PRIVATE LAW IN EUROPEAN CONTEXT SERIES

The New European Private Law

Essays on the Future of Private Law in Europe

Martijn W. Hesselink

Kluwer Law International

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Preface

This book contains a selection of the papers which I have presented and the essays which I have published during the last five years on the new European private law. Although most of the chapters have previously been published, it makes sense to publish them together in this book. This because, first, because many of the publications have either been published by a local national publisher or in a foreign language or, alternatively, in a journal which is not readily available in most European libraries. Therefore, many of these publications have not been readily accessible for all the participants in the European private law debate and I hope that this book will render them so. Secondly, and more importantly, bringing these essays together into one publication will emphasise the unity (or at least the similarity) they share as regards the themes, ideas and approach. I will come back to this aspect in the Introduction.

I have not attempted to completely rewrite the essays and to turn them into a coherent book. Therefore, although these essays share a clear unity as regards method, themes and views (which I will further explain in the Introduction) the book also has certain characteristics (the fragmentary and the overlapping) which are typical for a collection of essays. Nevertheless, I have edited all the chapters, updated them when and where necessary, adapted them in a few cases where my views have changed, and added cross-references and an index.

The Introduction (Chapter 1) was obviously written specifically for this book. Chapter 2 is based on my inaugural lecture at the *Universiteit van Amsterdam* which I delivered on June 27th, 2001 and which was published in Dutch ('De nieuwe Europese rechtscultuur', in: M.W. Hesselink, C.E. du Perron, A.F. Salomons, *Uitgesproken Teksten*, Vossiuspers UvA, Amsterdam 2002, pp. 17-30). The present elaborated version was published in the Netherlands by Kluwer in 2001. I partly wrote this chapter as a visiting scholar at Boalt Hall, School of Law, UC Berkeley, and as a Visiting Professor at the *Université René Descartes (Paris V)*. I would like to thank John Cartwright, Edgar du Perron, Jan Jans, Peter Morris, Jacobien Rutgers, Arthur Salomons and Theo Veen for their comments. Chapter 3 was prepared as a *preadvies* for the annual meeting of the Dutch Society for Private Law (*Vereniging voor Burgerlijk Recht*) which was held in The Hague on April 26th, 2001. It was published in the Netherlands ('The Principles of European Contract Law: Some Choices Made by the Lando Commission', in: Martijn W. Hesselink, Gerard de Vries, *Principles of European Contract Law*, Deventer 2001, pp. 5-95) and on the Internet (*Global Jurist Frontiers*: Vol. 1:

No. 1, Article 4). I partly wrote it as a visiting scholar at Boalt Hall, School of Law, UC Berkeley. I would like to thank James Gordley for his inspiring conversations on the subject and Maurits Barendrecht, Hugh Beale, Arthur Hartkamp and Edgar du Perron for their comments on the paper. Chapter 4 is based on a paper which I presented in Italian at the conference *Le riforme dei codici civili europei e l'armonizzazione delle regole di diritto privato (Il codice civile Europeo, III° giornata di studio)* organised by Guido Alpa in Rome on July 14th, 2001. That paper was published in Italian ('Il codice civile olandese del 1992 - un esempio per un codice civile Europeo?', in Guido Alpa and Emilio Nicola Buccico (eds.), *La riforma dei codici in Europa e il progetto di codice civile europeo; Materiali dei seminari 2001*, Milan 2002, pp. 71-82). Chapter 5 is based on paper which I presented at the conference entitled *Communication from the Commission on European Contract Law* organised by the Society of European Contract Law on November 30th and December 1st, 2001 in Leuven, Belgium. It was published on the Internet in *Global Jurist Frontiers*: Vol. 2: No. 1, Article 3. Chapter 6 is based on a paper which I presented at the conference entitled *Diritti fondamentali e formazione del diritto privato europeo* organised by Vincenzo Zeno-Zencovich at the *Università degli studi 'Roma Tre'* on June 28th, 2002. Chapter 7 is based on my doctoral thesis entitled *De redelijkheid en billijkheid in het Europese Privaatrecht*, Deventer 1999. The main conclusions were published as 'Good Faith', in: Hartkamp et al. (eds.), *Towards a European Civil Code*, 2nd. ed., Nijmegen and The Hague, London, Boston 1998, pp. 285-310. The present text is a revised and updated version of that article. Chapter 8 is based on a paper which I prepared for the *XVI Congress of the International Academy of Comparative Law*, held on July 14th-20th, 2002, in Brisbane, Australia, in reply to the questionnaire on *La structure des systèmes juridiques* by Professor Jacques VanderLinden. It was published in Ewoud Hondius and Carla Joustra (eds.), *Netherlands Reports to the Sixteenth International Congress of Comparative Law*, Antwerp, Oxford, New York, 2002, pp. 7-23.

I would like to thank my research assistant Julia van Ooststroom for her assistance in editing this volume and Peter Morris for revising the English.

Amsterdam, July 2002

1
Introduction

I. Culture, Principles, Models, Politics, Rights, Concepts, and Structure

HUNDREDS OF legal scholars across Europe are currently involved in the academic debate on the future of European private law. Some of the main issues in that debate relate to culture, principles, politics, models, rights, concepts and structure. In this book I will address each of these subjects, usually by focusing on a more specific question but sometimes by addressing the particular subject in general.

Chapter 2 describes the major shift that is currently taking place, as a result of the Europeanisation of private law, from a rather formal, dogmatic and positivistic stance to a more substance-oriented and pragmatic approach to private law. It argues that European legal culture is undergoing a radical change: the instrumentalist and impressionist approach of directives, the pragmatic style of the European Court of Justice, the subversive role of comparative law with its functional method, the external economic, cultural and political perspectives given by academics, the success of soft law which is based on substantive authority rather than on formal enactment, and the depositivisation of legal education as a result of the implementation of the Bologna Declaration together contribute to a new European legal culture that is significantly less formal, dogmatic and positivistic than national legal cultures in Europe have been.

In 2000 the Lando Commission published its 'Principles of European Contract Law'. Chapter 3 discusses some of the choices which the Lando Commission has made when drafting its Principles. In particular, it examines the choices which have been made with regard to the purpose of the PECL, the authors and their working methods, the format and style, the subject matter, politics, culture, economics, and progress v. tradition. By assessing these choices this Chapter provides a deconstruction of the PECL as a restatement of the common core of European contract law.

In 1992 the Netherlands enacted the central part of its new Civil Code, the *Burgerlijk Wetboek*. Chapter 4 examines whether this Civil Code - the most recent in the European Union - could serve as a model for a European Civil

Code. The recent Dutch codification experience also raises some more general considerations regarding codification today.

Chapter 5 explores the political stakes in the debate on the future of European contract law which was launched by the European Commission in July 2001. It focuses on the question: 'who has an interest in what kind of European contract law?' By doing so, it demonstrates that the European contract law debate - and the European private law debate in general - is not merely technical, but deeply political. Three political dimensions of the European contract law debate are addressed: empowerment, national traditions, and ideology. An obvious consequence of the conclusions is that the debate should not remain limited to the community of legal academics, heterogeneous as it may be.

Chapter 6 examines the constitutionalisation of European private law, in particular the effect of fundamental rights on contractual relationships. It is especially concerned with the need to guarantee the constitutional protection of social rights, including a 'general social clause', which is indispensable in order to avoid that ideological battles (autonomy v. solidarity) being fought once again on a different level of governance, and on an unequal footing.

Chapter 7 deals with the concept of good faith. It is generally thought that the concept of good faith may provide a major obstacle to the unification of private law in Europe, since it is, on the one hand, a central concept in the civil law tradition, whereas, on the other, it is traditionally unknown to the common law and is even rejected by it. However, a closer examination of the way in which good faith operates in practice demonstrates that this concept need not, in itself, keep the civil law and common law traditions divided. The reason is that good faith, as it has developed in many civil law countries, cannot (or at least cannot any longer) be regarded as a distinct normative concept: in reality it has developed into a completely open norm, which is not a norm at all, but rather a cover for the creation of new rules by the courts. This conclusion, however, raises another more fundamental problem which is common to both the civil law and common law traditions: where does judge-made law come from? The Chapter argues that the creation of new legal rules ultimately depends on the choices made by judges.

Chapter 8, the final chapter, brings together some of the ideas which were developed in the previous chapters. Assuming that at least a certain part of private law could and should be common in the future, the question arises what structure this future common European private law should have. For most participants in the debate on the future of European private law, both partisans and adversaries, the default model for such a structure would be a European civil code. This chapter discusses some aspects of the structure of European private law which cast some doubt on the desirability of a civil code in the classical sense today.

II. The New European Private Law

The title of this book has, of course, been deliberately chosen. I will now briefly explain it by discussing each of its elements and I will do so in the reverse order: 'law', 'private', 'European', 'new'.

First, this book is based on a specific conception of the law. It does not approach private law in the traditional dogmatic and positivistic way. Rather, it goes beyond legal rules, doctrines, concepts and dogma, and approaches the law in its context, in this case the European context. It especially focuses on the political, economic and cultural dimensions of the European private law enterprise. It emphasises that making law necessarily means making choices, and that people with different views, from different backgrounds et cetera will make these choices differently. This approach to the law is by no means original or unique. On the contrary, not only is it inspired by the traditions of European and American legal realism, critical legal studies, and all sorts of 'law &' movements, but this book is also merely one exponent of a much broader development which is currently taking place in Europe, the development of a new European legal culture, which is less dogmatic and formal than national legal cultures in Europe used to be.

What does private law mean today? Is private law still to be regarded as a largely neutral branch of the law, quite distinct from public law which is instrumental to social and political aims? Throughout this book I argue that the answer must be no. Private law is not neutral. On the contrary, it has an important function in ordering society. Indeed, most citizens in their daily lives will usually have at least as much to do with private law rules as with public law. The same applies to enterprises, especially in this age of deregulation and privatisation. However, people have different views on how society should be ordered. These views are often inspired by ideology. Two ideologies which have dominated the political debate throughout Europe for most of the last century are the liberal/conservative on the one (right) hand, and social-democrat/progressive on the other (left) hand. These ideologies have their pendants in private law, in the ideals of party autonomy and solidarity. In this book I demonstrate that many private law rules in Europe can (however, by no means exclusively) be explained in these terms. Moreover, I argue that a common European private law should be sufficiently social, based not only on the idea of party autonomy but also on the equally fundamental European value of solidarity.

This book is based on the conviction that our private law should, at least in part, be European. This conviction is inspired by European idealism, i.e. by the idea that it is desirable to do some things together in Europe because we share a common identity and common ideals. However, an important aspect of our common European identity is pluralism. Not only does every European have many identities at the same time (or one fragmented identity) - e.g. as a European, a Dutchman and as an Amsterdammer - in addition many Europeans share strong regional identities, which are sometimes even stronger

than their national identity -, but Europe is also a multi-cultural society which prides itself on traditions emanating from all over the world. Moreover, doing things together should not, of course, at the same time mean excluding others. A fortress Europe is not a part of the European dream. Therefore, the Europeanisation of private law will occur on many different levels of governance (including universities, legal practice et cetera) and on each of them at various speeds. As a result, the Europeanisation of private law will inevitably be complex and will frequently be troublesome, no different, in this respect, from the process of European integration in general. Ready-made solutions like a common European Civil Code in the classical sense, elegant as they may seem to some because of their simplicity, are probably unrealistic because they are too simplistic. Therefore, this book will not (and cannot) propose a blueprint for some sort of 'end result' for the Europeanisation of private law. Rather, it will make some observations on the process which has no doubt only just started.

Finally, this book argues for a new European private law. Interesting as the *ius commune* may be from the perspective of a historian, it definitely belongs to the past. Our future belongs to a new European private law which certainly must be deeply-rooted in our present law (and sometimes even in the law of the past) but would not be worth the effort if it were not 'better' than the private law we have had so far, and if it did not mean some sort of progress. Now, of course, one could argue, as a European idealist, that the mere fact of having a common European private law means progress, independent of what its content may be. However, I think we should be more ambitious. We should not be satisfied when we have found the greatest common denominator, the 'common core'. Instead, we should try to find solutions to problems which have not yet been solved, or not in a satisfactory way (and people will differ on what that means), on a national level. With 'problems' I mean, of course, not in the first place conceptual problems, but rather social problems. It is in this sense that we should strive for a truly *new European private law.*

CULTURE

2
The New European Legal Culture

I. Classical European Legal Culture

A. General

IN EUROPE throughout the 20th century the method in legal practice, scholarship and education has been largely dogmatic and positivistic. With 'positivistic' I mean the approach to the law whose main concern is to find out what the law *is* on a certain issue in a certain place, typically one's own country. In this approach written documents which are issued, in a formal way, by the state authorities, such as the legislator (codes, statutes) or courts (decisions), usually play a central role. With 'dogmatic' I mean the approach to the law which is based on the (largely implicit) assumption that the law is a coherent (though not necessarily comprehensive, and therefore: open) system of rules (integrity), and it is possible to derive answers to specific questions and solutions for specific cases from abstract rules and concepts (and the values 'contained' in them) in a more or less objective way, and that the system contains only one 'right answer' to each question.

Thus, in classical European legal culture formal arguments play an important role. With a formal argument I mean an argument which, in order to find answers to questions of law, refers to a source of law which has been previously established by the public authorities, such as statutes and case law. Substantive arguments, which refer to the relative merits of one possible solution or the other, play only a secondary role.

Some important characteristics of European legal culture include the following: its national character, its internal perspective, its systematic thinking (*Systemdenken*), its use of abstract rules and concepts, its deductive thinking, its striving for objectivity, and its text orientation. These characteristics of a dogmatic and positivistic (formal) approach to the law are found in most legal actors and most legal actions, be it by the legislator, in the courts, in academic debate or in legal education.