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978-1-107-03880-6 - The Transformation of European Private Law: Harmonisation, Consolidation, Codification or Chaos?

Edited by James Devenney and Mel B. Kenny

Excerpt

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## Introduction

JAMES DEVENNEY AND MEL B. KENNY

I have come to the conclusion that as regards contract law, we need a new approach . . . that on the one hand helps bring about the single market . . . while on the other hand respects Europe's legal diversity and the principle of subsidiarity.<sup>1</sup>

This book emerges from a duo-colloquium – ‘The Europeanisation of Private Law: Theory and Practice’ – hosted by the Research Group on Credit, Debt and Consumer Protection at Leicester University, in association with the Institute of Commercial and Corporate Law at Durham University, in December 2010. That conference explored the Europeanisation of private law against the backdrop of a changing Europe and in the context of the (then) proposed Consumer Rights Directive, efforts to consolidate the consumer acquis,<sup>2</sup> the draft Common Frame of Reference,<sup>3</sup> the Commission's appointment of an Expert Group on a Common Frame of Reference in the area of European contract law,<sup>4</sup> and the Commission Green Paper on *Policy Options for Progress towards a European Contract Law for Consumers and Businesses*.<sup>5</sup> The issues explored by that conference are even more relevant today given, for example, the passage of the Consumer Rights Directive, the proposal for an optional Common European Sales Law and renewed debate on a European Civil Code. However, much work is yet to be done, as is highlighted by the early response of the Council of the European Union

<sup>1</sup> Commissioner Viviane Reding, *The Next Steps Towards a European Contract Law for Businesses and Consumers* (Leuven, 3 June 2011).

<sup>2</sup> On which see e.g., B. Heiderhoff and M. Kenny, ‘The Commission's 2007 Green Paper on the Consumer Acquis: Deliberate Deliberation?’ (2007) 32 *European Law Review* 740.

<sup>3</sup> C. von Bar and E. Clive, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Oxford University Press, 2010).

<sup>4</sup> Commission Decision 2010/233/EU [2010] OJ L105/109.

<sup>5</sup> European Commission, *Green Paper from the Commission on Policy Options for Progress towards a European Contract Law for Consumers and Businesses*, COM(2010)348 final.

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on Justice and Home Affairs to the proposal for an optional Common European Sales Law:<sup>6</sup>

among the aspects of the proposal that require thorough discussion are the personal, material and territorial scope of the proposal, the complexity of linking the proposal with the different national legal systems, the details and consequences of choice of the instrument, the consequences of an invalid choice, the consumer protection rules relating to the choice and the reporting obligations of member states, including the envisaged online database of judgments.

Indeed, we may now be at a watershed moment in the Europeanisation of private law and this book, with fully updated contributions, critically reflects on whether the process of Europeanisation, which has shaped private law in the EU Member States, has now reached a critical turning point in its development, a point of *punctuated equilibrium*, with significant policy implications for EU law, national laws and the principle of subsidiarity.

The conference was the third in a series of events emanating from a project which was launched in 2008 with the generous support of Marie Curie research funds through the European Commission within the Seventh Framework Programme (FP7);<sup>7</sup> and we are indebted to Pascale Dupont, Chantal Huts and Laurent Correia, our former FP7 project officers. We are also grateful at an institutional and material level to the Institute of Corporate and Commercial Law at Durham and to the School of Law at the University of Leicester.

We are indebted to all those who submitted proposals, held papers, chaired sessions and made contributions to the conference and to this volume. In particular we are grateful to Mona Ahadi (Durham University), Prof. Tom Allen (Durham University), Prof. Cristina Amato (University of Brescia), Dr Jane Ball (Sheffield University), Prof. Hugh Beale (Warwick University), Prof. Immaculada Barral Viñals (Barcelona University), Prof. David Campbell (Leeds University), Prof. Olha O. Cherednychenko (Groningen University), Dr Jim Davies (Northampton University), Karen Fairweather (Queensland University), Dr Marine Friant-Perrot (Nantes University), Dr Amandine Garde (Liverpool University), Prof. Paula Giliker (University of Bristol), Dr Lorna Gillies (Leicester University), Ana Sofia Gomes (Lisbon), Mateusz Grochowski (Warsaw), Prof. Roger Halson (Leeds University), Prof. Axel Halfmeier (Leuphana University),

<sup>6</sup> PR CO 79.<sup>7</sup> Marie Curie Credit and Debt Project: FP7 ERG 223605.

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As any conference and any project depends on the cooperation and dedication of many otherwise unsung members of the support staff, we would like to take the opportunity to thank the events staff at Leicester Law School for their patience and help. Crucial support has also been given by the highly dedicated staff at Cambridge University Press; in particular, we would like to thank Kim Hughes, Richard Woodham, Jonathan Ratcliffe, Samantha Richter, Helen Francis and Finola O'Sullivan for their ongoing support and efficient management of the production process. Editorial assistance to the project was enthusiastically delivered by Claire Devenney and Elizabeth Davison.

Since the organisation of this conference and the publication of this collection, we have both moved to new pastures: Mel to a Chair in Consumer and Commercial Law at De Montfort University; and James to a Chair in Commercial Law at the University of Exeter. Information on the ongoing work and forthcoming events under the project can be obtained from the editors.

This collection is dedicated to our parents.

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# 1

## The Draft Common Frame of Reference in relation to English contract law

STEPHEN WADDAMS

### Introduction

On many points of contract law the Draft Common Frame of Reference (DCFR) invites comparison between English law and the legal systems based on Roman law. Such comparisons are by no means new. Comparison between the systems was familiar in the seventeenth century, as appears from the Preface, attributed to Sir Matthew Hale, to Rolle's *Abridgment* (1668).<sup>1</sup> Hale defended English law against other systems on the ground of the greater precision of the former:

The Common-laws of *England* are more particular than other laws, and this, though it render them more numerous, less methodical, and takes up longer time for their study, yet it recompenseth with greater advantages, namely, it prevents arbitrariness in the Judge, and makes the law more certain . . . It hath therefore always been the wisdom and happiness of the *English* Government, not to rest in Generals, but to prevent arbitrariness and uncertainty by particular Laws, fitted almost to all particular occasions.<sup>2</sup>

Critics of English law, Hale continued, objected to its lack of ordered classification, saying:

that it wants *method*, order, and apt *distributions*, and this hath bred some prejudice against it, not only in men much addicted to subtil learning, but

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<sup>1</sup> Preface to Henry Rolle, *Abridgement des plusieurs cases et resolutions del common ley*, 2 vols. (1668), reprinted in [Francis Hargrave] *Collectanea Juridica, consisting of tracts relative to the law and constitution of England* (London, 1791), p. 263 ('Lord Hale's Preface to Rolle's Abridgement'); Alan Cromartie, *Sir Matthew Hale, 1606–1676* (Cambridge University Press, 1995), p. 119.

<sup>2</sup> Hale's Preface, p. 3 (emphasis in original).

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also in the Professors of the Civil Law, who think that Law much more methodicall and orderly than the Common-law.<sup>3</sup>

After a discussion of methods of resolving moral questions, Hale remarked, in defence of English law, ‘yet it were a vain thing to conclude it is irrational, because not to be demonstrated or deduced by Syllogismes’.<sup>4</sup> Hale’s extended treatment of the question shows that he thought a defence of English legal methods to be necessary.

The search for ‘method, order, and apt distributions’ was closely linked with the concept of principle. Towards the end of the eighteenth century Sir William Jones wrote, in his *Essay on Bailments*, that ‘if LAW be a science and really deserve so sublime a name, it must be founded on principle, and claim an exalted rank in the empire of reason’.<sup>5</sup> In the nineteenth century the search for the principles of contract law intensified. Charles Addison wrote in the Preface to his treatise on contracts (1847) that English contract law was founded ‘upon the broad and general principles of universal law’ and that ‘the law of contracts may justly indeed be said to be a universal law adapted to all times and races, and all places and circumstances, being founded upon those great and fundamental principles of right and wrong deduced from natural reason which are immutable and eternal’. He went on to compare English writings on contract law, to their disadvantage, with ‘the elaborate and elegant works of Pothier’.<sup>6</sup>

Pothier had been extravagantly praised by Jones in his *Essay*, and was, for a time, treated almost as an authority on English law. In 1822 it was said by Best J (later Chief Justice of the Common Pleas) that:

[t]he authority of Pothier is . . . as high as can be had, next to the decision of a Court of Justice in this country. It is extremely well known that he is a writer of acknowledged character; his writings have been constantly referred to by the Courts, and he is spoken of with great praise by Sir William Jones in his

<sup>3</sup> *Ibid.* p. 6. In his posthumously published *Analysis of the Law* (London, 1713), Hale pursued an attempt ‘to reduce the laws of England at least into a tolerable *Method or Distribution*’, Hale’s Preface, p. 2 (emphasis in original).

<sup>4</sup> Hale’s Preface, p. 7.

<sup>5</sup> W. Jones, *An Essay on the Law of Bailments* (London, 1781), p. 123 (emphasis in original). Every coherent subject of intellectual enquiry was supposed to have principles. See W. Paley’s very influential *The Principles of Moral and Political Philosophy* (1885), Lord Kames (H. Home), *Principles of Equity* (1760), and many titles of eighteenth-century books on scientific and religious subjects.

<sup>6</sup> C. Addison, *A treatise on the law of contracts and rights and liabilities ex contractu* (W. Benning, London, 1847), Preface, pp. iv–v, vii.

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*Law of Bailments* and his writings are considered by that author equal, in point of luminous method, apposite examples, and a clear manly style, to the works of Littleton on the laws of this country.<sup>7</sup>

Many of the English nineteenth-century writers, including Pollock and Anson, made reference to civilian writings, especially to Pothier (1699–1772) and to the German jurist, Savigny (1779–1861). But the invocation of the names of Pothier and Savigny does not establish that Pollock and Anson were actually influenced by what they had written. Pollock indeed rejected Pothier's opinion on a point of contract formation (revocation of offers not known by the offeree to have been revoked) and Pollock's opinion on this point was expressly adopted by the English court in two separate cases in 1880.<sup>8</sup>

Pollock gradually distanced himself from Savigny's views on intention. In Pollock's first edition he had, in his second paragraph, assimilated 'agreement' with '*vertrag* as used by Savigny, whose analysis . . . we follow almost literally in this paragraph', quoting Savigny in the original German because 'a perfectly literal translation is not practicable'.<sup>9</sup> This is quite surprising, considering that these were the introductory words of a treatise on English law, written by an English writer in English for English readers, and because a sufficient knowledge of German language and culture to appreciate the subtle and untranslatable meaning that Savigny gave to *vertrag*, and to another word in Savigny's definition, *Willenserklärung*, could scarcely have been assumed among most of Pollock's readers. In his ninth edition (1921), by contrast, Pollock omitted this reference to Savigny, and, referring to American writings, gave prominent approval to 'the modern tendency to look to "the realization of reasonable expectations" as the ground of just claims rather than an artificial equation of wills or intentions'. The express rejection here of what Pollock now called 'an artificial equation of wills and intentions', and the preference for a theory of reasonable expectations, indicates a marked departure from the view expressed in the first edition, and evidences Pollock's later recognition that the concept of intention could not, on its own, supply a complete explanation of contractual obligation.

On the influence of civil law more generally, he had written in his fifth edition (1889), that 'for my own part I have found myself, as time goes on, rather less than more disposed to make Romanistic elements bear up

<sup>7</sup> *Cox v. Troy* (1822) 5 B & A 474, 480–1.

<sup>8</sup> *Byrne & Co. v. Van Tienhoven* (1880) 5 CPD 344; *Stevenson v. McLean* (1880) 5 QBD 346.

<sup>9</sup> F. Pollock, *Principles of Contract* (Stevens, London, 1876), p. 1 and 2 (notes).

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any substantial part of the structure of the common law'.<sup>10</sup> There is a sense of loss in this comment ('for my own part . . . found myself . . . as time goes on'), for the attraction of the civil law lay in its close connection with a search for order, elegance, and a 'scientific' approach to the study of English law, ideas that could not be abandoned without a struggle.

It has been suggested from time to time by various commentators writing from different perspectives that the distinctions between English and continental law have been more apparent than real on several points, including the question of subjective intention and mistake in contract formation, and the primacy of specific performance, and these suggestions gain some support from the Draft Common Frame of Reference.<sup>11</sup> On other questions, including relief for mistake as to relevant facts, and relief for unfairness, the provisions of the DCFR may actually be closer to English law, including equity, as it stood before the Judicature Acts than is modern English law. On these points, the DCFR is of interest not only to comparative lawyers, or to those seeking immediate action on harmonisation, but also to those seeking to understand, from a historical perspective, the concept of principle in English contract law.

### Meaning of 'principle'

'Principle' has often been contrasted with 'policy', but in English law the two concepts have interacted with each other, because a proposition has not generally been recognised as a principle unless it has been perceived as establishing a rule that is judged likely to lead to acceptable results in the future. Approaching the matter from the other side, a rule adopted for overt policy reasons has usually, after its acceptance as a rule of English law, been itself called a 'principle'.<sup>12</sup>

The DCFR also casts doubt on the workability of a sharp distinction between principle and policy. In a paragraph headed 'Meaning of "principles"' the authors wrote that:

<sup>10</sup> F. Pollock, *Principles of Contract* (5th edn, Stevens, London, 1889), p. 698. See N. Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford University Press, 2004), p. 194.

<sup>11</sup> C. von Bar et al. (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference*, Full Edition (Sellier, Munich, 2009).

<sup>12</sup> See S. Waddams, *Principle and Policy in Contract Law: Competing or Complementary Concepts?* (Cambridge University Press, 2011).

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the word is susceptible to different interpretations. It is sometimes used, in the present context, as a synonym for rules which do not have the force of law ... Alternatively, the word 'principles' might be reserved for those rules which are of a more general nature, such as those on freedom of contract or good faith. However, in the following paragraphs we explore a third meaning ...<sup>13</sup>

The document then discussed 'fundamental principles', mentioning that, in an earlier interim document no fewer than fifteen items had been listed as fundamental principles, including justice, freedom, protection of human rights, economic welfare, solidarity and social responsibility, establishing an area of freedom, security and justice, promotion of the internal market (of the European Union), protection of consumers and others in need of protection, preservation of cultural and linguistic plurality, rationality, legal certainty, predictability, efficiency, protection of reasonable reliance, and the proper allocation of responsibility for the creation of risks.<sup>14</sup> Any of these 'fundamental principles' could well have been described as policies.

This miscellaneous collection of objectives evidently seemed too varied and multifarious to be a satisfactory list of 'fundamental principles', and in the later version the document identified 'underlying principles', which were reduced to four (freedom, security, justice and efficiency).<sup>15</sup> The drafters go on to say that 'it is characteristic of principles such as those discussed that they conflict with each other'.<sup>16</sup> They also point out that 'the principles overlap', adding that 'many of the rules which are designed to ensure genuine freedom of contract can also be explained in terms of contractual justice'.<sup>17</sup> The drafters further seek to distinguish between 'underlying' principles (the four just mentioned) and 'overriding' principles 'of a high political nature', adding that 'the two categories overlap'.<sup>18</sup> These observations are not offered by way of criticism: they illustrate the inherent difficulty of attaching a single or simple meaning to the concept of principle, and of distinguishing it from policy. Any of the many objectives identified by the Draft Common Frame of Reference as principles might well be called policies.

<sup>13</sup> DCFR, Introduction, para. 10, vol. 1, pp. 4–5.

<sup>14</sup> *Ibid.* Introduction, paras. 11–12, vol. 1, p. 5, referring to Interim Outline Edition (2008).

<sup>15</sup> *Ibid.* vol. 1, p. 37; Outline Edition, p. 60. <sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.* Outline Edition, p. 61; Full Edition, vol. 1, p. 38.

<sup>18</sup> *Ibid.*, Introduction, para. 16, p. 14 (Outline Edition) and vol. 1, p. 8 (Full Edition).



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[More information](#)**Subjective intention in contract formation**

Most of the nineteenth-century English treatises identified agreement, or consent, as the basis of contract law, suggesting that contractual obligation depended on the actual intention of the promisor. The phrase ‘consensus ad idem’ was in frequent use, and the expression ‘will theory’ has been so commonly used of nineteenth-century English law as almost to attain the status of received wisdom. But on many points nineteenth-century English law plainly did not require actual consent for the creation of contractual obligation. The question of revocation of offers not known to the offeree to have been revoked, on which Pollock differed from Pothier, has been mentioned. Agency law imposed contractual obligations on a principal for contracts purportedly made by an agent, even though the agent might be flatly defying express private instructions. More generally, the conduct and words of a promisor were construed objectively, not according to the promisor’s private intention. In 1871, Blackburn J said, in a passage that has been quoted and relied on throughout the common law world, directly and indirectly, perhaps more than any other single passage in contract law, ‘If, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.’<sup>19</sup>

The underlying basis of this line of thinking was not intention, or mutual agreement, but protection of the promisee’s expectation – that is to say, reasonable expectation of what promise had been made. It followed that a promisor might be bound by the promisee’s reasonable understanding of what promise had been made, even though contrary to the actual intention of the promisor. The corollary was that if the promisee actually knew of the promisor’s real intention, the promisee would have no reasonable expectation of holding the promisor to a different meaning.<sup>20</sup> This conclusion rests not on any subjective theory of contract formation, but on the limits of a theory based on protection of reasonable expectations (i.e., expectations of what promise had been made are protected, but only insofar as really held).

It is sometimes suggested that civil law differs from the common law on the question of subjective intention in contract formation, but on this point the DCFR provides that ‘the intention of a party to enter into a binding legal relationship or bring about some other legal effect is to be

<sup>19</sup> *Smith v. Hughes* (1871) LR 6 QB 597, 607.<sup>20</sup> *Ibid.* 610 (Hannan J).

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determined from the party's statements or conduct as they were reasonably understood by the other party'.<sup>21</sup> In the comment the drafters say that 'this represents the law in many (probably the majority) of Member States',<sup>22</sup> with reference to the statement of Blackburn J from *Smith v. Hughes*, quoted above, as representing English law on the point.<sup>23</sup> The present writer is not in a position to assess the accuracy of the DCFR comment on the law in civilian jurisdictions. The words 'many (probably the majority)' indicate that there was, in the minds of the drafters, some uncertainty on the matter. Nevertheless, the fact that the comment was made is of significance to a common law observer, as showing (at the very least) that it would be a mistake to suppose, without qualification, that civilian jurisdictions have adhered uniformly to a principle of subjective intent.

### Specific performance

Comparing common law and civilian systems, Anthony Ogus wrote, in an essay published in 1989, that:

the latter [civilian systems] view the specific enforcement of agreements as a primary remedy, while the former [common law systems] accord it only secondary status, regarding it as appropriate only where the monetary equivalent of performance is 'inadequate'. At the same time, there is evidence that in practice the systems converge to some extent, that the types of contract which are specifically enforced in both systems share common characteristics.<sup>24</sup>

This view, which has been suggested also, more or less explicitly, by many other writers, common law and civilian, is to a considerable degree supported by the Draft Common Frame of Reference, which proposes the following rule:

III 3:302: Non-monetary obligations

(1) The creditor is entitled to enforce specific performance of an obligation other than one to pay money . . .

(3) Specific performance cannot, however, be enforced where:

(a) performance would be unlawful or impossible;

(b) performance would be unreasonably burdensome or expensive; or

<sup>21</sup> DCFR, art. II 4:102.      <sup>22</sup> *Ibid.* Comment B, and vol. 1, pp. 274–6 Notes 1–11.

<sup>23</sup> *Ibid.* vol. 1, pp. 275–6, Note 5.

<sup>24</sup> Anthony Ogus, 'Remedies 1: English Report' in D. Harris and D. Tallon (eds.), *Contract Law Today: Anglo-French Comparisons* (Clarendon Press, Oxford, 1989), p. 243.