PRIVATE LAW IN EUROPEAN CONTEXT SERIES

The Common Core of European Private Law

Edited by
Mauro Bussani and Ugo Mattei

Kluwer Law International

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KLUWER LAW INTERNATIONAL
THE HAGUE / LONDON / NEW YORK

Published by:
Kluwer Law International
P.O. Box 85889, 2508 CN The Hague, The Netherlands
sales@kluwerlaw.com
http://www.kluwerlaw.com

Sold and Distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
USA

Sold and Distributed in all other countries by:
Turpin Distribution Services Limited
Blackhorse Road
Letchworth
Hertfordshire SG6 1HN
United Kingdom

Printed on acid-free paper.

ISBN 9041120041

The Common Core of European Private Law

Private Law in European Context Series

VOLUME 1

Series Editors:

Martijn Hesselink
Ugo Mattei
Horatia Muir Watt

1. M. Bussani and U.Mattei (eds): *The Common Core of European Private Law.* Essays on the Project. 2002 ISBN 90-411-2004-1
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Preface: The Context

This book contains the contributions that prominent scholars gave to 'The Common Core of European Private Law' Project, addressing the first seven plenary sessions of the General Meetings held in the month of July each year at Trento, Italy.

1. The volume is published in what can be regarded as a special moment in the making of European private law so that some comments are in order. The manifold aspects of the europeanization of the law is the focus of an array of initiatives, meetings, seminars and books. European Institutions seem to have taken seriously the matter, with specific respect to one of the most relevant private law fields. The Commission issued a call-for document on Contract Law (Commission communication to the Council and the European Parliament on European Contract Law (COM(2001) 398 - C5-0471/2001), OJEC, 2001, C 255, 13.9.2001) and a new Resolution by the Parliament has even scaled in time the steps to attain a European Contract Code (European Parliament resolution on the approximation of the civil and commercial law of the Member States (COM(2001) 398 - C5-0471/2001 - 2001/2187(COS), November 15, 2001, A5 384/2001).

There is no doubt that the idea according to which the law has to be harmonized, integrated, uniformed is widespread and matches well identified social and economic needs. To be sure each of these goals bears different meanings and contents and each of those needs is bred by different reasons and different perspectives on the future of the law. Nevertheless history does seem to blow a tail wind for those who want the change and a head wind for those who advocate continuity.

'Changing the law' is by far the least of the possible targets of the project discussed in this book. As stated elsewhere, the Common Core Project is seeking to unearth the common core of the bulk of European Private Law, within the general categories of Contract, Tort and Property. The search is for what is different and what is already common behind the various private laws of European Union Member States. Such legal systems are differentiated not only along the lines of civil law versus common law heritage, but they can also be seen as belonging to other families of legal systems (Scandinavian, mixed, Latin) according to the taxonomy one wishes to adopt.

Such a common core is to be revealed in order to obtain at least the main lines of one reliable geographical map of the law of Europe.

The Common Core of European Private Law, pp.1–7, 2002.

For the transnational lawyer indeed, the present European situation is as that of a traveler compelled to use a number of different local maps each one of difficult use to foreign lawyers and sometimes containing information which (due to bias or hidden assumptions of municipal lawyers) can be misleading. We wish to comparatively connect these maps (and possibly correct this misleading information). We do not wish to force the actual diverse reality of the law within one single map to attain uniformity. We are not drafting a city plan for something that will develop in the future and that we wish to affect. This project seeks only to analyze the present complex situation in a reliable way. While we believe that cultural diversity in the law is an asset, we do not wish to take a preservationist approach. Nor do we wish to push in the direction of uniformity. Is this 'neutral approach' possible?

In using at the beginning of our journey the metaphor of cartography we have certainly tried to convey a message of neutrality and skepticism, locating our comparative work in the domain of the 'is' rather than of the 'ought'.

A few important developments in comparative law, both in America with the work of the 'new approaches' people (see David Kennedy's paper in this volume) and in Europe (among others an article by Erik Jayme and a prolusion by Sjef van Erp) have driven attention to the 'post-modern condition' in which legal scholarship is living and in particular to the impossibility of such neutrality and of the merely descriptive flavor of comparative law. Such renewed consciousness does not seem to undermine the value of our work and it is actually reflected in the way the common core project has unfolded.

On the theoretical side, it is almost a platitude for comparativists to see that most questions cannot have a clear right or wrong answer. Are common law and civil law converging? The answer depends on the assumptions. Is there an Americanization of European law going on? Again the answer depends from our willingness to recognize as 'American' certain modes of thought that today we all share as scholars in Europe (such as the crisis of the deductive method in favor of a more casuistic one as pointed out among those actively involved in Trento by Reimann and Hesselink). Should comparative law be 'forward looking' trying to build European law on new bricks (such as those that are offered by Law & Economics) or should it be backwards looking, struggling to find evidence of a common past to be restored? Again, we are here in a domain of free choices, of opinions that are shaped by different experiences and that it would be silly to evaluate in terms of right and wrong.

The common core project reflects this pluralism of opinion in the European legal community. And it could not possibly be different in a project that is now involving a rather large share of internationally active private law scholars in Europe (the record of our Managing Secretary, Carla Boninsegna, shows more than 200 registered participants). Certainly we have abandoned in the process of learning by doing (the common core wishes to compare rather than to preach how we should compare!) the emphasis on uniformity of our output in part because of the huge amount of transaction costs that would have to be faced by the editors in order to reach perfectly uniform volumes, in part because of the sense that the

different personalities and sensitivities of the volume editors should be reflected in the volumes. Sure, we have kept a few structural common principles, such as describing the answers of the single member states after the each question, or such as keeping high the effort of not assuming as unitary the legal rule to avoid formalism as much as possible, but we have welcomed new inclusions and outside perspectives which in the first meetings we were relentlessly trying to avoid. Also we have tried to keep high the effort to include all the member States although this has sometimes proved difficult.

If our agenda is then not uniformity, recognizing that in front of the complexity of a body such as that of European law this is an impossible (and also not a desirable) task, is it the safeguard of cultural specificity and national identities as witnessed by our effort to keep weaker jurisdictions represented and to avoid patterns of cultural imperialism of larger countries to emerge? The answer would also be on the negative. We cannot help to believe that in the present context of European private law a strongly conservative bias is behind promoting the interests of local lawyers as 'culture' and chauvinism is too strong of an enemy in front of us to offer to it a legitimating weapon. As discussed in the recent Amsterdam conference on critical legal theory in Europe (see *Eur. Rev. Priv. Law,* 2002), the post modern ideology within the European legal culture ends up in an agenda opposed to the efforts of legal change, most notably those changes potentially more able to shake the legal status quo, such as the civil code.

The common core project is not interested in freezing the status quo. Indeed, in the process of drafting the map we are changing the landscape of European private law by affecting the mode of thought, of one of the most important formants of professional law: i.e. legal doctrine (such changing impact is reflected by the title of this volume and it has been pointed out by Blanc Jouvan in a French book review of the first edition). In the course of these years that we have spent more or less intensively worrying about the same methodological problems, the same difficulties in communication due to the lack of common taxonomies, the same need to make our own law, including its more tacit assumptions, understandable by all the other members of our group, we have actually changed, we have augmented our comparative sensitivity and perhaps we have learned to think a bit more like European lawyers rather than like Italians, French, Greeks or Scottish. The distance between us and our foreign fellows perhaps has been reduced, while that between us and our parochial friends at home perhaps have increased. At least this has been the sense of our experience.

Someone might criticize us for this. Perhaps we have worked in the direction of creating a new legal élite, a sort of high table of the legal debate leaving the everyday problems of the law back at home and producing yet another gap between legal scholarship and legal practice. We like to see the issue the other way around. We like to see us busy in fulfilling the gap between a legal practice that is already highly globalized due to the relentless activity of the big transnational law firms, and a legal culture still too much parochial and busy discussing issues often outdated and irrelevant. Moreover we wish to claim that if an agenda is to be detected in the common core project it has always been an agenda of

democratization of the transnational legal elite. It might well be in the nature of law as a largely professional project a certain amount of elitism. It has always been like that in the history of the Western legal tradition. But if one compares the biographies and the generation of the scholars involved here in Trento with those of the participants to the other major international projects of comparable visibility such as the Lando, the Unidroit, the Gandolfi or the von Bar groups, it will be easy to see that our task of democratizing the elite has been a success. As noticed by Hondius in his recent review of 2000 meeting, all participants to our project, junior or senior, from leading as well as from recessive jurisdictions, have been treated on exactly equal standing and have been evaluated for their contributions to the discussion rather than for their status. We believe that this process of democratization will prove particularly valuable in approaching the future challenges of the Europeanization of Private law, most notably the debate over the Code. If there will be enough political strengths to make the Code we believe that the Common Core Project will be able to contribute to the success of that formidable enterprise by offering a collection of materials in our volumes as well as a ripe group of young and energetic transnational scholars linked in an effective network. The production of a code able to inject new 21 centuries conceptions rather than reproducing an outdated nineteenth century vision of progress badly requires such kind of contribution.

Despite such potentials in the world of the 'ought to be' and despite the methodological awareness that we have developed regarding the biases that each one of us, willingly or unwillingly has carried with him or her at Trento, we still believe that the most important cultural difference between the 'Common Core Project' and other remarkable enterprises – such as the Unidroit Principles, the Lando Commission, or the von Bar's Study Group – is that they may be seen as doing city planning rather than cartographic drafting.

2. Some may thus prefer to say that our initiative belongs to the efforts aiming at a cultural integration of the law (echoing the thought of one of the inspirers of the project, the late Rudolf B. Schlesinger). In this perspective, also the 'common core' research may be a useful instrument for legal harmonization, in the sense that it provides reliable data to be used in devising new common solutions that may prove workable in practice. Be that as it may, the latter goal has nothing to do with the common core research in itself, which is devoted to produce reliable information, whatever its policy use might be.

This 'critical neutrality' marks a strong difference of our project also from other major cultural enterprises, such as the one directed by van Gerven and aiming at the preparation of a series of European Law Casebooks – some of them already published. While the aim of developing culture using analytical, not normative tools is shared by both the 'Common Core' and the 'Casebooks' approach, what renders them different is their target and their method.

Our project is aimed at scholars while the casebooks project is aimed at building prospective common European lawyers by framing them since their student's years. The 'Common Core' Project too may provide some useful

materials for teaching purposes (we should say this to please our publishers!), but this is not its primary task. It investigates more specific areas, delving in depth into technical problems. Hence it may facilitate understanding and communication between professional lawyers already grounded in their own legal tradition, as opposed to prospective common European lawyers.

Furthermore our project equally focuses on all the European systems under review, it treats them as equally as possible and places no emphasis on systems that are or could be considered leading or paradigmatic, or hegemonic. Differently from us the 'Casebooks' project mainly concentrates on the English, French and German legal experiences, casting a fugitive glance on the other European systems, whose materials are considered and included in the picture only on an occasional basis.

3. We already highlighted that the actual use of the map we are attempting to draft is, or should be, of no concern for the cartographers who are drawing it and that, if reliable, this map may anyhow become indispensable for whoever is entrusted with drafting European legislation, restatements and/or codifications.

But there is another major contribution that our project and its methodology can hopefully offer to the current debate and to the future of European private law. To epitomize this contribution the word 'awareness' could be chosen.

Indeed, as it is well known, many scholars are currently engaged in a polemic that resembles the nineteenth-century dispute between Savigny and Thibaut on German codification. Despite the time elapsed, in the present debate, 'Code' and 'Culture' seem still perceived as antithetical and mutually exclusive, splitting the scholars into partisans of a 'top-down' and a 'bottom-up' legal reform. All this as if enacted law could exist in modern Western societies without legal culture, and as if the two could ignore each other. All this as if the debate could disregard one of the most important lessons to be drawn from experience and history of the Western legal tradition, specifically that the contrast between top-down and bottom-up legal change is a false opposition. All legal changes have aspects of both. Law is in part politics (top down) and in part culture (bottom up) and institutional change is inescapably due in part to invisible, and in part to visible phenomena. It is partially the recognizable work of political and professional elites, and partially the local evolution of institutions and interpretive practices.

Consequently, one should plainly recognize that, on the one hand, any academic opposition to a Code is likely to be ineffective if the political conditions do favor codification, while, on the other hand, creating a code does not cancel out the existence and the importance of the manifold legal styles and of the different actors of the law (mainly judges and scholars).

From this awareness one should infer other consequences.

The 'Common Core' approach and methodology request information on all the relevant elements that affect the legal solutions of the given case, including policy considerations, economic and social factors, social context and values, as well as the structure of the legal process (organization of courts, administrative structure, etc.). Knowledge of all the relevant elements and factors at play seems indeed crucial in proposing no matter what European legal integration (by means

of a 'traditional' code, a model code *à la* U.C.C., or otherwise) which aspires to go beyond both the nationality and the personal agendas of the decision-makers involved in it.

In fact any legal integration implies producing rules which are new for all, or at least for some, of the legal actors in the systems concerned. Implementation of such rules requires a class of interpreters – judges, practitioners, scholars – acquainted with the new rules and with their rationales. The absence of this knowledge in the short term, as well as (in the long term) the strength of deeply rooted traditions in respect of different concepts, notions and their interrelations, may lead every 'integrative' effort, not to mention a codification, to a dead end.

Being aware of these issues and of their implications can hopefully lead one to support the 'Common Core' approach and methodology, but it certainly enables whomever to see better the future of European private law – should one try to shape it or not. This awareness of the 'law in context' dimension fits particularly well with the philosophy of the collection of volumes in which this book is included.

4. A number of scholars involved in the 'Common Core' Project participate in the above debate, sometimes on strongly opposite sides. Nevertheless, there is one aspect that is common to everybody who is involved in our project. We all share the sense that knowledge and understanding should come before action. The views of the outstanding scholars who have addressed our General Meetings are contributions to knowledge and understanding that certainly deserved to be safeguarded.

5. This is for the 'Common Core' Project a moment of harvesting though, certainly, much work is still to be done. The first volumes in our series have finally been published (*Good Faith in European Contract Law*, R. Zimmermann & S. Whittaker eds; *Enforceability of Promises in European Contract Law*, J. Gordley ed.). A third one (*Pure Economic Loss in Europe*, M. Bussani & V.V. Palmer eds) has already been accepted. Seven others are in the pipeline. The mapping of European Private Law is proceeding.

But this book is also a token of gratefulness.

Some of the lecturers of our plenary sessions have not been able to send their written papers in time for the publication and, therefore, they are not included in this volume. Nonetheless, this preface is a good and further occasion to thank them too, for their valuable personal contribution to the cultural improvement of the initiative.

The gratitude is for the persons with whom we first discussed the enterprise, the scholars who gave us their cultural blessing for, and a strong encouragement to this project. We are hereby thanking our honorary editor Rodolfo Sacco. A special thank is also due to the chairmen of our Meetings, Antonio Gambaro (Property), James Gordley (Contract) and Mathias Reimann (Tort).

The gratitude is for the Directors of the Law Department and the Rector of the Trento University, the Local Government, the Italian Ministry of Education and

Scientific Research, the Italian National Research Council, the European Commission, and the I.S.A.I.D.A.T. Without the efforts and the contributions of all these Institutions the 'Common Core' Project would not be what it is.

The gratitude is for the executive secretary of the 'Common Core' Project, Ms Boninsegna, whose passion and spirit of sacrifice made possible this book.

The gratitude is for all the scholars, lawyers and students whose vivid participation has enriched days and nights of the General Meetings.

6. Professor Barry Nicholas, who was with us in Trento at the first preparatory meeting of the Common Core project in 1993 is no longer with us. He died in Oxford, after a lifetime of scholarship, a few weeks ago. To his memory, together with that of our former Honorary editor the Late Professor Rudolf B. Schlesinger this book is dedicated.

Mauro Bussani & Ugo Mattei

General Editors of the 'Common Core of European Private Law' Project