

Opening Up European Law

Mauro Bussani
Ugo Mattei
(Editors)

Opening Up European Law

The Common Core Project towards
Eastern and South Eastern Europe



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Preface

MAURO BUSSANI & UGO MATTEI*

1. This book presents the contributions prominent scholars gave to ‘The Common Core of European Private Law’ Project, addressing the participants to the plenary sessions at the 2001 to 2005 General Meetings, which have taken place during the month of July in Trento, Italy.

The papers contained in this book (which is the third of the same nature¹) interestingly witness the continuous self-reflection of the common core project, unfolding in the selection of presenters and in the discussions in the general meetings. Even more than the now numerous books already published and in preparation, this book and its title show the unique “politics” and agenda of the Common Core, as *an attempt to make European private law gain by knowledge and inclusiveness*. Let’s briefly explain what we mean.

The manifold aspects of a possible (mainly scholarly driven) Europeanisation of the law are the focus, and sometimes the very *raison d’être*, of an array of initiatives, meetings, seminars and books. The Common Core of European Private Law Project, launched in 1993 under the auspices of the late Professor Rudolf B. Schlesinger, has gained substantial visibility and a significant impact in this new “industry” of European private law. In 2005 it became part of the so called “network of excellence” and has been asked to provide critical insights of the ongoing work of the Study Group on the European Civil Code², one of the tools through which

* General Editors of the ‘Common Core of European Private Law’ Project.

¹ See M. BUSSANI & U. MATTEI, *Making European Law. Essays on the Common Core Project*, Trento, Università degli Studi, 2000 (containing addresses from 1994 to 1999); M. BUSSANI & U. MATTEI, *The Common Core of European Private Law. Essays on the Project*, The Hague, Kluwer, 2002, repr. 2003 (containing essays until 2001).

² The Joint Network on European Private Law (CoPECL; see <http://www.copecl.org>) Network of Excellence has been created by the European Commission as a project aiming to restructure the European research landscape especially in the field of contract law and overcome the current fragmentation. The Network will deliver a proposal for the Common Frame of Reference for European Contract Law as described in the Commission’s Action Plan on Contract Law (COM [2003] 68 final) and its follow-up Communication COM (2004) 651 final. This proposal will be called “Common Principles on European Contract Law” (CoPECL). The Study

European institutions are considering the matter. Acknowledging the puzzling size and the scattered scope of application of the EC legislation in the private law fields, the Commission, Council(s) and Parliament have intervened, to promote the revision of the ‘acquis’, to shape up a possible ‘common frame of reference’ for legal terminology and future private law normative drafting or to develop networks of experts.

Whatever the results of the scholarly and institutional actions will be, the contribution the ‘Common Core’ research is offering to the Europeanisation of the law is different and should be evaluated only in terms of knowledge and inclusiveness. There is no doubt that the idea according to which the law has to be harmonised, 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. The present situation in European private law does seem to blow a tail wind for those who want the change and a head wind for those who are against the change.

‘Changing the law’ is by far the least of the possible targets of the project this book is born from. As from our origins we many times stated in very simple, almost naïve terms, the ‘Common Core’ research, developed at Cornell back in the nineteen sixties³ and applied to European Private Law seeks to unearth the common core of the bulk of European Private Law, within the general categories of Contract, Tort and Property⁴. The search is for what is different and what is already common behind the various legal forms of European Union Member States. Such legal forms (or styles if we prefer) are differentiated not only along the lines of civil law versus common law heritage, but also by a number of other Western

Group on a European Civil Code (<http://www.sgecc.net>), as one of the main ‘drafting groups’ of the Network, is called to distil and draft principles of European law embracing the main areas of private law in the European Union which are relevant to the internal market, therefore focusing not only on contract law, but giving also attention to non-contractual obligations and issues of the law of property in movables. The ‘Common Core’ Project has been requested to apply its methodologies of factual approach and dissociation of legal formants to the results of this ‘legislative drafting’ activity, in order to assess the operational impact such Principles might have on legal outcomes in the different European legal cultures.

³ See R.B. SCHLESINGER, *Formation of Contracts. A Study of the Common Core of Legal Systems*, Dobbs Ferry, N.Y., Oceana, 1968.

⁴ M. BUSSANI and U. MATTEI, *The Common Core Approach to the European Private Law*, in 3(3) *The Columbia Journal of European Law*, Fall/Winter 1997/98, 339 ff.

legal traditions, or sub-traditions, according to the taxonomy one wishes to adopt. In a metaphor that is repeated in the jackets of all the books produced in our project, the common core hiding behind the different forms of the law *is to be revealed in order to obtain at least the main lines of one reliable geographical map of the law of Europe.*

2. The book that we are presenting here is a tangible sign of our belief that a deeper and broader knowledge of the private laws of the now 25 countries making the European Union is what we dramatically need today. We also believe that the hubris of the hegemonic legal cultures of Western Europe is imposing a very high price to the process of production of a more integrated private law framework for transactions that today affect almost half billion Europeans (and an unknown number of outsiders). Indeed many of the ongoing Commission-sponsored efforts of private law making in Europe seem to suffer both from superficiality, too often taking the laws of the member countries at its face value without a genuine effort to put it in context, and from lack of attention to the many variations and possibilities offered by legal experiences outside of the leading core of western European countries. There is today in Europe a dramatic lack of communication between the legal cultures of north-western countries, which are highly integrated and communicating among themselves, and the rest. Both Latin countries and former socialist countries live today at the margins of legal Europe, with a consequent dualism that is neither legitimate politically nor justified from a scholarly perspective.

The European Commission could have very simply cured this state of affairs by a proactive policy of integration, totally missing thus far. The result of this lack of vision is very clearly demonstrated by the nationality of the “stakeholders” that have offered some feedback to the process that today is bringing to the production of the “common frame of reference”, an enterprise lacking both soul and legitimacy exactly because only the usual suspects of the “old boys” club are involved.

At the Common Core meetings we have been aware of this problem at least since the mid nineties and we have always sought to involve a younger generation of scholars coming from all over Europe. In the second volume of our published essays it was already clear that we were making a genuine attempt to involve so called peripheral legal cultures by going beyond the nationality pool of our first distinguished plenary speakers. The present volume shows how far we tried to go in the direction of opening the treasury boxes of legal experiences from the new accessions.

All of this effort is unfortunately happening without any financial help whatsoever, which is a shame because the European Commission should have invested in the necessary effort to proactively involve scholars from “peripheral” legal cultures. As the readers of this book will appreciate, such scholars have unique perspectives to offer, coming from legal systems in which many of the institutional arrangements of the more advanced capitalist systems cannot and should not be taken for granted. This alternative cultural experiences of the new Europe, should be appreciated as a wealth and not only considered as an aberration or delay in an assumed straight path towards a model of development that is only an ideological device to downplay the specificities of “social Europe” in favour of technocracy⁵.

For the Editors of this volume the very fact of having been able to locate and involve participants from all the new accessions is a matter of satisfaction, but the effort to be made to carry on the Common Core in the future in order to maintain the promise of inclusiveness is daunting. Nevertheless we do not think it would be scholarly desirable to claim in the future to be describing the “common core of European private law” without full inclusion of all its voices.

3. Some may challenge and have challenged our claim of providing “only knowledge” by enrolling the Common Core Project among 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. Schlesinger⁶) and have stressed that the ‘common core’ research too may be a useful instrument for legal harmonisation, 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 producing reliable information and thus knowledge, whatever its policy use might be.

We have always considered our project as aimed at scholars interested in a process of learning rather than of teaching. A process of learning that may facilitate understanding and communication between professional lawyers already grounded in their own legal tradition, and that as a

⁵ For a critical appraisal, see U. MATTEI and F. NICOLA, forthcoming in 41 *New England L. Rev.* (2006/2007).

⁶ See R. B. SCHLESINGER, *The Past and the Future of Comparative Law*, in 43 *Am. J. Comp. Law* (1995) 477 ff.

byproduct may even produce some interesting teaching materials. Nevertheless teaching is not our main goal here, especially the quite arrogant attitude of teaching to “newcomers” in the European institutional setting.

To the contrary, a humble attitude is for us, as always, of the utmost importance especially as from 1st May 2004, when the (still on-going) enlargement of the EU enriched the European law-making process with the legal experiences of the so-called “post-socialist” and Mediterranean countries. Since that time our Project and our books have been attempting to face the new challenge by utilising the peculiar techniques of the factual approach as the main tool for the understanding of the private law and the legal foundations of the new EU members too. The need to make an even stronger effort to put the law in context is even more apparent than before.

It is in this perspective that the opening plenary session of the 2004 Meeting was mainly devoted to what we have called the “Ten New Treasury Boxes – The European Enlargement and the Common Core Project”. Leading scholars from the new EU countries (Martha Hayes Sampson, Cyprus; Lubos Tichy, Czech Republic; Paul Varul, Estonia; Tibor Tajti, Hungary; Kaspar Balodis, Latvia; Valentinas Mikėlanas, Lithuania; Ian Refalo, Malta; Ewa Baginska and Tomats Pajor, Poland; Anton Dulak, Slovakia) have enlightened us on the impact of the integration of EU law in their legal systems as well as the challenges the ‘Common Core’ method of legal analysis opens in their respective national legal cultures. The resulting essays are included in this book as a crucial part of it, for we consider them as well-representative of one of the most exciting aims of our Project, i.e. that of the creation of a truly ‘common’ and integrating European legal culture. With this idea we mean a culture which could be called as ‘common’ throughout Europe not because it uniform legal solutions and methods, or it abolishes differences, but because it enables scholars coming from different backgrounds to a mutual understanding of their respective legal systems. These “new” European legal cultures are certainly to be considered new data which one cannot avoid to know especially if it is engaged in drafting European legislation, restatements and/or codifications. And today reliable data on what the law is seem to be the “great absent” in the many ongoing efforts of European legal integration, too often pursued without a previous knowledge of how things are. As we know, enacted law does not exist without a legal culture interpreting it, so that the contrast between top-down and bottom-up legal change, too often

emerging in the current debate on the desirability of a codified European private law is a false opposition⁷.

One should plainly recognise that, on the one hand, any academic opposition to a Code is likely to be ineffective if the political conditions do favour 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).

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 (organisation 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.

A number of scholars involved in the ‘Common Core’ Project participate in the above debate over the desirable future of European private law, sometimes on strongly opposite sides. Nevertheless, there is one aspect that is common to the nearly 200 scholars 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.

⁷ See M. BUSSANI, *The Driving Forces Behind a European Civil Code*, in *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*. Supplement. Broj 3, 2003, 133 ff.

4. This is for the General Editors of the ‘Common Core’ Project a moment of satisfaction, since published results are speedily growing and so is the visibility of our project.

Cambridge University Press has published a number of books: *Good Faith in European Contract Law*, R. Zimmermann & S. Whittaker eds.; *Enforceability of Promises in European Contract Law*, J. Gordley ed.; *Pure Economic Loss in Europe*, M. Bussani & V.V. Palmer eds.; *Mistake, Fraud and Duties to Inform in European Private Law*, R. Sefton-Green, ed.; *Security Rights in Movable Property in European Private Law*, E.-M. Kieninger ed.; *Commercial Trusts in European Private Law*, M. Graziadei, U. Mattei, L. Smith, eds.

CUP itself has devoted to our Project an autonomous series of which the General Editors are the authors of this preface.

Stämpfli – in association with Carolina Academic Press and Bruylant – has already published F. Werro and V.V. Palmer (eds.), *The Boundaries of Strict Liability in European Private Law*, and is at the end of the publication process for B. Pozzo (ed.), *Property on Environment*.

Eleven other books are in the pipeline: A. Heinemann, T. Möllers (eds.), *Private Remedies in Competition Law. Sanctions and Enforcement in Unfair Competition, Consumer Protection and Antitrust Law in a European Comparative Perspective*; G. Brüggemeier, A. Colombi Ciacchi (eds.), *Personality Rights*; S. Banakas, P. Brun, G. Comandè, G. Viney (eds.), *Personal Injury Compensation*; D. Beyleveld, C. Godt, L. Guibault, G. van Overwalle (eds.), *Boundaries to Information Property*; M. Hinteregger (ed.), *Environmental Liability and Ecological Damage*; E. Hondius, H.C. Grigoleit (eds.), *Unexpected Circumstances*; P. Pichonnaz (ed.), *Set-Off*; C. van der Merwe, R. Caterina, A. Verbeke (eds.), *Real Rights Limited in Time*; C. van der Merwe, G. Watt, F. Fiorentini (eds.), *Security Rights over Immovable Property*; E. Cooke, U. Jensen, L. Martinez (eds.), *Transfer of Immovable Property*; M.D. Panforti, A. Miranda, O. Roy, C. Dadomo (eds.), *Duties of Care and Duties of Cash in Family Law*.

The mapping of European Private Law is proceeding.

5. Too many people and institutions should be thanked for their contribution to a project that is now almost fourteen years of age. Our explicit thought should at least go to 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: our honorary editors Rudolf

B. Schlesinger (sadly not any more with us) and Rodolfo Sacco. A special thank you is also due to the colleagues that served as chairmen of our Meetings, Antonio Gambaro (Property), James Gordley, Ewoud Hondius (Contract) and Franz Werro, Mathias Reimann (Tort). Thanks also to Francesca Fiorentini and, for sustaining the Project in a not always easy academic environment, to Andrea Pradi and Luisa Antonioli. Of course, a special gratitude is for the executive secretary of the ‘Common Core’ Project, Ms Carla Boninsegna and her staff, whose passion and spirit of sacrifice made possible this book, too.

Trieste and Berkeley, August 15, 2006

General Editors of the ‘Common Core of European Private Law’ Project