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Regional Private Laws & Codification in Europe

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REGIONAL PRIVATE LAWS AND CODIFICATION IN EUROPE

Regions within European Union member states such as Scotland and Catalonia have their own legal systems: how will the process of 'Europeanisation' affect them? This volume examines the phenomenon of 'regional' private law in the European Union, considering jurisdictions and laws below those of the member states (such as Scotland in the UK and Catalonia in Spain) and drawing comparisons with other such jurisdictions elsewhere in the world, such as Louisiana and Quebec. The whole is considered in relation to the development of European private law, and the use of codification in that process. This volume will be of interest to academic lawyers worldwide, advanced law students and European policy makers.

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ABBREVIATIONS

ABGB	Allgemeinen bürgerlichen Gesetzbuch (Austrian General Civil Code)
AC	Appeal Cases (House of Lords, England)
AcP	*Archiv für die civilistische Praxis*
ADC	*Anuario de Derecho Civil*
AJCL	*American Journal of Comparative Law*
All ER	All England Law Reports
AnfG	Anfechtungsgesetz (Germany)
AnfO	Anfechtungsordnung (Austria)
BCC	Baltic Civil Code
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BNA	British Nationality Act 1981
BOE	*Boletín Oficial del Estado*
BW	Burgerlijk Wetboek (Dutch Civil Code)
C.	Code of Justinian
CC	code civil (French Civil Code)
CCQ	code civil Quebec
C. de D.	*Cahiers de droit*
CDCC	Compilació del dret civil de Catalunya
CE	Spanish constitution
CEELI	Committee on East European Legal Initiatives
CISG	Vienna Convention on the International Sales of Goods (1980)
CJEL	*Columbia Journal of European Law*
CLJ	*Cambridge Law Journal*
CP du N	*Cours de perfectionnement du Notariat*
CYADC	Constitutions y Altres Drets de Catalunya
D.	Digest of Justinian
DLR	Dominion Law Reports (Canada)

ECR	European Court Reports
EEN	*Ephimeris Ellinon Nomikon*
ELR	*Edinburgh Law Review*
ERPL	*European Review of Private Law*
GCC	Greek Civil Code
ICLQ	*International and Comparative Law Quarterly*
Inst.	Institutes
IO	Insolvenzordnung (Germany)
JBl	*Juristische Blätter*
JhJb	*Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts*
JLH	*Journal of Legal History*
JLSS	*Journal of the Law Society of Scotland*
Jur. Rev.	*Juridical Review*
JuS	*Juristische Schulung*
JZ	*Juristenzeitung*
KO	Konkursordnung (Germany)
KritE	*Kritiki Epitheorissi*
LHR	*Law and History Review*
LQR	*Law Quarterly Review*
LTIT	Llei de la Tutela Institucions Tutelats (Catalan Act on Guardianship, abrogated)
NAFTA	North American Free Trade Agreement
NBW	Nieuw Burgerlijk Wetboek (New Dutch Civil Code)
NoV	*Nomiko Vima*
OJ	Official Journal of the European Communities
OJLS	*Oxford Journal of Legal Studies*
OR	Obligationenrecht (Swiss Code of Obligations)
PECL	Principles of European Contract Law
PrALR	Prussian Allgemeiner Landrecht
QB	Queen's Bench Law Reports (England)
RabelsZ	*Rabels Zeitschrift für ausländisches und internationales Privatrecht*
R. du B.	*Revue du barreau*
RDC	*Rivista di Diritto Civile*
RDP	*Revista de Derecho Privado*
RGD	*Revue générale due droit, de la législation et de jurisprudence en France et à l'étranger*
RGLJ	Revista General de Legislación y Jurisprudencia

RHDI	*Revue hellénique de droit international*
RIDA	*Revue internationale de droit d'antiquité*
RIDC	*Revue internationale de droit comparé*
RJC	*Revista Jurídica de Catalunya*
RJPIC	*Revue juridique et politique de l'indépendance et de la coopération*
RTDC	*Revue trimestrielle de droit civil*
SALJ	*South African Law Journal*
SALR	*South African Law Reports*
SC	Session Cases (Scotland)
SCCR	Scottish Criminal Case Reports
SC (HL)	Session Cases (House of Lords section) (Scotland)
SCLR	Scottish Civil Law Reports
SCR	Supreme Court Reports (Canada)
SLPQ	*Scottish Law and Practice Quarterly*
SLT	Scots Law Times
SME	*Stair Memorial Encyclopaedia*
SSL	*Scandinavian Studies in Law*
THRHR	*Tydskrif vir Hedendaagse Romeins-Hollandse Reg*
TR	*Tijdschrift voor Rechtsgeschiednis*
TSAR	*Tydskrif fir die Suid-Afrikaanse Reg*
Unidroit	International Institute for the Unification of Private Law
UPLR	*University of Pennsylvania Law Review*
WLR	Weekly Law Reports (England)
ZEUP	*Zeitschrift für Europäisches Privatrecht*
ZNR	*Zeitschrift für neuere Rechtsgeschichte*
ZSS	*Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische/Romanistische Abteilung*
ZvglRWiss	*Zeitschrift für vergleichende Rechtswissenschaft*

CONTENTS

Introduction

HECTOR L. MACQUEEN, ANTONI VAQUER AND
SANTIAGO ESPIAU ESPIAU

This book consists of revised versions of the papers presented at a conference held in the Universitat de Lleida, Catalonia, on 27–29 April 2000. Scholars from all over the world came together to discuss a seemingly diverse range of topics linked by three key concepts: (1) European private law; (2) regional private law; and (3) codification of law. The purpose of this introduction is to show how these concepts draw together, and why their interaction is important at this juncture in the development of Europe as a cultural, political and juridical entity.

European private law: the new *ius commune*

The idea of European private law has been central to much legal scholarship at the end of the twentieth and the beginning of the twenty-first centuries. It has been driven by at least three distinct engines: (1) the European Union; (2) the findings of comparative law; (3) the history of law in Europe, in particular the medieval and early modern concept of a European *ius commune*, based upon the learned Roman Civil Law and the Canon Law of the Roman Church.

In practical terms, the most important of these engines for the idea of a European private law has been the development of what is now the European Union, linking together for political, economic and social purposes an increasing number of the states of western Europe, and doing so by means, among other things, of law and legal instruments. The bitterly contested modern arguments about the nature and future development of the Union should not obscure its birth in the literally smouldering ruins in which Europe was left by the experiences of the First and, in particular, the Second World Wars, and the deeply rooted desire of all civilised Europeans

that further recurrence of such horrors should be prevented by the creation of indissoluble bonds working initially through the mechanisms of trade and extending later in other directions.

From the start, the project of European union has used laws as a means towards its ends, whether through the creation of its own legal structures and rules or by way of the harmonisation of the laws of the member states. Increasingly (and inevitably) that activity in law has entered upon the sphere of private and commercial legal relations. As a result, in some fields (an example might be intellectual property) it has become less and less the case within member states that the law is seen as domestic other than in form (i.e. it continues to be based upon national legislation albeit following upon a European directive or other instrument) or in enforcement (i.e. litigation takes place rather more in national than in European courts).

Thus it is already possible to observe as a matter of fact (and law) the growth of European private law;[1] but the growth is neither universal nor systematic. Rather it has been haphazard and piecemeal, dependent upon the identification of areas crucial to the project of union and upon which the political agreement of member states is achievable within the relatively short time-frames provided by political and economic agenda. Typical examples to which reference is often made in this book are the Product Liability Directive,[2] affecting part of the law of delict or tort, and, in the field of contract, the Unfair Terms and Consumer Guarantees Directives.[3] All of these are linked by policies favouring consumer protection, and they have been enacted, by and large, without consideration of how they might fit into a larger whole of even the national laws of delict and contract, never mind any possible or actual Europe-wide principles and rules.[4] Some of these difficulties were however recognised by the European Commission in July 2001 when it issued a Communication to the Council and the European Parliament on European contract law,[5] seeking views on whether problems

[1] See e.g. N. Lipari, *Diritto Privato Europeo* (Padua, 1997); C. Quigley, *European Community Contract Law* (London, 1997).

[2] Council Directive 85/374/EEC, OJ 1985 L210/29.

[3] Council Directive 93/13/EEC, OJ 1993 L95/29; Parliament and Council Directive 99/44/EC, OJ 1999 L171/12.

[4] A convenient collection of the legislative texts affecting the development of European private law may be found in U. Magnus (ed.), *European Law of Obligations: Regulations and Directives* (Munich, 2002) (texts in German, English and French).

[5] COM(2001) 398 final. See further the website http://europa.eu.int/comm/off/green/index_en.htm.

result from divergences in contract law between member states; and whether the proper functioning of the internal market might be hindered by problems in relation to the conclusion, interpretation and application of cross-border contracts. The Commission was also interested in whether different national contract laws discourage or increase the costs of cross-border transactions. If concrete problems were identified, the Commission also wanted views on possible solutions, such as

- leaving it to the market;
- promotion of the development of non-binding contract law principles such as the Principles of European Contract Law;[6]
- review and improvement of existing EC legislation in the area to make it more coherent and/or adaptable;
- adoption of a European contract code at EC level.

A further factor pointing in the direction of a European private law and closely linked to the development of the European Union is profound political and social change – revolution, indeed – in eastern Europe. The collapse of the Iron Curtain in 1989 and of the Soviet Union in 1991 brought to an end another division of Europe that was the product of its century of wars. The end of Communist economic systems in the east entailed the introduction of legal regimes there to provide the framework and support required for the establishment and maintenance of market economies, and also pointed to the expansion of the hitherto entirely western European Union. Moreover, it was not enough for the eastern European countries simply to adopt the Union's legislative framework and to follow that as it developed; the whole structure of private and commercial law, which the west had been able to take as essentially a given, needed to be absorbed in both form and substance. A necessary preliminary was, of course, the identification and formulation of that substance.

The second engine driving the idea of a European private law has been comparative law. Comparison of legal systems one with another has long been justified by pursuit of the unification of law and a search for the 'best' or the 'ideal' rules to prevail in any such unified law. As long ago as the 1920s the establishment of Unidroit, shorthand for the International Institute for the Unification of Private Law, gave formal backing to these goals, and it has manifested itself also in the achievements of numerous

[6] See further below, text at nn. 11–15.

international conventions embodying substantive rules bearing upon private and commercial relations, in particular where these necessarily involve cross-border transactions or persons from different national jurisdictions. For the purposes of this collection the most important recent example of such an instrument is the 1980 Vienna Convention on the International Sale of Goods (the Vienna Convention or CISG), which establishes a system of rules to govern such transactions that has now been adopted by over fifty countries (although not yet the UK). Unidroit has also been responsible for such informal documents as the Principles of International Commercial Contracts, published in 1994 as an elaboration of the general contractual rules contained in the CISG and available as 'soft law' for use particularly in international arbitrations.

That the results of comparative law might go further than transnational situations perhaps began to emerge from the view that the true basis of comparison between legal systems did not lie in their concepts and structures but rather in the functions performed and the social needs met by these concepts and structures. From such an approach there could emerge hitherto underlying unities in the seemingly diverse laws and legal systems of the modern world.[7] In the European context, the importance of this lay in opening up possibilities of reconciliation between the two major legal traditions in Europe: the Continental Civil Law and the English Common Law, whose contrasts in substance and method appeared to be otherwise unbridgeable, and so to present a major obstacle to any progress in the harmonisation and unification of private law in Europe.

Such divergence, to say nothing of any underlying unities, might also be explained by legal history, the third engine in the idea of European private law. Comparative study showed the historical connections between systems, much of which lay ultimately in the learned laws of Rome and the Church as expounded from the Middle Ages on in the universities of Europe. History also suggested that such supranational, essentially academic law – the *ius commune* – could exist in fruitful if variable interaction with the more restricted *iura propria* of specific territories, even in England.[8] As a law

[7] See generally K. Zweigert and H. Kötz, *Introduction to Comparative Law*, trans. T. Weir, 3rd edn (Oxford, 1998), chs. 1–4.

[8] Classic studies now available in English include F. Wieacker, *A History of Private Law in Europe*, trans. T. Weir (Oxford, 1995); O. F. Robinson, T. D. Fergus and W. M. Gordon, *Introduction to European Legal History*, 3rd edn (London, Edinburgh, Dublin, 1999); R. C. van Caenegem, *An Historical Introduction to Private Law* (Cambridge, 1992); M. Bellomo (trans. L. G. Cochrane),

created and sustained by scholarly study and publication, it also provided a model by which a modern renewal of the *ius commune* might be achieved.[9]

So there have emerged over the last twenty years a number of academic projects with the goal of contribution, in various ways, to the creation and recognition of a new *ius commune*, or a European private law.[10] It is important to note that many of these projects involved or involve the substantial participation of all the European legal traditions, including those of the Common Law and of Scotland.

Perhaps the longest sustained and furthest advanced is the Principles of European Contract Law produced by the Commission for European Contract Law, a private group of mainly academic lawyers headed by Professor Ole Lando. Each jurisdiction within the European Union, including Scotland, was represented on the group.[11] The Lando Commission began work in the early 1980s, with the objective of producing a code or restatement of contract law for use within what was then the European Community. The Commission took a comparative approach, seeking to identify the goals of contract law and to find rules that would best express the results of this work. The American restatement model was important for the Lando Principles, involving the production, not only of a text of rules, but also of a commentary thereupon alongside notes of the state laws from which the text has been derived.[12] The goals of the project have now been largely achieved, with the publication of part I in 1995[13] and part II in 1999;[14] the third and final part appeared in 2003.[15]

The Common Legal Past of Europe 1100–1800 (Washington, D.C., 1995). Note also the series of publications, Comparative Studies in Continental and Anglo-American Legal History, sponsored by the Gerda Henkel Stiftung, in which a comparative approach to legal history has produced some interesting results.

[9] See most recently R. Zimmermann, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (Oxford, 2001), ch. 3.

[10] In addition to the specific projects discussed below, note the establishment in the 1990s of at least two journals dedicated to the development of European private law: *European Review of Private Law* and *Zeitschrift für Europäisches Privatrecht*.

[11] One of the authors became the Scottish representative on the group in 1995.

[12] See the interesting discussion by M. Hesselink in M. Hesselink and G. J. P. de Vries, *Principles of European Contract Law* (Dordrecht, 2001), pp. 12–32.

[13] O. Lando and H. Beale (eds.), *Principles of European Contract Law Part I: Performance and Non-Performance* (Dordrecht, 1995).

[14] O. Lando and H. Beale (eds.), *Principles of European Contract Law Parts I and II* (Dordrecht, 1999).

[15] O. Lando, E. Clive, A. Prum and R. Zimmermann (eds.), *Principles of European Contract Law Part III* (Dordrecht, 2003). The final meeting of the Lando group was held in Copenhagen

While the end product of the Lando Commission is unquestionably academic in nature, it is intended to influence law reform at national and European Union levels and also to be available as a potential legal basis for international contracts and arbitrations in commercial disputes.[16] A rival product on contract law is the work of a group headed by Professor Giuseppe Gandolfi of Pavia, which was published in 2000[17] and is based upon the Italian Civil Code and the Code of Contract Law drafted in the late 1960s by Harvey McGregor QC for the English and Scottish Law Commissions.[18] We will return to the significance of the latter document for European private law later in this introduction. But it should be noted that the existence of these privately produced Principles of the Lando and Gandolfi groups was a powerful factor underlying the European Commission's Green Paper of 2001 on European contract law.[19]

The codal or restatement method of the Lando and Gandolfi groups has had its followers in other areas of private law, most notably, perhaps, in the law of trusts,[20] although none have so fully worked out their results. But as the work of the Lando Commission has drawn to a close, it has given birth to an even larger new project, the Study Group towards a European Civil Code, which began work in 1999.[21] Following methods in essence the same as those of the Lando project, but involving several groups based in various European centres, the project incorporates work upon delict (tort), unjustified enrichment, *negotiorum gestio*, securities, sale of goods and contracts for services. It may go on to include projects on transfer of property, trusts and insurance. So far as contract is concerned, the results

in February 2001. The project has a website: http://www.cbs.dk/departments/law/staff/ol/commission_on_ecl/index.html. The Principles are referred to by the House of Lords when searching for the meaning of good faith in the Unfair Terms Directive in *Director General of Fair Trading* v. *First National Bank plc* [2002] 1 AC 481.

[16] Compare in this regard the Unidroit *Principles of International Commercial Contracts* (Rome, 1994), another set of rules created by an essentially academic group working collaboratively and comparatively over a period of years and starting on the basis of the CISG. Further work is now taking place to extend the Unidroit Principles.

[17] G. Gandolfi (ed.), *Code européen des contrats: livre premier* (Pavia, 2001).

[18] H. McGregor, *Contract Code Drawn up on Behalf of the English Law Commission* (Milan, 1993).

[19] See above, text at n. 5.

[20] See D. J. Hayton, S. C. J. J. Kortmann and H. L. E. Verhagen (eds.), *Principles of European Trust Law* (The Hague, 1999); discussed in (2000) 8(3) *European Review of Private Law* (a special issue entitled 'Trusts in Mixed Legal Systems: A Challenge to Comparative Law') and reprinted as J. M. Milo and J. M. Smits (eds.), *Trusts in Mixed Legal Systems* (Nijmegen, 2001).

[21] See the Study Group's website, http://www.sgecc.net.