PRIVATE LAW IN EUROPEAN CONTEXT SERIES

The Politics of a European Civil Code

Edited by
Martijn W. Hesselink

KLUWER LAW
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The Politics of a European Civil Code

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For the
Society of European Contract Law (SECOLA)

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Contract law is probably the most dynamic area of European Private Law and also the fundamental private law discipline in all national legal systems. SECOLA was founded to assist the study of European contract law and to enhance its quality. SECOLA organises an open, interdisciplinary, truly international and interdisciplinary discussion platform. The focus of the Society is upon newly enacted European Community legal measures, on core concepts in the field of European contract law, and on proposals for further legislation. The Society organises one or two international conferences each year, arranges for the publication of scholarly discussions in the field including books to be published in this series, and assists with other network activities. In addition, SECOLA is building up an information platform, systematically structured, containing all relevant European legal measures in full text in all official languages of the Community, together with their transposition into national laws and with reference to the pertinent scholarly literature (see www.secola.org).

A list of previous titles in the series may be found at the end of this volume.

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Preface

This book contains the contributions to the conference entitled *The Politics of a European Civil Code* which was held in Amsterdam on 7 January 2005.

The conference was supported financially by the Amsterdam Institute for Private Law (*AIP*), the Law Faculty, the executive board (*College van Bestuur*) of the *Universiteit van Amsterdam*, and by the Royal Netherlands Academy of Arts and Sciences. I am very grateful for their generous contributions.

I would like to extend a special word of thanks to Marianne van Leeuwen, my research assistant, for her invaluable help both in organizing the conference and in editing this book.

Martijn W. Hesselink
Amsterdam/Brussels, September 2005

Chapter 1
A Technical 'CFR' or a Political Code? – An Introduction

Martijn W. Hesselink

I. A TECHNICAL 'CFR' . . .

In February 2003 the European Commission published an Action Plan on European contract law. In that plan the Commission announced that it will adopt a 'common frame of reference' (CFR) and that it will examine whether one or more (optional) European codes of contract law are necessary in order to 'solve problems' in the area of European contract law. According to the Commission the main problems are the incoherence of the existing Community law concerning contracts and the differences between the national systems of contract law which may hamper the proper functioning of the Internal Market.[1]

The Commission's approach towards the Europeanization of contract law is, in essence, both functional and technocratic. It is necessarily functional because the European Union currently has no general power to comprehensively legislate in the area of private law. The European Community has specific powers to harmonize specific sectors of the law of the Member States (including their private law), e.g. with a view to the completion of the internal market (Article 95 EC). However, such measures must 'genuinely have as their objects the improvement of the conditions for the internal market.'[2] Moreover, harmonization measures are only permitted if their objectives cannot be achieved by the Member States (subsidiarity) and they may not go beyond what is necessary to achieve these objectives (proportionality) (Article 5 EC). This explains why the Commission

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1 Communication from the Commission to the European Parliament and the Council; A More Coherent European Contract Law; An Action Plan, COM (2003) 68 final, OJEC 2003 C 63/01. See also the Communication from the Commission to the Council and the European Parliament on European Contract Law, 11 July 2004, COM(2001) 398 final (OJ 2001/C 255/01).

2 Case C-376/98 *Germany* v. *European Parliament and Council* [2000] ECR I-8419 (ECJ).

M.W. Hesselink (ed.), *The Politics of a European Civil Code*, 3–8

seeks to justify the need for a CFR entirely in terms of the coherence of the *acquis communautaire*, for which, it presumes, there is already a valid basis, and of divergences between national contract laws, which create obstacles to the proper functioning of the internal market and which may therefore justify new Community measures.

Since the problems that the Commission is seeking to solve are technical (incoherence of legislation, market deficiencies) it is not surprising that the Commission adopts a technocratic approach in order to solve them. It has appointed experts (academics) who are asked to propose the 'best solutions' to those problems.

In a follow-up communication of October 2004 the Commission underlines that it does not envisage proposing a European Civil Code.[3] It is merely proposing a toolbox containing the best solutions found by experts for existing problems. There is no reason to worry that anything political or otherwise controversial is at stake, one might think.

II. . . . OR A POLITICAL CODE?

The measures announced by the Commission are meant to lead to a coherent statement of rules relating to some of the main parts of private law. Most people would call that a European Civil Code (under construction). Therefore, even before one or more optional codes will be formally enacted it makes sense to refer to the CFR as a European Civil Code (in a substantive sense). Indeed, many observers have come to a similar conclusion. Ewoud Hondius speaks of a 'pre-code', Hugh Collins proposes to 'just call it a Code', the European Union Committee of the House of Lords is worried that 'the CFR may turn out to be something of a Trojan Horse', whereas stakeholders have been struck by the fact that the main part of the CFR will be drafted by the Study Group on a European Civil Code.[4]

Many political questions arise with regard to the idea of a European Civil Code, if it comes in the guise of a 'CFR': Is a civil code an essentially liberal idea? What is the European concept of distributive justice and what role should it play in private law? Is a European code compatible with the ideal of cultural diversity? What

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3 Communication from the Commission to the European Parliament and the Council: European Contract Law and the revision of the *Acquis*: The Way Forward, COM (2004) 651 final, p. 9.

4 E. Hondius, 'Towards a European Civil Code', in: A.S. Hartkamp et al. (eds), *Towards a European Civil Code* (The Hague, London, New York: Kluwer Law International 2004), p. 13; H. Collins, 'The "Common Frame of Reference" for EC Contract Law: a Common Lawyer's Perspective', in M. Meli & M. R. Maugeri (eds), *L'armonizzazione del diritto privato europeo* (Milan: Giuffrè, 2004) pp. 107–124; House of Lords (European Union Committee), *European Contract Law – The way forward?* (HL Paper 95) (London: The Stationery Office Limited 2005), p. 115. Cf also the evidence given by the Law Society of England and Wales (the professional body representing the interests of its 116,000 solicitor members) to the House of Lords.

process can guarantee the democratic legitimacy of codification? Who has an interest in a European Civil Code and who would benefit from maintaining the status quo?

III. THE POLITICAL STAKES

This book explores the various political stakes in the current process towards a European Civil Code. Most contributions to this book are based on papers which were presented at the conference entitled *The Politics of a European Civil Code* which was held in Amsterdam on 7 January 2005. There was a special reason for organizing that conference: Duncan Kennedy was awarded an honorary doctorate by the *Universiteit van Amsterdam*. Kennedy's work on the politics of private law has important implications for the academic debate on European private law. Indeed, after his 'Form and Substance in Private Law Adjudication' (1976), *A Critique of Adjudication* (1997) and 'The Political Stakes in "Merely Technical" Issues of Contract Law' (2002) it is difficult to still maintain that private law is predominantly technical and ideologically neutral.[5]

The political stakes in presumably technical issues of private law can be demonstrated with the help of an analytical tool which was developed by Kennedy: different possible rule solutions to any legal question can be placed on an individualism-altruism continuum. Brigitta Lurger, for example, applies Kennedy's continuum in order to explain the ideological stakes in different rule solutions for property law. The analysis leads to the important question of what kind of world should be shaped by new European rules of property law: 'a more individualistic freedom-oriented world supporting the interests of strong and experienced market actors or a more social world taking into account the needs of consumers and small businesses?' In my own contribution I analyse some presumably technical issues of general contract law in a similar way.

There are many more common threads running through the different chapters. For example, both Duncan Kennedy and Miguel Maduro conclude that it is time to develop a common European notion of social justice. Kennedy invites European colleagues to develop a common theoretical basis for the discussion of social values in Europeanization. In the view of Maduro, 'European integration has reached a point where its emerging European demos and its redistributive and majoritarian elements can no longer be socially accepted and legitimized without an underlying social contract and a criterion of distributive justice.' Such a criterion, which justifies a social Europe, should be able to stand at least the most obvious (neo-)liberal criticism. Indeed, Kennedy is puzzled by the fact that 'Europeans interested in social values in private law don't seem to have answers to criticisms of the social that are standard and dangerously powerful in the United States.'

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[5] See 89 *Harv L Rev* (1976) 1685; Cambridge, Massachusetts: Harvard University Press 1997; 10 *ERPL* (2002) 7–28 respectively.

Another *Leitmotiv* is the potential of social rights in the shaping of European private law. As Maduro points out, social rights are given an important role in the context of the Nice Charter: 'they are systematically placed in an equivalent position to other economic rights'. Some of the social rights in the Charter are even immediately effective. Moreover, Maduro explains, social rights can be used as possible exceptions to free movement rules and their possible deregulatory impact on national social policies. Similarly, Collins argues that social rights should be understood as a way of expressing both the reach and limitations of first and second generation rights: 'They represent a sophisticated modern understanding of how competing rights should be reconciled in the light of broader social goals.' Moreover, instead of drawing solely on the rights at the foundation of traditional civil codes (i.e. the rights to property and freedom of contract), according to Collins the Charter can provide the foundations for a new civil code that draws on a wide range of social and economic rights. Stefano Rodotà, one of the authors of the Charter, even goes one step further. He argues that any act of codification of private law *has to be* coherent with the provisions of the Charter. Hence, according to Rodotà, the weakness of an approach that considers codification as a simple rationalization of existing legislation, as a pure restatement of the *acquis communautaire*: 'The materials to be put in order and embodied in an single text have originated from an institutional context that is prevailingly, and at times exclusively, dominated only by the market logic, thus by a system of values not corresponding to those set out, in particular, in the Charter of Fundamental Rights.'

There is also some strong disagreement among the contributors. The best example is the question whether it is desirable to unify private law in Europe. Ruth Sefton-Green is sceptical. In her view, the differences in the way of thinking and the underlying values make the idea of a European Civil Code difficult and even undesirable. The reasons and values underlying the French and English rules of contract law, she argues, symbolize two different ideological approaches, one is moralistic and based on solidarity ideology ('the judge as a paternalistic figure interfering in the contract is part of an entrenched ethos in French contract law'), the other is self-regulatory and based on market-individualist values ('the resistance to state interference in English law is shared by businesses and jurists alike'). Interestingly, Sefton-Green's analysis comes close to linking up Kennedy's individualism-altruism paradigm to the idea of a dichotomy between a common law and a civil law tradition. However, in his contribution Kennedy himself is sceptical of the rhetoric of tradition in private law. He rather sees the appeals to national legal traditions – which typically come from hegemonic legal powers with fading spheres of influence – in terms of power, dominance and hegemony. Hugh Collins, in turn, is even attracted by the notion of a European Civil Code, because of its radical potential. The codification project can be seized in order to implement a radical agenda for a workers' civil code: 'One can be sceptical about the business case for a European contract law code, but at the same time view such an instrument as having the potential to provide fresh foundations for a European Union that is closer to the values and aspirations of the people.'