdavača
prof. dr Božin Vlašković

Priredio
Prof. dr Radovan D. Vukadinović

Tiraž: 500

Štampa:

Organizaciju Savetovanja podržali: Ministarstvo za nauku, tehnologije i razvoj Republike Srbije i Deutsche Stiftung für internationale rechtliche Zusammenarbeit e.V. - IRZ

ISBN 86-80765-28-7

SADRŽAJ*

Redosled referata opredeljen je sistematikom Evropskih načela.

CONTENTS

PREDGOVOR

I Zna~aj harmonizacije privatnog prava za ujedinjavanje evropskih dr`ava

Već je Rimskim Ugovorom o osnivanju pred Evropsku ekonomsku zajednicu kao jedan od ciljeva postavljeno i "usklađivanje pravnih propisa u meri u kojoj je to potrebno za uspešno delovanje zajedničkog tržišta".[1] Kako uspostavljanje i funkcionisanje zajedničkog tržišta u najvećoj meri zavisi od adekvatnog privatnog prava čijim normama treba obezbediti jednakost komunitarnim subjektima, slobodan promet robe, slobodno kretanje lica, usluga i kapitala, to se usklađivanje nacionalnih propisa država članica postavilo kao paralelni cilj ekonomskim ciljevima. U tom smislu Evropsku ekonomsku zajednicu, a posebno kasniju Evropsku zajednicu i Evropsku uniju treba posmatrati ne samo kao ekonomsku integraciju, što nesporno jeste, već i kao napor ka stvaranju jedinstvenog pravnog sistema[2] u kome se kao komunitarni subjekti ne pojavljuju samo države i privredna preduzeća, već sve više pojedinci kao potrošači. Otuda su dugo vremena komunitarno pravo, kao osobeni i jedinstveni skup propisa koji nastaje i primenjuje se u okvirima triju Zajednica: Evropske (ekonomske) zajednice, Evropske zajednice za ugalj i čelik i Evropske zajednice za atomsku energiju činili propisi uglavnom javno pravne (administrativne) prirode.[3] Međutim, nakon što je njihovom primenom ostvaren potreban javnopravni okvir za ekonomsku i političku integraciju, a paralelno sa širenjem ciljeva

[1] Čl. 3.h) Ugovora o osnivanju Evropske ekonomske zajednice.

[2] J. Schwarze, Concept and Perspectives of European Community Law, 5 *European Public Law*, 2 (1999), 227, p. 229.

[3] Vid. R. Vukadinović, *Pravo Evropske unije*, Beograd, 2001, str. 40-47.

Zajednice/Unije i sve izraženijom namerom da Evropska zajednica iz "saveza država" preraste u "saveznu državu"[4] označenu kao Evropska unija, postavljeno je i pitanje stvaranja jedinstvenog privatnog prava za svih 15 država članica. Odabrana je oblast privatnog prava jer se pošlo od pretpostavke zasnovane na dosadašnjem iskustvu da se bez jedinstvenog privatnog prava ne može stvarati jedinstveni ekonomski i politički prostor i da razlike koje postoje u nacionalnim pravima država članica *per se* otežavaju ne samo uspostavljanje i funkcionisanje zajedničkog i unutrašnjeg tržišta, nego na posredan način onemogućavaju ili usporavaju ostvarivanje i drugih ciljeva. Jedinstvenim pravilima koja bi trebalo da sadrži budući Evropski građanski zakonik je tako data pijemonska uloga, pa su jedinstveni propisi shvaćeni ne samo kao "kamen temeljac"[5] jedinstvenog tržišta,[6] već i kao doprinos "zajedničkom identitetu"[7] i faktor povezivanja i zbližavanja ne samo država članica, već i naroda Evrope.

U tom cilju Evropski parlament je usvojio dve Rezolucije: od 26. juna 1989. godine[8] i od 25. jula 1994.[9] godine u kojima se ističe da bi unifikacija većih grana privatnog prava u formi usvajanja Evropskog građanskog zakonika predstavljala najefikasniji metod harmonizacije kako bi se uspostavilo jedinstveno tržište bez granica. Donošenje rezolucija je u pravnoj teoriji pratila vrlo živa rasprava o novoj savremenoj *evropeizaciji* prava[10] i mogućnosti stvaranju novog *ius commune Europaeum* čiji bi jedan deo

---

[4] Vid. odluku nemačkog Saveznog ustavnog suda (Bundesvervassungsgerischt) u slučaju *Manfred Brunner.and Others v The European Union Treaty*, Cases 2 BvR 2134/92 & 2159/92, Š1994Ć 1 CMLR, 57-109, tač. 51, p. 89.

[5] G. Alpa, European Community Resolutions and the Codofication of "Private Law", 2 *European Review of Private Law*, (2000)321, p. 327.

[6] J. Basedow, A Common Contract Law for the Common Market, 33 *CMLRev.,* (1996) 1169-1195;

[7] U. C. Schmid, Legitimacy Conditions for a European Civil Code, *EUI Working Papers*, RSC No. 2001/4, European University Institute, p. 5.

[8] Resolution A2-157/89, Official Journal of the European Communities 1989, *OJ No C 158/400*, od 26. 06. 1989.

[9] Resolution A3-0329/94, Official Journal of the European Communities 1994, *OJ No C 205/518*, od 25. 07. 1994.

[10] Vid. T. Repgen, Europäisierung des Privatrechts durch Wiederbelebung des ius commune? u: Europäisierung des Privatrechts durch Wiederbelebung des ius commune? u: EuropÌisierung des Privatrechts. Zwischenbilanz und Perspektiven, *Jahrbuch Junger Zivilrechtswissenschaftler* 1997, Stutgart 1998, S. 9 i dalje.

predstavljalo i jedinstveno evropsko privatno pravo kao pandan srednjevekovnom *lex mercatoria*. Pri tome se pod "*evropeizacijom*" privatnog prava podrazumeva proces unifikacije ili harmonizacije[11] kroz prihvatanje i primenjivanje od strane privatnih i državnih institucija zajedničkih standarda, prvo u državama članicama Evropske unije, a onda i u ostalim evropskim državama. U pogledu tehnike, "evropeizaciju" je moguće sprovoditi tzv. metodom "odozdo" (*bottom-up*, *from below*) i metodom "odozgo" (*from above*). Metod odozdo kao alternativni pristup se zasniva na aktivnostima nelegislativnih organa, pre svega, pravnih teoretičara i praktičara kako bi se evropski sistemi što više približili. Ovakav metod podrazumeva slobodu (opciju) ugovornih strana i sudova, kao i ostalih da ih primenjuju kao izabrano pravo ili da ostanu izvan njega.[12]

Harmonizacija metodom odozgo ili obavezujuća (*mandatory*)[13] podrazumeva obavezu stranaka i sudova da primenjuju tako usvojena pravila jer su nametnuta od vlasti Unije ili od strane legislativnih vlasti u državama članicama. Ovako usvojena pravila "stupaju na snagu odozgo", t.j. od strane zvaničnih legislativnih vlasti.[14] Razlike koje postoje između ova dva metoda zapravo odražavaju razlike između dve "škole": kodifikatorske i prosvetite-

---

[11] Razlika između harmonizacije i unifikacije propisa postoji u stepenu jednoobraznosti koji se ovim pravnim metodima postiže. Harmonizacija je odomaćeni izraz koji podrazumeva usklađivanje propisa u meri da se njihovom primenom može ostvariti željeni cilj. Unifikacijom se postiže potpuna jednoobraznost propisa što vodi stvaranju jedinstvenog pravnog sistema. Vid. R. M. Buxbaum & K. J. Hopt, *Legal Harmonization and the Business Enterprise*, Berlin/New York, 1988; J. Slot, Harmonisation, 21(1996) *ELRev*., 378-397; R. Vukadinović, Pravna sredstva i metodi harmonizacije kompanijskog prava u Evropskoj uniji, 5-8/1998, *Pravo i privreda*, str. 913-923.

[12] C. U. Schmid, "'Bottom-up" Harmonisation of European Private Law: Ius Commune and Restatement, u: S. Feiden and C. U. Schmid (Eds.), Evolutionary Perspectives and Projects on Harmonisation of Private Law in the EU, *EUI Working Paper in Law*, No. 7/99, European University Institute, Florence, pp. 103-124, p. 113. Ovakav metod O. Lando naziva opcionim (Optional or Mandatory Europeanisation of Contract Law, u: S. Feiden and C. U. Schmid (Eds.), Evolutionary Perspectives and Projects on Harmonisation of Private Law in the EU, *EUI Working Paper in Law*, No. 7/99, European University Institute, Florence, p. 11).

[13] O. Lando, Optional or Mandatory Europeanization of Contract Law, *op. cit.,* p. 11.

[14] K. Preinerstorfer, The Work of the Lando-Commission from an Alternative Viewpoint, u: S. Feiden and C. U. Schmid (Eds.), Evolutionary Perspectives and Projects on Harmonisation of Private Law in the EU, *EUI Working Paper in Law*, No. 7/99, European University Institute, Florence, p. 46.

ljske (*the codifiers and the cultivators*). Ono što deli ove "škole" je pitanje da li jednoobrazno pravo narodima Evrope treba da bude nametnuto putem zakona ili narodi treba da budu uvučeni u njega strpljivim prosvećivanjem i ubeđivanjem. "Evropski kodifikatori" kao krajnji cilj usklađivanja razmatraju mogućnost i opravdanost donošenja jedinstvenog Evropskog građanskog zakonika ili Evropskog zakonika o privatnom pravu. Ipak, kad je reč o ovom poslednjem, preovladao je stav da bi unifikacija celokupnog privatnog prava, uz brojne teorijske nesuglasice i praktične teškoće koje bi to izazvalo, bio preambiciozni zadatak i da za takav posao u ovom momentu ne postoje realne potrebe. Kao jedan od razloga protiv sveobuhvatne kodifikacije najčešće se navodi[15] da je predmet i obim unifikacije uslovljen, pre svega, postavljenim ekonomskim ciljevima i stepenom njihovog ostvarivanja u Ekonomskoj zajednici, odnosno Evropskoj uniji. Ugovorom o osnivanju Evropske unije iz Mastrihta, sa kasnijim izmenama i dopunama iz Amsterdama i Nice, ti ciljevi su definisani kao uspostavljanje i funkcionisanje jedinstvenog unutrašnjeg tržišta, ekonomske, monetarne i političke unije. Za njihovo ostvarivanje očigledno je da nije potrebno uskladiti propise iz svih oblasti privatnog prava, kao npr. porodičnog ili naslednog prava koje ostaju *cura posterior*. U tom smislu se u preambuli Rezolucije Evropskog Parlamenta ističe da "unifikacija može biti izvršena u granama privatnog prava koje su od velike važnosti za razvoj jedinstvenog tržišta, kao što je ugovorno pravo..." Ograničenje predmeta harmonizicije na one oblasti privatnog prava koje se odnose na "ekonomski orijentisane domene", navodi se i u posebnoj studiji Evropskog parlamenta.[16]

Pobornici unifikacije celokupnog građanskog prava i donošenja odgovarajućeg jedinstvenog Evropskog građanskog zakonika potporu za svoj

---

[15] V. Ulmer, Vom deutschcn zum europäischen Privatrecht, 47 *Juristen Zeitung* (1992), S. 5; O. Remien, Illusion und Realität eines europäischen Privatrechts, 47 *Juristen Zeitung* (1992), 277-284, S. 280; H. Kötz, Rechtsvergleichung und gemeineuropäisches Privatrecht, u: Gemeinsames Privatrecht in der Europäischen Gemeinschaft, Müller-Graff (ed.), Baden-Baden, 1993, S. 95; R. Zimmermann, Civile Code and Civil Law - The "Europeanization" of Private Law within the European Community and the Re-Emergence of a European Legal Science, 1 *Columbia Journal of European Law* (1994/95), 63, p. 78.

[16] *The Private Law Systems in the EU: Discrimination on Grounds of Nationality and the Need for a European Civil Code*, Working Paper of Directorate General for Research of European Parliament, Legal Affairs Series, JURI 103 EN, European Parliament, Luxembourg, 1999, p. iii.

optimizam nalaze u činjenici da "ne postoji displina pravnih nauka koja je toliko evropskog karaktera kao što je disciplina privatnog prava"[17] i u dosadasnjem iskustvu Evropske zajednice u usklađivanju nekih pitanja ne samo obligacionog, već i ostalih grana privatnog prava donošenjem odgovarajućih komunitarnih uputstava. Tako je u oblasti prava potrošača za regulisanje pojedinih pitanja iz ugovornih odnosa u periodu od 1985. do 2000. godine doneto sedam uputstava.[18]

Kad je reč o obligacionom pravu posebno se ističu dva uputstva: Uputstvo EEZ-a o odgovornosti za štetu od proizvoda sa nedostatkom i Uputstvo EEZ-a o nepravičnim ugovornim klauzulama.

Navedenim uputstvima postavljeni su temelji budućeg usklađenog regulisanja ugovorne i deliktne odgovornosti, što čini "srce obligacionog prava".[19]

Osim ovih, doneta su i druga uputstva kojima je izvršena sektorska harmonizacija posebnih ugovora.[20]

---

[17] P. Koschaker, *Europa und das Römische Recht*, 3 Auflage, 1958, S.1. navedeno prema: J. Basedow, Common Contract Law for the Common Market, 33 *CMLRev*., (1996), p. 1169, n. 1.

[18] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 *on certain aspects of the sale of consumer goods and associated guarantees* (OJ L 171, 7.7.1999, p.12; Council Directive 93/13/EEC of 5 April 1993 *on unfair terms in consumer contracts* (OJ L 95, 21.4.1993, p. 29); Council Directive 90/314/EEC of 13 June 1990 *on package travel, package holidays and package tours* (OJ L 158, 23.6.1990, p. 59); Council Directive 85/577/EEC of 20 December 1985 *to protect the consumer in respect of contracts negotiated away from business premises* (OJ L 372, 31.12.1985, p. 31); Council Directive 87/102/EEC of 22 December 1986 *for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit* (OJ L 42, 12.2.1987, p. 48) as modified by Directive 90/88 (OJ L 61, 10.3.1990, p. 14) and Directive 98/7 (OJ L 101, 1.4.198, p. 17); Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 *on the protection of consumers in respect of distance contracts* (OJ L 144, 4.6.1997, p. 19); Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 *on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis* (OJ L 280, 29.10.1994, p. 83).

[19] E. Hondius, Towards a European Civil Code, General Introduction, u: *Towards a European Civil Code*, Eds. A. S. Hartkamp i dr., Nijhoff, Dordrecht/Boston, London, 1994, p. 1.

[20] Council Directive 86/653/EEC of 18 December 1986 *on the co-ordination of the laws of the Member States relating to self-employed commercial agents* (OJ L 382, 31.12.1986, p. 17); Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 *on certain*

Međutim, kako su uputstvima regulisana samo konkretna pitanja, pokazalo se da ovaj metod kao "bolan proces racionalizacije nacionalnoih privatnih prava"[21] pored fragmentarnosti ne obezbeđuje ni potrebnu pravnu sigurnost jer države članice u procesu njihove implementacije mogu zloupotrebiti njima ostavljenu slobodu i ugroziti ili njihovo jedinstveno tumačenje ili jedinstvenu primenu na celoj teritoriji Unije. S druge strane, iskustvo je pokazalo da se komunitarna uputstva sporo donose, kao i da između njihovih rešenja postoje neusaglašenosti što u primeni umesto jednoobraznosti može dovesti do pravnog partikularizma. Zbog toga se paralelno sa donošenjem konkretnih komunitarnih uputstava radilo i na donošenju formulisanju opštih pravila koja bi se kao načela primenjivala na sve ugovore. U tom cilju Komisija Evropske zajednice je podržala osnivanje posebne Komisije za evropsko ugovorno pravo (*Commission on European Contract Law*), poznate i kao Landoova komisija. Rezultat rada prva dva saziva ove Komisije su Načela evropskog ugovornog prava sadržana i objedinjena u ovom momentu u dve knjige: *Načela evropskog ugovornog prava, delovi I i II (Principles of European Contract Law*, Parts I and II).[22] Kako do sada formulisanim i usvojenim načelima nisu regulisana sva pitanja ugovornog prava, Komisija u trećem sazivu od 1997. godine je nastavila rad na formulisanju zajedničkih pravila koja se odnose na nelegalnost, prebijanje, ustupanje potraživanja, subrogaciju, pretpostavka dugovanja, množinu poverilaca i dužnika i zastarelost. Predviđeno je da se na harmonizaciji nastavi i u ostalim oblastima koje bi obuhvatio budući građanski zakonik, kao što su pitanja naslednog, porodičnog, trgovačkog prava, ali i u ostalim

---

legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ L 171, 17.7.2000, p. 1); Directive 2000/35/EC ofthe European Parliament and of the Council of 29 June 2000 *on combating late payment in commercial transactions* (OJ L 200, 8.8.2000, p. 35); Council Directive 85/374/EEC of 25 of July 1985 *on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products* (OJ L 210, 7.8.1985, p. 29) as modified by the Directive 99/34/EC (OJ L 141, 4.6.1999, p. 20); Directive 97/5/EC of the European Parliament and the Council of 27 January1997 *on cross-border credit transfers* (OJ L 43, 14.2.1997, p. 25).

[21] D. Caruso, The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration, *http://www.law.harvard.edu/programs/JeanMonnet/papers/96/9609ind.html*, deo III, 4.b.

[22] *Principles of European Contract Law*, Parts I and II, Ed. by O. Lando and Hugh Beale, Kluwer Law International, 2000.

segmentima privatnog prava. U ovom momentu već rade komisije pod rukovodstvom nemačkog profesora Von Bara[23] za harmonizaciju ostalih izvora obligacija, kao što su: delikti, restitucija, neosnovano obogaćenje i *negotiorum gestio*.

Bez obzira koja "škola" će prevladati i koji će metod biti korišćen, nesporno je da je proces "evropeizacije" već prisutan kao "životna činjenica"[24] i da će se i u buduće nastaviti sa ili bez formalne kodifikacije.[25] Ono što karakteriše takav proces "preoblikovanja" nacionalnog privatnog prava jeste da se odvija van nacionalnih državnih legislativnih organa - na meta nacionalnom nivou. Savremeni proces "preoblikovanja" nacionalnih prava je u pravnoj teoriji država članica Evropske unije izazvao brojne rasprave,[26] ali

---

[23] Vid. C. V. Bar, *The Common European Law of Torts*, Oxford, 1998. Za deliktno pravo neposredno je zadužena tzv. Spie/Koziol grupa.

[24] A. Hartkamp, Perspectives for the Development of a European Civil Law, simpozijum: *The Process of Approximation of Domestic Law to the Law of the European Union* ..., pod naslovom II, http://www.cbs. dk/departments/law/staff/ol/commission_on_ecl/ literature/ hartkamp/perspectives_trento.htm

[25] F. Wero, Towards Denationalization of Private Law in Europe, u: *New Perspectives on European Private Law*, Fribourg (Swisse), 1998. ed. Franz Werro, p. 24.

[26] Od rasprava koje su objavljene na engleskom i nemačkom jeziku navodimo samo neke: O. Lando, Principles of European Contract law, An Alternative or a Precursor of European Legislation, *RabelsZ* 56(1992), 261; Zweigert/Kötz, *Einführung in die Rechtsvergleichung auf dem Gebietem des Privatrechts* I, Tübingen, 1984; H. Kötz, Gemeineuropäisches Zivilrecht, u: *Festschrift für Konrad Zweigert*, Tübingen, 1981, 481-500; B. de Wite/C. Forder, *The common law of Europe and the future of legal education*, Deventer, 1992; H. Coing, *Das Europäische Privatrechtt*, München, 1985/1989; A. Hartkamp i dr., *Towards a European Civil Code*, Nijhoff, 1994. i 1998; Zweigert/Kötz, *An Introduction to comparative law*, Oxford, 1992; Ulmer, Vom deutschcn zum europäschen Privatrecht, 47 *Juristen Zeitung* (1992), 1-8; M. Bussani and U. Mattei, The Common Core Approach to European Private Law, 3 *Columbia Journal of European Law,* 1997/8, pp. 339-356; O. Remien, Illusion und Realität eines europäischen Privatrechts, 47 *Juristen Zeitung* (1992), 277-284; T. Hartlief, Towards a European Private Law? A Review Essay, *Maastricht Journal of European and Comparative Law*, 1(1994)2, 166-178; Müller-Graff, (ed.), *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, Baden-Baden, 1993; U. Drobnig, General principles of european contract law, u: *International sale of goods*, Dubrovnik lectures (Sarcevic/Volken, eds.), Oceana, 1986, 305-333; Müller-Graff, Europäisches Gemeinschaftrecht und Privatrecht, *NJW*, 1993, 13-23; Müller-Graff, *Privatrecht und Europäisches Gemeinschaft - Gemeinschafts privatrecht*, Baden-Baden, 1991. U Zborniku je ovom pitanju posvećena poseban referat: M. Stanivuković, Instrumenti unifikacije i harmonizacije prava i njihov odnos prema kolizionim normama, s posebnim osvrtom na Načela evropskog ugovornog prava.

je podstakao i Organizatore ovog Savetovanja da razmotre značaj načela za razvoj privatnog prava u trećim državama i da u tom smislu uporede neka rešenja iz jugoslovenskog Zakona o obligacionim odnosima[27] sa Načelima evropskog ugovorog prava.

II Zna~aj Na~ela evropskog ugovornog prava za prava tre}ih dr`ava

Svrha Načela je višestruka i mogu služiti kao: 1) osnova za kasnije formulisanje jedinstvenog Evropskog zakona o privatnom pravu; 2) pravni vodič za Evropsku uniju, njene organe i države članice u pripremi sopstvenih zakona i drugih propisa; 3) osnova za buduće kodifikacije ili rekodifikovanje građanskog prava pre svega u državama članicama, ali i trećim državama budućim članicama; 4) pravo koje će primenjivati sudovi na ugovore u okviru Evropske unije i 5) izabrano pravo koje će se primenjivati na ugovore od strane i između evropskih ugovornih strana.

Budući da su namenjena pre svega Evropskoj uniji, to je analiza njihove sadržine i pravne prirode od prevashodnog značaja za pravnu teoriju i praksu država članica Evropske unije. O tome već postoje brojne analize, rasprave i komentari.

Razlog zbog koga su, međutim, Centar za pravo Evropske unije i Institut za pravne i društvene nauke organizovali Naučni skup na kome su prezentovani materijali koji čine sadržinu ove knjige jeste naučna znatiželja da se proceni i predvidi uticaj koji bi Načela mogla imati i na prava trećih država. Pored ovog "naučno saznajnog" razloga, stoje i razlozi praktične prirode nametnuti već izraženom željom SR Jugoslavije da što je moguće više unapredi odnose sa Evropskom unijom i da u tom cilju već naredne (2002. godine) zaključi sporazum o stabilizaciji i asocijaciji i time trasira put za kasnije punapravno članstvo u Evropskoj uniji.[28] Proces približavanja i kasnijeg prijema u Evropsku uniju podrazumeva prihvatanje od strane treće

[27] Zakon o obligacionim odnosima, donet 1978. godine, objavljen u "Sl. listu SFRJ", br. 29/78, sa kasnijim izmenama i dopunama u 39/85, 57/89 i 31/93.

[28] Iako se ne pominju konkretni datumi, visoki politički predstavnici Savezne vlade i Vlade Republike Srbije izjavljuju da će nastojati da se Jugoslavija pripremi za pregovore o punom članstvu već 2004. godine, a da se do 2010. godine pregovori okončaju.

države čitavog niza uslova sadržanih u pravnim načelima, političkim principima i odlukama Suda pravde koji se generalno označavaju kako *komunitarne tekovine (acquis communautaire*).[29]

I bez obzira što u ovom momentu Jugoslavija još nije preuzela formalnu obavezu da svoje propise usaglašava sa pravnom regulativom Evropske unije, proces preispitivanja domaćeg zakonodavstva i upoznavanja prava Evropske unije se već intenzivno odvija i u naučnim krugovima i u okviru pojedinih vladinih i nevladinih institucija.

Jedan od razloga je i želja da se Načela razmotre u kontekstu opšte i sve izraženije tendencije ka stvaranju svetskog prava trgovaca i težnje ka svetskoj unifikaciji privatnog prava kao delovima procesa pravne i ekonomske globalizacije.[30] U tom kontekstu, evropeizacija i globalizacija mogu biti posmatrani kao "prijatelji i rivali."[31] U teorijskom smislu stvaranje novog zajedničkog prava za Evropu[32] dovodi u pitanje postavku o pravu kao izrazitoj nacionalnoj kategoriji čiji su nastanak i primena neodvojivo povezani sa državnom strukturom.[33] U tom pogledu novo "evropsko" pravo kao rival konkuriše nacionalnim unutrašnjim pravima. S druge strane, očigledna je nužnost da se pod uticajem talasa ekonomske globalizacije nacionalne kodifikacije "prilagode novim kategorijama ugovora kao i autonomnom transnacionalnom pravu poslovne zajednice" koje će sve više opstajati izvan nacionalnih sistema prava.[34] i da egzistiraju i primenjuju se kao "prijatelji".

---

[29] Vid. C. C. Gialdino, Some Reflections on the Acquis Communautaire, 32 *CMLRev*., (1995), 1089-1121.

[30] Vid. M. Shapiro, The Globalization of Law, *http://www.gelso.unitn.it/card-adm/review/Comparative/Shapiro-1996/shapiro.htm*

[31] F. Snyder, Globalization and Europenization as Friends and Rivals: European Union Law in Global Economic Networks, *EUI Working Paper, Law No 99/8*, European University Institute, Florence.

[32] Lord Bingham, A New Common Law for Europe, The Clifford Chance, *Millenium Lectures "The Comming Together of the Common Law and Civil Law*" Ed. by B. S. Markesinis, Oxford, 2000. p. 27.

[33] Vid. W. Brauneder, Europäisches Privatrecht: historische Wirklichkeit oder zeitbedingter Wunsch an die Geschichte?, Saggi, Conferenze e Seminari, Paper No 23; R. Vukadinović, *Pravo Evropske unije*, Beograd, 2001, str. 39.

[34] K. Riedl, The Work of the Lando-Commission from an Alternative Viewpoint, *European Review of Private Law*, 1(2000); *http://www.ufsia.ac.be/čestorme/Riedl.html/*

Kada je reč o odnosu Načela i jugoslovenskog privatnog prava, podneti referati pokazuju da su rešenja domaćeg ugovornog prava iz Zakona o obligacionim odnosima u najvećem broju slučajeva usaglašena sa Načelima ili da se odgovarajućim tumačenjem mogu naći značenja koja su na liniji onih koja se označavaju kao savremena evropska shvatanja. Rezultati ovog Skupa kao i onih koji će verovatno uslediti sa kasnijih, trebalo bi da otklone predrasude koje, na žalost, postoje kod jednog dela eksperata koji pokušavaju da pomognu modifikaciji pravnih sistema u zemljama u tranziciji. U svom referatu profesor Morait navodi da se prva predrasuda sastoji u tome što strani eksperti ulaze u sistem "ideoloških a ne pravnih normi", a druga je "da su norme pravnih sistema naših tranzicijskih zemalja anahrone; da pripadaju tradiciji, a ne evropskom pravnom krugu".[35]

Podneti referati potvrđuju da su rešenja Zakona o obligacionim odnosima po onim pitanjima koja su bila predmet obrade, savremena i da pripadaju "evropejskim uzorima". Uostalom, na potrebu pravne "evropeizacije", u smislu ugledanja na strane zakone-uzore ukazivano je već na počecima kodifikacije srpskog građanskog prava.[36]

Međutim, to ne znači i da ne postoje određene razlike, kao što je pitanje značaja kauze ili pitanje opozivosti ponude. Kada je reč o značaju kauze, Načela polaze od potpune slobode ugovornih strana i nastanak

---

[35] B. Morait, Principi evropskog ugovornog prava o izvršenju ugovora, referat u ovom Zborniku.

[36] Navedeno prema: M. Pavlović, Uslovi, ideje i razlozi za pravnu evropeizaciju Srbije, u: *Srbija i evropsko pravo*, knj. I, Kragujevac, 1996, str. 127-143.

Korene "ugledanja" srbijanskih zakonopisaca na strane uzore trebalo bi tražiti u vreme pre Prvog srpskog ustanka. Na potrebu pravne evropeizacije prvi je ukazao Boža Grujović naglašavajući da Srbi uporedo sa oslobodilačkom borbom treba da se bore za načelo zakonitosti "da bi što pre i prosveštena Evropa uvidela da se Srbi nisu samo prosto protivu Turaka ... podigli, nego da oni u isto vreme osnivaju i jednu stalnu državu, jedno stalno, na zakonitosti osnovano pravlenije..." Pri tome su se ustanici kolebali između recepcije, ruskog, austrijskog i francuskog prava. Tadašnje srbijanske vođe nisu, međutim, bile voljne da na ovaj način, po rečima Karađorđa "sapinju konja za trku".

No, i pored poznate sklonosti Miloša Obrenovića da vlada i upravlja bez zakona kako se ne bi vezivao "za artiju, pa ne može da čini ni zla ni dobra", posle čitanja Trećeg hatišerifa 1833. godine, rešio je da po ugledu na evropske izgradi pravni sistem kako bi pokazao svetu da "nismo gomila divljih razbojnika, nepodobna da sama upravlja, kao što je našim neprijateljima ugodno da nas predstavljaju." U tom cilju u jesen 1828, počinje sa izradom zakonskih projekata. Za uzor se uzima Napoleonova kodifikacija, dok je dilema između evolucionog i revolucionog metoda rešena u korist ovog drugog.

ugovora ne vezuju za postojanje kauze niti engleskog *consideration*-a.[37] Zakon o obligacionim odnosima spada u onu grupu kontinentalnih prava koja nastanak i postojanje ugovora vezuju za postojanje kauze (*cause, causa*),[38] s tim što se pretpostavlja da obaveza ima osnov iako nije izražen. Kauzom se objašnjava i opravdava ekonomska svrha ugovora.[39] Obećanje u kome se ne vidi svrha ne obavezuje. Osim toga, kauza mora biti pravno dozvoljena, odnosno dopuštena. Prema odredbama Zakona o obligacionim odnosima kauza je nedopuštena ako je protivna prinudnim propisima, javnom poretku ili dobrim običajima.

U pravnom sistemu *common law*, kao i prema pravu Nemačke i pravima Nordijskih zemalja, kauza nije od značaja za nastanak i pravnu valjnost ugovora.

Potiskivanje značaja kauze predstavlja savremenu tendenciju u globalizaciji privatnog prava i prihvaćena je i u UNIDROIT Načelima.[40]

U pogledu opoziva ponude, u Načelima je prihvaćeno rešenje iz anglosaksonskog prava prema kome ponuda može biti opozvana ako opoziv stigne ponuđenome pre nego što je on poslao svoj prihvat ili, u slučaju prihvata ponašanjem, pre nego što je ugovor zaključen. Ovakvo rešenje koje vodi poreklo iz *common law* sistema, prihvaćeno je kao savremeno i u Bečkoj konvenciji o ugovorima o međunarodnoj prodaji robe i UNIDROIT Načelima. U većini nacionalnih prava germanske grupe u *civil law* sistemu ponuda se ne može opozvati.[41] I u Zakonu o obligacionim odnosima se polazi od neopozivosti ponude pa je ponudilac vezan ponudom izuzev ako je svoju obavezu da održi ponudu isključio, ili ako to isključenje proizlazi iz okolnosti posla. Ponuda se moze povući (*withdraw*), a ne opozvati

---

[37] Vid. slučaj C-106/89, *Marleasing SA/La Comercial*, of 13 Novembar 1990, u kome je Sud pravde Evropskih zajednica zauzeo stav prema kome se postojanje kauze ne zahteva za postojanje (nastanak) nekih ugovora zasnivajući takav stav na Uputstvu 68/151 u kojoj kauza nije bila navedena kao osnov za ništavost ugovora (o osnivanju kompanije).

[38] Austrijsko, francusko, belgijsko, luksemburško, italijansko, špansko, grčko i portugalsko pravo. Vid. O. Lando & H. Beale, napomena uz član 2:101, pp. 141-143.

[39] Vid. detaljnije R. Zimmerman, *The Law of Obligations, Roman Foundations of the Civilian Tradition*, Oxford, 1996, pp. 549- 559.

[40] Vid. čl. 3.2.

[41] Vid. referat M. Draškića, "Ponuda i prihvat prema uniformnim pravilima i uporednom pravu ", u ovom *Zborniku*; R. Sacco, Formation of Contracts, u: *Towards a European Civil Code*, Eds. A. Hartkamp i dr., 1998, pp. 197-198.

(*revocation*) samo ako je ponuđeni primio opoziv pre prijema ponude ili istovremeno sa njom.

Ova dva slučaja su navedena samo primera radi. O nekim drugima je pisano u podnetim referatima. Time nikako nije iscrpljena lista razlika, pa očekujemo da to može biti tema narednih skupova.

Kada je reč o proceni mogućeg uticaja Načela na prava trećih država, utisak je da se može očekivati da će načela evopskog ugovornog prava, bez obzira što nisu usvojena u obavezujućih formi, vršiti uticaj pre svega na evropsku pravnu doktrinu kako u državama članicama, tako i trećim državama. Može se, takođe, očekivati da određeni uticaj izvrše i na arbitraže i nacionalne sudove, ne samo kao pomoć u tumačenju i određivanju potpunijeg sadržaja nacionalnih propisa, već i da kao *lex mercatoria* budu i direktno primenjivani, kao što je to već slučaj sa UNIDROIT Načelima.[42]

Što se tiče njihovog mesta u procesu globalizacije, nesumnjivo je da se proces "evropeizacije" prava koji je otpočeo sa usklađivanjem ugovornog prava, bez obzira na pravna sredstva i metode kojima se to vrši, odvija u sklopu sve izraženije globalizacije prava u svetskim razmerama kao "komplementaran i delimično preklapajući proces."[43] Iako se u ovom momentu ne može sa sigurnošću prevideti u kom pravcu će se nesumnjivo je da dolazi do konvergencije pravnih sistema.

Prof. dr Radovan D. Vukadinović*

---

[42] Vid. M. Bonell, UNIDROIT Principles: a significant recognition by a United States District Court, *Uniform Law Review*, 3(1999), pp. 651-663.

[43] F. Snyder, *op. cit*., p. 59.

* Direktor Centra za pravo Evropske unije Pravnog fakulteta u Kragujevcu.

FOREWORD

Importnace of a unified private law for a unified Europe

One of the goals set to the European Economic Community in the Treaties of Rome under which it was established, was the "harmonisation of laws and regulations to the extent necessary for successful operation of the common market".[1] Since the establishment and operation of the common market largely depends on an adequate private law, the provisions of which should provide for the equality of members of the community, free trade and free movement of people, services and capital, the harmonisation of national legislations of the member states was set as a goal parallel to the economic ones. In that respect, the European Economic Community and subsequently the European Community and the European Union, should be looked upon not only as an economic integration, which it certainly is, but also as an effort made towards creating a unified legal system[2] in which the community subjects are not only states, but also individuals as consumers increasingly. Consequently, the community law - as a special and unique set of regulations that is created and applied in the framework of three Communities: European (Economic) Community, European Coal and Steel Community and European Atomic Energy Community - comprised for a long time mostly regulations of public law (administrative) nature.[3] However, once the necessary public law frame for economic and political integration was created by applying them, and parallel to the expansion of the Community's/Union's

---

[1] Article 3.h of the Treaty Establishing the European Economic Community.

[2] J. Schwarze, Concept and Perspectives of European Community Law, *5 European Public Law,* 2(1999), 227, p. 229

[3] See: R. Vukadinović, *Pravo Evropske unije,* Belgrade, 2001, pp. 40-47.

goals and the increasingly expressed intention to turn the European Community from a "union of states" into a "federal state"[4] designated as the European Union, also the question of developing a unified private law for all of the 15 member states was raised. The domain of private law was selected because the starting point was the assumption based on the experience showing that without a unified private law, it is not possible to create unified economic and political space and that the existing differences in national laws of the member states *per se* impede not only the establishment and operation of the common and internal market, but they also indirectly render impossible or slow down the achievement of other objectives. The unified rules the future European Civil Code should contain were thus assigned the role of Piemont, so that the unified regulations were taken not only as the "cornerstone"[5] of the single market[6], but also as a contribution to "joint identity"[7] and a factor of linking and rapprochement not only of the member states, but also of the peoples of Europe.

To that end, the European Parliament adopted two resolutions: one on 26 June 1989[8] and the other on 25 July 1994,[9] stating that the unification of major private law branches in the form of adoption of the European Civil Code would be the most efficient method of harmonisation for the purpose of establishing a single market without frontiers. The enactment of these resolutions was followed by very lively debates among theoreticians of law on the subject of new modern *Europeanisation of law*[10] and the possibility of

---

[4] See: Decision of the German Federal Constitutional Court (Bundesvervassungs gerischt) in the *Manfred Brunner and Others v. The European Union Treaty* case, Cases 2 BvR 2134/92 & 2159/92, Š1994Ć 1 CMLR, 57-109, Item 51, p. 89.

[5] G. Alpa, European Community resolutions and the Codification of "Private Law", *2 European Review of Private Law,* (2000)321, p. 327.

[6] J. Basedow, A Common Contract Law for the Common Market, 33 CMLRev., (1996), pp. 1169-1195.

[7] U.C. Schmid, Legitimacy Conditions for a European Civil Code, *EUI Working Papers,* RSC No. 2001/4, European University Institute, Florence.

[8] Resolution A2-157/89, Official Journal of the European Communities 1989, OJ No. C 158/400, of 26.06.1989.

[9] Resolution A3-0329/94, Official Journal of the European Communities 1994, OJ No C 205/518, of 25.07.1994.

[10] See: T. Repgen, Europäisierung des Privatrecht durch Wiederbelebung des ius commune? in: Europäisserung des Privatrecht. Zwischenbilanz und Perspektiven, *Jahrbuch Junger Zivirechtswissenschaftler* 1997, Stuttgart 1998, S.9 onwards.

creating a new *ius commune Europaeum,* a part of which would also be the unified European private law as the counterpart of the medieval *lex mercatoria.* In that context, "Europeanisation" of private law means a process of unification or harmonisation[11] based on the acceptance and application of common standards by private and government institutions, first in the European Union member states and then in other European states. As for the method, "Europeanisation" can be carried out by the so-called *bottom-up, from below* method and the *from above* method. As an alternative approach, the bottom-up method is based on the activity of non-legislative bodies, law theoreticians and practitioners in the first place, so that European systems could get closer one to another as much as possible. This method entails the freedom (option) of contracting parties and courts, as well as of others to apply them as selected law or stay out of it.[12]

Harmonisation by the from above method or *mandatory*[13] entails the duty of parties and courts to apply the thus adopted rules, because they have been imposed by the European Union authorities or the legislative authorities of the member states. The thus adopted rules "come into force from above", i.e., they are put into effect by the official legislative authorities.[14] The differences existing between these two methods actually

---

[11] A difference between harmonisation and unification of regulations exists in the degree of uniformity that can be achieved by these legal methods. Harmonisation is an assimilated term that means adjustment of regulations to the extent necessary for achievement of the *desired goal* by applying them. Unification is conducive to the achievement of full uniformity of regulations, which in turn leads to the creation of a unified legal system. See R.M. Buxbaum & K.J. Hopt, *Legal Harmonization and the Business Enterprise,* Berlin/New York, 1988; J. Slot, harmonisation, 21(1996) *ELRev*., 378-397; R. Vukadinović, Pravna sredstva i metodi harmonizacije kompanijskog prava u Evropskoj uniji, 5-8/1998, *Pravo i privreda,* pp. 913-923.

[12] C.U. Schmid, "Bottom-up" Harmonisation of European Private Law: Ius Commune and Restatement, in: S. Frieden and C.U. Schmid (Eds.), Evolutionary Perspectives and Projects on Harmonisation of Private Law in the EU, *EUI Working Paper in Law,* No. 7/99, European University Institute, Florence, pp. 103-124, p. 113. O. Lando refers to this method as *optional* (Optional or Mandatory Europeanisation of Contract Law, in: S. Feiden and C.U. Schmid (Eds.), Evolutionary Perspectives and Projects on Harmonisation of Private Law in the EU, *EUI Working Paper in Law*, No. 7/99, European University Institute, Floerence, p. 11.

[13] O. Lando, Optional or Mandatory Europeanization of Contract Law, *op. cit.,* p. 11.

[14] K. Preinerstorfer, The Work of the Lando-Commission from an Alternative Viewpoint, in: S. Feiden and C. U. Schmid (Eds.), Evolutionary Perspectives and Projects on

reflect the difference between two "schools": the codifiers and the cultivators. The dividing line between the two "schools" is the question of whether the uniform law should be imposed onto *European peoples* legislatively or should the peoples be drawn into it on the basis of patient cultivation and persuasion. The "European codifiers" are considering as *ultimate objective* of harmonisation the *possibility and justification of enactment* of a single European Civil Code or a European Private Law Code. Even so, with reference to the latter, the prevailing view was that unification of the entire private law, along with the many ensuing *disagreements among theoreticians* and difficulties encountered in practice, would be an *excessively ambitious* task and that there is no real need for that at present. One of the most frequently given reasons against all-inclusive codification[15] is that the subject and scope of unification are conditional on the set economic goals and the rate of their achievement in the Economic Community or the *European Union.* In the European Union founding Maastricht Treaty and the amendments thereto adopted in Amsterdam and Nice, these goals were defined as the establishment and operation of a single internal market, an economic, monetary and political union. Evidently, their achievement does not call for harmonisation of regulations in all areas of private law, such as those dealing with family or succession, for example, which remain *cura posterior.* In that context, it is stated in the preamble to the European Parliament Resolution that "unification may be carried out in the branches of private law that are of great importance for the development of a unified market, as is the case with contract law...". The limitation of the subject matter of harmonisation to the private law branches relating to "economy-

---

Harmonisation of Private Law in the EU, *EUI Working Paper in Law,* No. 7/99, European University Institute, p. 46.

[15] See: Ulmer, Vom deutschcn zum europäischen Privatrecht, 47 *Juristen Zeitung* (1992), S. 5; O. Remien, Illusion und Realität eines europäischen Privatrechts, 47 *Juristen Zeitung* (1992), 277-284, S. 280; H. Kötz, Rechtsvergleichung und gemeineuropäisches Privatrecht, u: Gemeinsames Privatrecht in der Europäischen Gemeinschaft, Müller-Graff (ed.), Baden-Baden, 1993, S. 95; R. Zimmermann, Civile Code and Civil Law - The "Europeanization" of Private Law within the European Community and the Re-Emergence of a European Legal Science, 1 *Columbia Journal of European Law* (1994/95), 63, p. 78.

oriented domains" is also referred to in a special European Parliament study.[16]

The advocates of unification of the entire civil law and adoption of an appropriate single European Civil Code base their optimism on the fact that "no other branch of law is so much of a European nature as is the private law branch"[17] and the European Community s experience in harmonising some issues relating not only to contract law, but also to other branches of private law, by issuing appropriate community directives. Thus, seven directives were issued from 1985 to 2000 in the consumer rights domain to deal with some issues relating to contractual relationships.[18]

As for contract law, two directives stand out in particular: EEC Directive on liability for damage caused by deficient products and EEC Directive on unfair contract clauses.

---

[16] *The Private Law System in the EU: Discrimination on Grounds of Nationality and the Need for a European Civil Code,* Working Paper of Directorate General for Research of European Parliament, Legal Affairs Series, JURI 103 EN, European Parliament, Luxembourg, 1999, p. iii.

[17] P. Koschaker, *Europa und das Römische Recht,* 3 Auflage, 1958. S.1., quoted according to: J. Basedow, A Common Contract Law for the Common Market, 33 *CMLRev.,* (1996), p. 1169.

[18] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 *on certain aspects of the sale of consumer goods and associated guarantees* (OJ L 171, 7.7.1999, p. 12; Council Directive 93/13/EEC of 5 April 1993 *on unfair terms in consumer contracts* (OJ L 95, 21.4.1993, p. 29); Council Directive 90/314/EEC of 13 June 1990 *on package travel, package holidays and package tours* (OJ L 158, 23.6.1990, p. 59); Council Directive 85/577/EEC of 20 December 1985 *to protect the consumer in respect of contracts negotiated away from business premises* (OJ L 372, 31.12, 1985, p. 31); Council Directive 87/102/EEC of 22 December 1986 *for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit* (OJ L 42, 12.2.1987, p. 48) as modified by Directive 90/88 (OJ L 61, 10.3.1990, p. 14) and Directive 98/7 (OJ L 101, 1.4.198, p. 17); Directive 97/7/EC of the European Parliament and the Council of 20 May 1997 *on the protection of consumers in respect of distance contracts* (OJ L 144, 4.6.1997, p. 19); Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 *on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis* (OJ L 280, 29.10.1994, p. 83).

The mentioned directives laid foundations to the future harmonised regulation of contractual and delictual (tort) liability, which makes up the "heart of contract law".[19]

Besides these, also other directives have been issued, on the basis of which a sectoral harmonisation of special contracts has been carried out.[20]

However, since the directives regulated only concrete issues, it turned out that this method as "the painful process of rationalization of national private laws"[21] besides being fragmentary, does not provide for the necessary legal security either, because in the process of their implementation, the member states can misuse the freedom left to them and jeopardise either their uniform interpretation or uniform application throughout the Union's territory. On the other hand, experience has shown that the adoption of communal directives is a slow process and that there is a disharmony between their provisions, which could lead to legal particularism in their implementation, instead of uniformity. That is why the adoption of concrete community directives was also paralleled by the adoption of general rules that would be applicable as principles to all contracts. To that end, the European Community Commission gave support to the establishment of the *Commission on European Contract Law,* which is also known as the Lando Commission. The first two sessions of the latter Commission resulted in the

---

[19] E. Hondius, Towards a European Civil Code, General Introduction, u: *Towards a European Civil Code*, Eds. A. S. Hartkamp i dr., Nijhoff, Dordrecht/Boston, London, 1994, p. 1.

[20] Council Directive 86/653/EEC of 18 December 1986 *on the co-ordination of the laws of the Member States relating to self-employed commercial agents* (OJ L 382, 31.12.1986, p. 17); Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 *on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market* (OJ L 171, 17.7.2000, p. 1); Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 *on combating late payment in commercial transactions* (OJ L 200, 8.8.2000, p. 35); Council Directive 85/374/EEC of 25 July 1985 *on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products* (OJ L 210, 7.8.1985, p. 29) as modified by the Directive 99/34/EC (OJ L 141, 4.6.1999, p. 20); Directive 97/5/EC of the European Parliament and the Council of 27 January 1997 *on cross-border credit transfers* (OJ L 43, 14.2.1997, p. 25).

[21] D. Caruso, The Missing View of the Cathedral: The Private Law paradigm of European Legal Integration, *http://www.law.harvard.edu/programs/Jean Monnet/papers/96/9609ind.html, Part III, 4.b.*

Principles of European Contract Law, which are set out and unified in two books at present: *Principles of European Contract Law,* Parts I and II).[22]

Since the principles drafted and adopted so far did not regulate all contract law issues, the Commission carried on working in its convocation of 1997 on the drafting of common rules relating to illegality, set-off, assignment of claims, subrogation, assumption of debt, plurality of creditors and debtors and prescription.

Regardless of what "school" will prevail and what method will be used, it is beyond any doubt that the "Europeanisation" process is already under way as a "vital fact"[23] and that it will also be carried on in the future with or without formal codification.[24] What characterises such process of "transformation" of national private law is the fact that it is taking place outside the national state legislative bodies, on meta national level. The modern process of "transformation" of national laws provoked many debates among the law theoreticians of the European Union member states,[25] as well

---

[22] *Principles of European Contract Law,* Parts I and II, Ed. by O. Lando and Hugh Beale, Kluwer Law International.

[23] A. Hartkamp, Perspectives for the Development of a European Civil Law, Symposium: The Process of Approximation of Domestic Law to the Law of the European Unionÿ, under title II, http://www.cbs.dk/departments/law/staff/ol/commission_on_ecl/literature/hartkamp/

[24] F. Werro, Towards Denationalisation of Private Law in Europe, in: *New Perspectives on European Private Law,* Fribourg (Switzerland), 1998, ed. Franz Werro, p. 24.

[25] Of the many treaties published in English and German, we shall mention only a few: O. Lando, Principles of European Contract law, An Alternative or a Precursor of European Legislation, *RabelsZ* 56(1992), 261; Zweigert/Kötz, *Einführung in die Rechtsvergleichung auf dem Gebietem des Privatrechts* I, Tübingen, 1984; H. Kötz, Gemeineuropäisches Zivilrecht, u: *Festschrift für Konrad Zweigert*, Tübingen, 1981, 481-500; B. de Wite/C. Forder, *The common law of Europe and the future of legal education*, Deventer, 1992; H. Coing, *Das Europäische Privatrechtt*, München, 1985/1989; A. Hartkamp i dr., *Towards a European Civil Code*, Nijhoff, 1994. i 1998; Zweigert/Kötz, *An Introduction to comparative law*, Oxford, 1992; Ulmer, Vom deutschcn zum europäschen Privatrecht, 47 *Juristen Zeitung* (1992), 1-8; M. Bussani and U. Mattei, The Common Core Approach to European Private Law, 3 *Columbia Journal of European Law,* 1997/8, pp. 339-356; O. Remien, Illusion und RealitÌt eines europÌischen Privatrechts, 47 *Juristen Zeitung* (1992), 277-284; T. Hartlief, Towards a European Private Law? A Review Essay, *Maastricht Journal of European and Comparative Law*, 1(1994)2, 166-178; Müller-Graff, (ed.), *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, Baden-Baden, 1993; U. Drobnig, General principles of european contract law, u: *International sale of goods*, Dubrovnik lectures (Sarcevic/Volken, eds.), Oceana, 1986, 305-333; Müller-Graff, Europäisches Gemeinschaftrecht und Privatrecht, *NJW*, 1993, 13-23; Müller-Graff, *Privatrecht*

as prompted the Organisers of this Conference to consider the importance of the principles for the development of private law in third states and in that context, to compare some solutions set out in the Yugoslav Law of Contract[26] with the Principles of European Contract Law.

Importance of the Principles for the law systems of third states

The purpose of the European Principles was to serve as: (1) the basis for future formulation of the Common European Code of Private Law; (2) a legal guide for the EU, EU organs and EU member states in the drafting of their legislation and regulations and in regulating their own conduct; (3) the basis for the formulation of the EU member states (and implicitly also that of prospective EU member states) future codification or recodification of contract law; (4) the law applied by tribunals to EU contracts; and (5) the law voluntarily chosen as the applicable law for contracts by and between European parties.

Since they are intended for the European Union in the first place, the analysis of their contents and legal nature is of prime importance for the law theory and practice of the European Union member states. Many analyses, treaties and comments already exist on that subject.

However, the reason why the Centre for European Union Law and the Institute of Law and Social Sciences organised the scientific conference at which the papers making up the contents of this book are presented, is scientific curiosity concerning the assessment and forecast of the effect the Principles could produce on the laws of third states, too. Besides this "scientific cognitive" reason, there are also reasons of a practical nature, resulting from the already expressed wish of the FR of Yugoslavia to further as much as possible its relations with the European Union and to that end, to

---

und EuropÌisches Gemeinschaft - Gemeinschafts privatrecht, Baden-Baden, 1991. The Collection of Papers includes one dealing with this matter in particular: M. Stanivuković, Instrumenti unifikacije i harmonizacije prava i njihov odnos prema kolizionim normama, sa posebnim osvrtom na Nacela evropskog ugovornog prava. I

[26] Original title: *Zakon o obligacionim odnosima*, adopted 1978 (published in the *Službeni list SFRJ*, No 29/78 with amendments in:39/85, 57/89 and 31/93.

conclude already next year (2002) an Agreement on stabilisation and association and thereby pave the way to its subsequent full membership of the European Union.[27] The process of approximation and subsequent admission to the European Union requires of a third state to accept a series of conditions included the legal principles, political principles and decisions of the Court of Justice, which are generally referred to as *community heritage (acquis communautaire)*.[28]

Regardless of the fact that Yugoslavia has still not formally undertaken to harmonise its regulations with the European Union laws, the reconsideration of national legislation and study of the European Union laws are already under way at a fast pace, both in the scientific circles and in the framework of some government and non-government institutions.

One of the reasons for this is also the wish to consider the Principles in the context of the general and growing tendency towards creating a world mercantile law and the aspiration for the worldwide unification of private law as parts of the process of legal and economic globalisation.[29] In that context, Europeanisation and globalisation can be regarded as "friends and rivals".[30] Theoretically speaking, the creation of a new common law for Europe[31] brings into question the assumption to the effect that law is a strikingly national category, the origin and application of which is inseparably associated with the state structure.[32] In that respect, the new "European" law

---

[27] Although concrete dates are not mentioned, high political representatives of the Federal Government and the Government of the Republic of Serbia say that endeavours will be made towards getting Yugoslavia ready for negotiations for its full membership already in 2004 and that these negotiations would be completed by 2010.

[28] See C.C. Gialdino, Some reflections on the Acquis Communautaire, 32 *CMLRev.,* (1995), pp. 1089-1121.

[29] See M. Shapiro, The Globalization of Law, *http://www.gelso.unitn.it/card - adm/review/Comparative/Shapiro-1996/shapiro.htm.*

[30] F. Snyder, Globalisation and Europeanisation as Friends and Rivals: European Union Law in Global Economic Networks, *EUI Working Paper, Law No. 99/8,* European University Institute, Florence.

[31] Lord Bingham, A New Common Law for Europe, The Clifford Chance, *Millennium Lectures* "*The Coming Together of the Common Law and Civil Law*" Ed. by B. S. Markesinis, Oxford, 2000, p. 27.

[32] See W. Brauneder, Europäisches Privatrecht: historische Wirklichkeit oder zeitbedingter Wunsch an die Geschichte?, Saggi, Conferenze e Seminari, Paper No 23; R. Vukadinović, *Pravo Evropske unije*, Beograd, 2001, str. 39.

competes as a rival with national internal laws. On the other hand, in the wake of the globalisation of the economy, national codifications have to accommodate new categories of contracts as well as the autonomous law of the business community (*lex mercatoria)* which has emerged beyond the national legal systems and exist and be applied as "friends".[33]

As for the relationship between the Principles and Yugoslav private law, the presented papers show that the solution of the national contract law set out in the Law of Contract are in most cases in keeping with the Principles or that subject to suitable interpretations, it would be possible to find meanings denoted as modern European ideas. The results of this Conference, as well as of the likely subsequent ones, should do away with the prejudices shown, unfortunately, by some experts who are trying to help in the modification of legal systems of the countries in transition. In his paper, Professor Morait said that the first prejudice is in the fact that foreign experts go into the system of "ideological, not legal norms", and the second in the fact "that the norms of the legal systems of our countries in transition are anachronous; that they belong to traditions, not to the European law community".[34]

The presented papers confirm that the provisions of the Law of Contract dealing with the matter under observation, are modern and belong to "European models". After all, the need for legal "Europeanisation", in the sense of emulating foreign laws/models, was pointed at already at the beginning of codification of the Serbian civil law.[35]

However, that does not also mean the non-existence of certain differences, such as the question of importance of the causa or the question of revocability of the offer. As for the importance of the causa, the Principles take as starting point the full liberty of contracting parties and do not tie the conclusion of a contract to the existence of the causa or the English

---

[33] K. Riedl, The Work of the Lando-Commission from an Alternative Viewpoint, European Review of Private Law, 1(2000); *http://www.ufsia.ac.be/čestorme/Riedl.html/*

[34] B. Morait, Principi evropskog ugovornog prava o izvršenju ugovora, a paper in this Collection of papers.

[35] Quoted according to: M. Pavlovic, Uslovi, ideje i razlozi za pravnu evropizaciju Srbije, in: *Srbija i evropsko pravo,* Vol. I, Kragujevac, 1996, pp. 127-143.

consideration.[36] The Law of Contract belongs to the group of continental laws that do not tie the conclusion and existence of contracts to the existence of the causa (*cause*),[37] assuming though that the duty is founded even if that is not expressed. The causa explains and justifies the economic purpose of contract.[38] A promise in which the purpose cannot be seen is not binding. Moreover, the causa has to be legally permissible. According to the Law of Contract, the causa is impermissible if it is contrary to obligatory regulations, public order or good practices.

In the *common law* legal system, as well as in the laws of Germany and the Nordic states, the causa is not important for the conclusion and legal validity of contracts.

The shoving aside of importance of the causa is a modern tendency in the globalisation of private law and it is also accepted in the UNIDROIT Principles.[39]

As for the revocability of the offer, the Principles accept the provision of the Anglo-Saxon law, which provides that an offer may be revoked, if the notice of revocation reaches the offeree before the latter has dispatched its notice of acceptance or in the case of acceptance by conduct, before the contract has been concluded. Such a solution originating from the *common law* system has been accepted as a modern one also in the Vienna Convention on Contracts of International Sale of Goods and the UNIDROIT Principles. In the majority of national laws of the Germanic group, an offer cannot be revoked in the *civil law system.*[40] Also in the Law of Contract, the starting point is the irrevocability of offer, so that the offeror is bound by its offer, unless it has excluded its duty to abide by its offer, or if

---

[36] See case C-106/89, *Marleasing SA/La Commercial,* of 13 November 1990, in which the European Communities Court of Justice took the position that the existence of the causa does not require the existence (conclusion) of some contracts, basing that position on Directive 68/151, in which the causa was not mentioned as grounds for making a (company founding) contract null and void.

[37] Austrian, French, Belgian, Luxembourg, Italian, Spanish, Greek and Portuguese laws. See O. Lando & H. Beale, note relating to Article 2:101, pp. 141-143.

[38] For more details, see R. Zimmermann, *The Law of Obligations, Roman Foundations of the Civilian Tradition,* Oxford, 1996, pp. 549-559.

[39] See Article 3.2.

[40] See the paper of M. Draskic included in this *Collection of papers;* R. Sacco, Formation of Contracts, in: *Towards a European Civil Code,* Eds. A. Hartkamp et all, pp. 197-198.

such exclusion arises from the circumstances of the transaction. An offer may be *withdrawn,* not revoked only if the offeree has received the notice of revocation prior to receiving the offer or concurrently with it.

These two cases were mentioned just as examples. Some other cases are referred to in the papers presented. That in no way exhausts the list of differences, so that we feel that this could be the topic of future conferences.

As for the appraisal of the possible impact of the principles on the laws of third countries, the prevailing feeling is that although not adopted in a binding form, the principles of the European contract law will affect the European legal doctrines, in the member states and third states alike. Moreover, it can also be expected that they will also affect the arbitration and national courts, not only in giving assistance in the interpretation and determination of the fuller contents of national regulations, but also in being directly applied as *lex mercatoria*, as is the case with the UNIDROIT Principles.[41]

With regard to their place in the globalisation process, it is beyond any doubt that the "Europeanisation" of law, which began with the harmonisation of contract law, regardless of the means and methods of doing so, is being carried out in the scope of growing globalisation of laws on international scale, as a "complementary and partly overlapping process".[42] Although it is not possible at present to predict the direction in which it will go, it is beyond any doubt that a convergence of legal systems will be taking place.

Professor Radovan D. Vukadinović, Ph.D.*

[41] See M. Bonell, UNIDROIT Principles: A significant recognition by a United States District Court, *Uniform Law Review,* 3(1999), pp. 651-663.

[42] F. Snyder, *op. cit.,* pp. 651-663.

* Head of the Centre for European Union Law, Kragujevac Faculty of Law.