Introduction

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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.

of the Lando Commission are a given, albeit subject to such modification as the realisation of the new overall project may require. The ambitions of the civil code groups are high: ultimately, coverage of most of the core areas of private law and, probably in the very long term, enactment as positive law in the European Union or the basis for such an enactment should the political will exist to go that far with European unification. Heart has been taken from the repeated call of the European Parliament for the production of a European civil code,[22] and from the Commission Green Paper on a European contract law, published in 2001.[23]

Rather different in method and output from the work of the Lando, Gandolfi and European civil code groups is the treatise on European contract law being produced by the German scholars Hein Kötz and Axel Flessner.[24] They argue that all that is needed to constitute European private law is its recognition and to teach it to the lawyers of the future, rather in the manner of the medieval universities and the original *ius commune*. Their text on European contract law, which is to be the basis for such teaching, proceeds by identifying principles and institutions common to the European legal systems and expounding them as a system in the manner of an introductory (although by no means elementary) textbook.

Even more ambitious is Christian von Bar's *Gemeineuropäisches Deliktsrecht*,[25] in which each national law of tort in Europe is seen as 'merely a national manifestation of a single discipline . . . it is therefore possible to condense different national laws to a *common* European law of torts, or delict'. 'To think in a European fashion', continues von Bar, 'means first to stress the common characteristics, secondly to understand national laws as reactions to developments in neighbouring countries, and thirdly, to tackle historical coincidences and rough edges, which, in view of the process of

[22] Resolution of 26 May 1989, OJ 1989 C158/401; repeated 6 May 1994, OJ 1994 C205/518. See also A. Hartkamp et al. (eds.), *Towards a European Civil Code*, 1st edn (Nijmegen, 1994), 2nd edn (Nijmegen, 1998); a 3rd edn is forthcoming; note further G. Barrett and L. Bernardeau (eds.), *Towards a European Civil Code: Reflections on the Codification of Civil Law in Europe* (Trier, 2002).

[23] See above, n. 5.

[24] H. Kötz, *Europäisches Vertragsrecht I* (Tübingen, 1996), trans. T. Weir as *European Contract Law Volume One: Formation, Validity, and Content of Contracts; Contract and Third Parties* (Oxford, 1997). Flessner is writing the second part dealing with the remainder of contract law.

[25] 2 vols. (Munich, 1996); published in English translation as *The Common European Law of Torts*, vol. I (Oxford, 1998) and vol. II (Oxford, 2000), trans. Christian von Bar. References below are to the latter version. The book is referred to by the House of Lords on issues of causation in *Fairchild* v. *Glenhaven Funeral Services Ltd* [2003] 1 AC 32.

European unification, can be ground down without substantial loss.'[26] Where Kötz and Flessner focus mainly on the major legal systems of western Europe – Germany, France and England – von Bar draws upon all sixteen jurisdictions in the European Union, and his work goes well beyond the scope of a textbook, being at the very least a major comparative analysis and work of research and scholarship.

Other projects have also gone forward on the basis that European private law will emerge and develop through university instruction and research, picking up that characteristic product of the case method of the law schools of the United States of America, the casebook. The year 2000 saw the publication of the first output of the Common Law of Europe Casebook series, *Cases, Materials and Text on National, Supranational and International Tort Law*, edited by Walter van Gerven, Jeremy Lever and Pierre Larouche. Like von Bar, the editors aim 'to uncover common roots, notwithstanding differences in approach, of the European legal systems with a view to strengthening the common legal heritage of Europe'. They 'hope that the book will be used as teaching material in universities and other institutions throughout Europe and elsewhere in order to familiarize future generations of lawyers with each other's legal systems and to assess and facilitate the impact of European supranational legal systems on the development of national laws, and *vice versa*'. But they deny an intention 'to unify the existing laws of tort . . . that would not be possible, nor would it be desirable'.[27] This is echoed by the editors of the second volume in the series to appear, *Cases, Materials and Text on Contract Law*, which was published in 2002,[28] but they do make use of the Principles of European Contract Law and the Unidroit Principles of International Commercial Contracts as a basis for what is covered and as a point of comparison with the national material surveyed (itself limited to England, France and Germany). Further casebooks in preparation for the series include one on unjustified enrichment,[29] and it will also move into the domain of public law with a collection about judicial review of administrative action.[30]

[26] Both quotations von Bar, *Common European Law of Torts*, vol. I, p. xxiii.
[27] (Oxford, 2000). Both quotations at introduction, p. v.
[28] H. Beale, A. Hartkamp, H. Kötz and D. Tallon (eds.), *Cases, Materials and Text on Contract Law* (Oxford, 2002), p. v.
[29] To be edited by E. J. H. Schrage (Amsterdam) and J. Beatson (Cambridge).
[30] The project website is http://www.rechten.unimaas.nl/casebook. The tort casebook is referred to by the House of Lords on issues of causation in *Fairchild* v. *Glenhaven Funeral Services Ltd* [2003] 1 AC 32. An earlier partial release of the tort casebook, published in 1998, is also referred to in *McFarlane* v. *Tayside Health Board* 2000 SC (HL) 1 (damages for birth of a child).

Finally, yet another grand project towards a European private law, the Common Core of European Private Law, led by Mauro Bassani of Trento and Ugo Mattei of Torino and Hastings, combines the approaches of searching for the common ground between systems and considering particular cases. In this instance, however, the cases are hypothetical ones, not actual decisions of the courts, and the methodology is to consider how they would be resolved in each national system (again including England and Scotland).[31] It might be called an inductive, Common Law, method of approaching European legal unity, as distinct from the more deductive codal or scholastic methods of the other projects mentioned above. The first publication, *Good Faith in European Contract Law*, edited by Reinhard Zimmermann and Simon Whittaker,[32] exemplifies the approach and shows two-thirds of the cases producing at least some harmony of result if not of analysis or technique, since several of the legal systems studied do not give overt or extensive recognition to a general and active concept of good faith. The book thus reasserts the classic comparative law notion of the functional unity of law, although it contains no prescription as to what a European law of good faith might look like or do. The second publication in the series is *The Enforceability of Promises in European Contract Law*, edited by James Gordley, which appeared in 2001. This examines a number of specific cases and argues that 'the results that different legal systems reach . . . can most often be explained as responses to common underlying problems'.[33] The book concludes by asking 'what is the most straightforward way to address the problems', meaning by this the solution 'that comes the closest to giving the right result – the one that resolves the problem – in the largest number of cases'.[34] So it comes rather closer to offering a prescriptive model of the ideal rule, but notes that this may not give rise to the most practical rule: 'One might be better off with a rule that gives the wrong answer more of the time but is clearer and simpler.'[35] The ideal rule may, however, provide a benchmark for how often the clearer, simpler rule goes wrong.

It would be wrong to conclude this discussion of European private law without observing that the whole idea has been the subject of profound criticism, most vigorously maintained by Professor Pierre Legrand.[36] In particular, Professor Legrand has attacked the whole idea of unifying, harmonising

[31] The project has a website: http://www.jus.unitn.it/dsg/common-core.
[32] (Cambridge, 2000). [33] (Cambridge, 2001), p. 378. [34] Ibid., p. 379. [35] Ibid.
[36] See, e.g., his 'European Legal Systems are not Converging', (1996) 45 *International and Comparative Law Quarterly* 52; 'Against a European Civil Code', (1997) 60 *Modern Law Review* 45; 'Are Civilians Educable?' (1998) 18 *Legal Studies* 216.

or converging law in Europe, the deep flaw in such projects being their failure to take account of the deeper cultural and social reasons why laws are different from each other. As he has put it with characteristic understatement in a book review, 'these epitomes all desert serious thought for earnest prostration before the instrumentalist sabotage of cognition'.[37] The division between the Common Law and the Civil Law *mentalités* is much more profoundly rooted than mere technical distinctions of black-letter law, and these intellectual differences far outweigh any functional unities that may be perceived. The true general picture of law in Europe remains one of diversity and 'plurijurality'[38] which cannot be overcome by either bureaucratic or academic means, and all attempts to do so are doomed to failure. Such arguments appear to be of particular relevance to this work, concerned as it is to analyse the links, possible and actual, between European and regional developments in private law.

A Scots lawyer might begin a response to Legrand's arguments by asking whether the existence of 'mixed' systems of law such as those of Scotland does not at least raise questions about the supposed incompatibility of the Civil Law and the Common Law. It might also be asked whether the proliferation of European projects does not suggest the existence of an increasingly powerful third *mentalité* in Europe, strongly supported, consciously or not, by the growth of European and, indeed, global legal practice impatient of national and merely doctrinal differences. The differences and divisions which Legrand sees as apparently unalterably fixed are essentially historical; but examination of what is happening now suggests that for some at least change is under way and needs to be taken further.

The most interesting response to Legrand is by Jan Smits of Maastricht.[39] He too is concerned by the loss of diversity involved in the Europeanisation of law, but is nonetheless in favour of this as an ultimate objective. But it must be a natural development, one which responds to the growth and actual needs of the single market as determined from and by experience in the market-place. Smits does not think, therefore, that the high road to European legal unity will be best achieved by legislative or restatement vehicles, but will be better traversed by what he calls 'non-centralist'

[37] [1999] *Cambridge Law Journal* 439 at 441 (reviewing a release of part of the van Gerven tort casebook referred to above, n. 27).
[38] For this coinage, see [1999] *CLJ* 442.
[39] See J. Smits, *The Making of European Private Law: Towards a Ius Commune Europaeum as a Mixed Legal System*, trans. N. Kornet (Antwerp, 2002).