The European Civil Code

Hugh Collins argues that the European Union should develop a civil code to provide uniform rules for contracts, property rights and protection against civil wrongs, thus drawing together the differing national traditions with respect to the detailed regulation of civil society. The benefits of such a code would lie not so much in facilitating cross-border trade, but in establishing foundations for a denser network of transnational relations of civil society, which in turn would help to overcome the present popular resistance to effective and functional political institutions at a European level. These principled foundations for a more inclusive and less ‘balkanised’ civil society in Europe also provide elements of a required European Social Model that offers necessary safeguards for consumers, workers and disadvantaged groups against the pressures of market forces in an increasingly global economic system.

Hugh Collins is the Professor of English Law at the London School of Economics and Political Science and a Fellow of the British Academy.
This series aims to produce original works which contain a critical analysis of the state of the law in particular areas of European Law and set out different perspectives and suggestions for its future development. It also aims to encourage a range of work on law, legal institutions and legal phenomena in Europe, including 'law in context' approaches. The titles in the series will be of interest to academics; policymakers; policy formers who are interested in European legal, commercial and political affairs; practising lawyers including the judiciary; and advanced law students and researchers.

Joint Editors
Professor Dr Laurence Gormley
Rijksuniversiteit Groningen, The Netherlands
Professor Jo Shaw
University of Edinburgh, UK

Editorial advisory board
Professor Richard Bellamy, University of Reading
Ms Catherine Barnard, University of Cambridge
Professor Marise Cremona, Queen Mary College, University of London
Professor Alan Dashwood, University of Cambridge
Professor Dr Jacqueline Dutheil de la Rochère, Université de Paris II, Director of the Centre de Droit Européen, France
Dr Andrew Drzemczewski, Council of Europe, Strasbourg, France
Sir David Edward KCMG, QC, former Judge, Court of Justice of the European Communities, Luxembourg
Professor Dr Walter Baron van Gerven, Emeritus Professor, Leuven & Maastricht and former Advocate General, Court of Justice of the European Communities
Professor Daniel Halberstam, University of Michigan, USA
Professor Dr Ingolf Pernice, Director of the Walter Hallstein Institut, Humboldt Universität, Berlin
Michel Petite, Director General of the Legal Service, Commission of the European Communities, Bruxelles;
Professor Dr Sinisa Rodin, University of Zagreb;
Professor Neil Walker, University of Aberdeen and EUI, Fiesole.

For a full list of titles published in the series, please see the end of the book.
The European Civil Code

The Way Forward

Hugh Collins
# Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preface</td>
<td>ix</td>
</tr>
<tr>
<td>Series editors' preface</td>
<td>xi</td>
</tr>
<tr>
<td>Table of cases</td>
<td>xiii</td>
</tr>
<tr>
<td>Table of treaties and legislation</td>
<td>xvii</td>
</tr>
</tbody>
</table>

## I Civil society and political union
1. The constitution of everyday life | 4  
2. Mutual recognition               | 7   
3. Social dumping                    | 10  
4. Post-nationalism                  | 12  
5. Networks of transnational civil society | 18  
6. Towards a European Civil Code     | 21  
7. Objections, refutations and qualifications | 23  

## II The acquis communautaire in private law
1. Establishing the Common Market    | 31  
2. The internal market agenda       | 34  
   - Negative integration            | 35  
   - Positive integration measures   | 38  
3. The character of the acquis communautaire | 40  
   - Lack of generality              | 42  
   - Limited harmonisation           | 45  
   - Re-regulation and private law   | 46  
   - Tilt                            | 49  
4. The judicial acquis               | 51  
   - Compensation claims under void contracts | 53  
   - Cooling-off period for a surety | 56  
   - Non-pecuniary loss              | 58  
5. Reforming the acquis              | 61  

The hidden code

1 Legal risk and barriers to trade
2 Transaction costs
   Transnational standardised contracts
   Optional code of contract law
   Uniform law
3 The paradox of the Common Frame of Reference
   The interpretive obligation
   Political pressure for harmonisation
4 A code that dares not speak its name
5 The way forward

Private law and the Economic Constitution

1 What is an Economic Constitution?
2 The emerging European Social Model
3 The constitutional dimension of private law
   Persistence
   Social justice
   Citizenship rights
4 The regulatory dimension of private law
5 The hybrid character of the *acquis communautaire*
6 Towards a balanced economic constitution

Cultural diversity and European identity

1 Solidarity
2 Code and culture
3 A code of principles
4 Political identity
5 Moral values
6 Language
7 Conclusion

Respecting legal diversity

1 Common heritage
2 Convergence
3 Autonomy of legal culture
4 Perfectionism and welfarism
5 Private law and perfectionist principles
6 Legal networks and sources of law
7 Common law and codes

Multi-level private law

1 An impossible necessity?
2 Rigidity of codes
3 Code as directive

  * Indirect effect
  * Why not direct effect?
  * Implementing a Directive
  * Linguistic diversity

4 Optimal level of specificity

5 Reference procedure

6 Mutual learning

7 Multi-level governance and harmonisation

VIII Strengthening convergence

1 European Private Law Institute

  * The role of doctrinal scholarship
  * New governance mechanisms
  * Dialogue between the courts
  * Private Law Institute

2 Standard form contracts

  * Regulating standard forms
  * Legal diversity
  * Harmonisation of principle
  * Preventive injunctions
  * Collective self-regulation

3 Deliberative supranationalism

IX Exploring the European Social Model

1 Structures

2 Substantive principles

  * Integration of externalities
  * Effectiveness
  * Human rights and private law

3 The way forward

Index
Preface

A British author writing about the European Union must overcome contradictory preconceptions. Continental colleagues will probably assume that the work will be sceptical about any proposal emanating from Brussels. If the proposal concerns the introduction of a comprehensive civil code that would replace the uncodified common law of England, this forecast of the British author’s hostility probably seems guaranteed. Yet within the United Kingdom, anyone who demonstrates much interest in or sympathy with the activities and proposals of the European Union is immediately suspected of conspiring to abandon national sovereignty to foreign powers. Most English private and commercial lawyers, convinced of the superiority of their tools of production, the common law, prefer to ignore European legal developments as much as possible, though, if cornered, would urge their government to wield a veto power against initiatives that might interfere with their business routines. In this work, the reader should forgo either of these tempting preconceptions.

Although the book offers considerable critical evaluation of the past and current forays of the institutions of the European Union into the field of private law, ultimately identification with the values and long-term goals of Europe steers the argument towards a re-conception of the European agenda rather than a rejection of the project for a European Civil Code. In its essentials, the book provides a critical evaluation of why the development of a civil code in Europe is a valuable, though daunting, project. In so doing, however, the work criticises much of what has been achieved so far and casts doubt on the viability of current plans. In particular, taking account of the diversity of existing national private law systems and the way the European Union functions as a multi-level system of governance, it is argued that, to be
legitimate and effective, a European Civil Code would have to comprise principles-based regulation, a framework of normative standards for a transnational civil society rather than a complex body of detailed rules.

My ideas on this subject have evolved over more than a decade. In more than a score of papers, I have wrestled with many of the topics addressed here, with investigations ranging from the detailed inadequacies of European institutions to broad questions about the essential qualities of cultural diversity in Europe. This book is not a collection of those articles, but rather a re-consideration of the themes and issues from a more comprehensive viewpoint, a synthesis of the arguments and ultimately a clearer sense of direction for the way forward for a European Civil Code.

It has been an exciting period to study private law in Europe as the ‘balkanised' national legal systems have been thrown suddenly together by the need to adapt to the ever-more ambitious harmonisation of laws agenda in Europe. My papers and now this book have been stimulated by many colleagues from continental Europe. Although there have been too many helpful colleagues to mention them all here, special debts should be acknowledged to especially influential interlocutors: Günther Teubner, Christian Joerges, Thomas Wilhelmsson, Jacobien Rutgers, Ruth Sefton-Green, Miguel Poires Maduro, Stephen Weatherill and Guido Alpa. Many thanks to them for their stimulating encouragement, together with my fellow editors of the European Review of Contract Law, Stefan Grundmann, Martijn Hesselink, Muriel Fabre-Magnan, Vicenzo Roppo and other members of the Study Group on Social Justice in European Private Law. I should also acknowledge the friendly assistance of colleagues at the LSE, especially Damian Chalmers, who together provide a lively forum in which to explore ideas about Europe. I am grateful finally to the Arts & Humanities Research Council for supporting a period of research leave in which this book took shape. The book assumes that the Lisbon Treaty will take effect, though the negative Irish referendum occurred too late to be considered here.

Department of Law
London School of Economics
1 February 2008
Hugh Collins’ book on the future of European private law develops a distinctive argument for legal change in an increasingly well-trodden field of study. He makes a sustained and convincing argument for a different normative basis for legislative developments at the EU level as regards a putative European Civil Code. He wishes to distract private law from its current market integration focus, where the only politically acceptable justifications for interventions in private law relations can be found in the impact of failure to harmonise or actively to promote mutual recognition on the evolution of the single market for goods, services, persons and capital. Instead Collins’ normative proposal links private law to European civil society, understood in its widest sense to include the multitude of everyday relations between persons. At present, these private law relations are regulated predominantly at the national or subnational levels. Sympathetic to arguments for closer integration, but specifically for reasons of promoting welfarism and social justice rather than political union as such, Collins rejects the monolithic ‘top-down’ approach of building common institutions or searching for a common European foreign policy favoured by EU institutional and many national elites. Rather, he wishes to see fostered the conditions for ‘bottom-up’ development rooted, as he puts it, ‘in the bonds for commonplace social interactions’. Through these will come the necessary community which can sustain, in turn, political development at the supranational level. Collins’ argument is ambitious, and requires a fully developed critique of the current acquis communautaire and a direct engagement with the legal competences and legal instruments of EU law as it exists. What he proposes would, he acknowledges, require seismic shifts in both legal and political terms, but he argues that such changes would offer
significant gains in terms of the promotion of social justice within a
distinctive European economic constitution underpinned by welfarism
and protection of the weaker party in private relations, rather than
economic (neo-)liberalism. It is testimony to the increased importance
of the law and institutions of the European Union in private as well
as public law fields that distinguished private law scholars such as
Hugh Collins are beginning to bring to bear their legal and intellectual
imaginations on the question of European private law, envisioning a
more human face to the legal framework of legal integration. What is
particularly attractive about the argument is that it could offer a bonus
in terms of strengthening the legitimacy of political action at the EU
level. We are delighted that Collins’ book is appearing in the series
Cambridge Studies in European Law and Policy.

Laurence Gormley
Jo Shaw
May 2008
### Table of Cases

**European Court of Justice and Court of First Instance**

<table>
<thead>
<tr>
<th>Case Reference</th>
<th>Case Name</th>
<th>Decision Year</th>
<th>ECR Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>C-29/69</td>
<td><em>Stauder</em> v. <em>City of Ulm</em></td>
<td>[1969]</td>
<td>ECR 419 252</td>
</tr>
<tr>
<td>C-43/75</td>
<td><em>Defrenne</em> v. <em>Sabena</em></td>
<td>[1976]</td>
<td>ECR 455 93, 193</td>
</tr>
<tr>
<td>C-120/78</td>
<td><em>Rewe Zentrale AG</em> v. <em>Bundesmonopolverwaltung für Brantwein (Cassis de Dijon)</em></td>
<td>[1979]</td>
<td>ECR 649 36, 37, 38, 39, 120</td>
</tr>
<tr>
<td>C-199/82</td>
<td><em>Amministrazione delle Finanze dello Stato</em> v. <em>San Giorgio</em></td>
<td>[1983]</td>
<td>ECR 3595 175</td>
</tr>
<tr>
<td>C-14/83</td>
<td><em>Von Colson and Kamann</em></td>
<td>[1984]</td>
<td>ECR 1891 191</td>
</tr>
<tr>
<td>C-178/84</td>
<td><em>Commission</em> v. <em>Germany</em></td>
<td>[1987]</td>
<td>ECR 1227 37</td>
</tr>
<tr>
<td>C-222/84</td>
<td><em>Johnston</em> v. <em>Chief Constable of the Royal Ulster Constabulary</em></td>
<td>[1986]</td>
<td>ECR 1663 51</td>
</tr>
<tr>
<td>C-407/85</td>
<td><em>Drei Glocken GmbH</em> and <em>Gertruad Kritzinger</em> v. <em>USL Centro-Sud</em> and <em>Provincia autonomia di Bolzano</em></td>
<td>[1988]</td>
<td>ECR 4233 37, 126</td>
</tr>
<tr>
<td>C-104/86</td>
<td><em>EC Commission</em> v. <em>Italy Case</em></td>
<td>[1988]</td>
<td>ECR 1799 175</td>
</tr>
<tr>
<td>C-322/88</td>
<td><em>Grimaldi (Salvatore)</em> v. <em>Fonds des Maladies Professionelles</em></td>
<td>[1989]</td>
<td>ECR 4407 82</td>
</tr>
</tbody>
</table>
### TABLE OF CASES

C-362/88, **GB Inno BM v. CCL** [1990] ECR I-667  246
C-106/89, **Marleasing SA v. Las Comercial Internacionale de Alimentacion SA** [1990] ECR I-4135  43, 191
C-188/89, **Foster v. British Gas** [1990] ECR I-3313  195
C-221/89, **Secretary of State for Transport, ex parte Factortame** [1991] ECR I-3905  121
C-6/90 and C-9/90, **Francovitch and Bonifaci v. Italy** [1991] ECR I-5537  195
C-126/91, **Schutzverband gegen Unwesen in der Wirtschaft v. Y. Rocher GmbH** [1993] ECR I-2361  69
C-267/91 and C-268/91, **Keck and Mithouard** [1993] ICR I-6097  36, 118
C-334/92, **Wagner-Miret v. Fondo de Garantia Salarial** [1993] ECR I-6911  192
C-384/93, **Alpine Investments v. Minister van Financien** [1995] ECR I-1141  69
C-415/93, **Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman** [1995] ECR I-4921  93
C-168/95, **Arcafo** [1996] ECR I-4705  192
C-45/96, **Bayerische Hypotheken- und Wechselbank AG v. Dietzinger** [1998] ECR I-1199  56, 60
C-443/98, **Unilever Italia v. Central Food** [2000] ECR I-7535  43
C-144/99, **Commission v. The Netherlands** [2001] ECR I-3541  196
C-453/99, **Courage v. Crehan** [2001] ECR I-6314  53, 60
C-168/00, **Simone Leitner v. TUI Deutschland GmbH & Co KG** [2002] ECR I-2631  59, 60, 61
C-386/00, **Axa Royale Belge** [2002] ECR I-2209  117
C-473/00, **Confidis SA v. Fredout** [2002] ECR I-10875  203
C-341/01, **Plato Plastik v. Caropack** [2004] ECR I-4883  200
C-397–403/01, **Pfeiffer and Others v. Deutsches Rotes Kreuz** [2004] ECR I-8835  192
C-36/02, **Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn** [2004] ECR I-9609  141
### Table of Cases


**C-350/03, Schulte v. Deutsche Bausparkasse Badenia AG [2005] ECR I-9215** 200

**C-295/04–298/04, Vincenzo Manfredi v. Lloyd Adriatico Assurazioni SpA (13.7.2006)** 55


**C-168/05, Elisa María Mostaza Claro v. Centro Móvil Milenium SL [2006] ECR I-10421** 203


### National Courts

**England and Wales**

- British Crane Hire Corpn Ltd v. Ipswich Plant Hire Ltd [1975] QB 303, CA 223
- Chester v. Afshar [2004] UKHL 41 170
- Kleinwort Benson Ltd v. Birmingham City Council [1996] 4 All ER 733 175
- Royal Bank of Scotland plc v. Etridge (No 2) [2001] UKHL 44 57
- Viking Line ABP v. International Transport Workers' Union [2005] EWCA Civ 1299; 2006 1 RLR 58; [2006] 1 CMLR 27 121
- Woolwich Building Society v. IRC (No. 2) [1993] AC 170, [1992] 3 All ER 737 175

**France**

- Civ 1, 9 October 2001 (2001) Dalloz 3490 170
xvi  TABLE OF CASES

Germany

BGH 4 June 1970, BGHZ 17,1.3  223
BVerfG 19 October 1993, BVerfGE 89, 214 (Bürgschaft) Neue Juristische
Wochen schrift 1994, 36  57, 106, 107, 254
BGH 24 February 1994, Neue Juristische Wochen schrift 1994, 1341  107
Table of Treaties and Legislation

Treaties

Amsterdam Treaty (1997) 96, 97
Constitution for Europe (proposed) Treaty (2004) 15, 17, 100
European Coal and Steel Community (Treaty of Paris) (1951) 13
European Community Treaty (Consolidated) (1999)
  Article 2 96
  Article 3 31, 122
  Article 14 33
  Article 17 15, 97
  Article 18 97
  Article 28 12, 35–38, 67, 118, 120, 141, 248
  Article 30 12, 36–37, 45, 46, 120, 141
  Article 43 121, 122
  Article 81 53
  Article 94 32, 33, 64
  Article 95 32, 33, 39, 40, 45, 64
  Article 136 122
  Article 137 31
  Article 138 214, 230
  Article 139 214, 230, 231
  Article 141 93, 193, 194
  Article 234 200
  Article 250 29
  Article 251 29, 32, 33
  Article 295 34
European Economic Community (Treaty of Rome) (1957) 13
TABLE OF TREATIES AND LEGISLATION

Maastricht Treaty (1992) 97
Lisbon Treaty (2007) 17, 252
Article 1 3, 124, 125, 252, 253
Article 1.3 27
Article 1.6 17
Article 1.8 17, 100
Article 2.12 31
Article 2.81 32
Article 2A–E 31
Single European Act (SEA) (1986) 14, 39
Treaty on European Union (1992) 15, 128
Article 1A 3, 124
Article 2 3, 27, 97
Article 6 17, 97

European legislation

Regulations

Reg. 4055/86, on applying the freedom of movement Provisions explicitly to maritime transport between the Member States [1986] OJ L378/1 121
Reg. 1400/2002 on the application of Article 81(3) to certain categories of vertical agreements and concerted practices in the motor-vehicle sector [2002] OJ L203/30 42
Reg. 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40 8
Reg. 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6 8, 12, 49, 66

Directives

Dir. 77/249 on lawyers’ services [1977] OJ L78/17 19
Dir. 85/577 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/31 56
Dir. 87/102 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit [1987] OJ L42/48
Dir. 90/88 amending Dir. 87/102 [1990] OJ L61/14
Dir. 90/314 on package travel [1990] OJ L158/59
Dir. 92/96 on the coordination of laws relating to direct life insurance (Third Life Insurance) [1992] OJ L228/1
Dir. 93/13 on unfair terms in consumer contracts [1993] OJ L95/29
Dir. 94/47 on the protection of purchasers of timeshares [1994] OJ L280/83
Dir. 96/71 concerning the posting of workers [1996] OJ L18/1
Dir. 97/5 on cross-border credit transfers [1997] OJ L43/25
Dir. 97/80 on the burden of proof in cases of discrimination based on sex [1998] OJ L205/66
Dir. 98/5 on lawyers’ establishment [1998] OJ L77/36
Dir. 98/27 on consumer injunctions [1998] OJ L166/51
Dir. 1999/44 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12
Dir. 2000/31 on certain legal aspects of information society services [2000] OJ L178/1
Dir. 2001/23 on safeguarding of employees’ rights in the event of transfers of undertakings [2001] OJ L82/16
Dir. 2006/54 on the implementation of the principles of equal opportunities and equal treatment of men and women in matters of employment and occupation [2006] OJ L204/23