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Excerpt

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1 Introduction

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A. The Common Core Project

1. Aim and method

a. Aim

The present volume forms part of a project that started in Trento in 1993 and has produced, so far, ten similar volumes.¹ The aim of the Common Core Project has been defined, and refined, by the general editors of the project, Mauro Bussani and Ugo Mattei, on several occasions.² The main aim is legal cartography, that is, to draw a reliable map of private law in Europe:³

the Common Core Project is seeking to unearth the common core of the bulk of European Private Law . . . The search is for what is different and what is already common behind the various private laws of European Union Member States . . . Such a common core is to be revealed in order to obtain at least the main lines of one reliable geographical map of the law of Europe.

The research project is meant to be neutral, without any specific agenda for or against further Europeanisation of private law, whether or not

¹ Zimmermann and Whittaker, *Good Faith in European Contract Law*; Gordley, *The Enforcement of Promises in European Contract Law*; Bussani and Palmer, *Pure Economic Loss in Europe*; Werro and Palmer, *The Boundaries of Strict Liability in European Tort Law*; Kieninger, *Security Rights in Movable Property in European Private Law*; Sefton-Green, *Mistake, Fraud and Duties to Inform in European Contract Law*; Graziadei, Mattei and Smith, *Commercial Trusts in European Private Law*; Pozzo, *Property and Environment*; Möllers and Heinemann, *The Enforcement of Competition Law in Europe*; Hinteregger, *Environmental Liability and Ecological Damage in European Law*.

² Notably, in M. Bussani and U. Mattei, 'The Common Core Approach to European Private Law' (1997/1998) 3 *Columbia Journal of European Law* 339 and M. Bussani and U. Mattei, 'Preface: the Context', in Bussani and Mattei, *The Common Core of European Private Law* (2002), pp. 1–8.

³ Bussani and Mattei, 'The Context', above n. 2, p. 1.

through codification. As Bussani and Mattei put it, 'We are not drafting a city plan for something that will develop in the future and that we wish to affect. This project seeks only to analyze the present complex situation in a reliable way.'⁴ This also means that the legal systems of the Member States are treated on an equal basis; no relations between legal systems, hierarchical or in terms of 'legal families', are assumed.

This neutral stance distinguishes the present project from other international research projects in the area of European private law, such as the projects undertaken by the Commission on European Contract Law (Lando Group),⁵ the Study Group on a European Civil Code (Von Bar Group),⁶ the Accademia dei Giusprivatisti Europei (Gandolfi Group),⁷ and the European Research Group on Existing EC Private Law (Acquis Group),⁸ who all aim to draft common rules ('principles') of private law for Europe; and also from the Study Group on Social Justice in European Private Law (Social Justice Group) which, without drafting rules, pursues a well-defined political aim.⁹

b. Method

As to the methodology, the Trento Common Core Project has had two main sources of inspiration. First, was the Common Core Project that Rudolph Schlesinger directed at Cornell University in the 1960s.¹⁰ From Schlesinger's project the Trento Project borrowed its functional approach and its specific case-based method. Schlesinger thought that legal rules are best described by their function and that a good way of

⁴ *Ibid.* p. 2.

⁵ See Lando and Beale, *Principles of European Contract Law, Parts I and II*, prepared by the Commission on European Contract Law; Lando, Clive, Prüm, Zimmermann, *Principles of European Contract Law, Part III*, prepared by the Commission on European Contract Law. On the aims see art. 1:101 PECL. On the working method, see 'Introduction', in *Principles of European Contract Law, Parts I and II*.

⁶ See von Bar, *Principles of European Law: Benevolent Intervention in Another's Affairs*; Hesselink, Rutgers, Bueno Díaz, Scotton, Veldman, *Principles of European Law: Commercial Agency, Franchise and Distribution Contracts*; Barendrecht et al., *Principles of European Law: Service Contracts*; Drobnić, *Principles of European Law: Personal Security*. See also www.sgecc.net.

⁷ Gandolfi, *Code Européen des contrats - Avant-projet*.

⁸ See Research Group on the Existing EC Private Law (Acquis Group), *Principles of the Existing EC Contract Law (Acquis Principles)*, Contract I (Pre-contractual Obligations, Conclusion of Contract, Unfair Terms).

⁹ Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: a Manifesto' (2004) 16 *European Law Journal* 653.

¹⁰ Schlesinger, *Formation of Contracts: a Study of the Common Core of Legal Systems*.

comparing legal systems is by inquiring how different legal systems solve the same practical cases ('factual approach').

The second source of inspiration is Rodolfo Sacco's work on the methodology of legal comparison, in particular his theory of legal formants.¹¹ Sacco distinguishes several legal formants that together form a legal system. The originality of Sacco's theory compared to theories and descriptions of 'sources of law' lies in the fact that Sacco rejects the assumption that different legal formants of one legal system always point in the same direction (that is, give the same answer to a question of law). Instead, within his 'dynamic' approach to comparative law legal formants are regarded as being in a competitive relationship with one another.

Ugo Mattei and Mauro Bussani have merged these two approaches to legal comparison into one method, 'the common core method'. The Trento Common Core Project seeks to provide a reliable map of European private law by comparing the way in which the national systems of the different Member States deal with the same practical cases relating to some of the main topics in some of the main areas of private law. The national reporters are encouraged not to take for granted that their legal system provides one determinate and coherent answer to the questions under consideration. On the contrary, they are asked, in principle, to discuss the answer given by each of the legal formants separately.

Legal formants are formally distinguished into three levels.¹² On a first level ('operative rules') the national reporters are asked to indicate how the case would be solved according to case law, legislation, legal doctrine, custom and usage, and whether all these formants are concordant, both from an internal point of view, and from a diachronic point of view. On a second level ('descriptive formants') the reporter is to indicate the reasons why lawyers feel obliged to adopt the solutions mentioned on the first level. Finally, on a third level ('metalegal formants') the reporters are invited to indicate any other elements that might affect the solutions mentioned at level I, such as policy considerations, economic factors, social context and values, and the structure of the legal process. However, the 'Instructions about how to answer the

¹¹ Sacco, *Introduzione al diritto comparato*, p. 43ff.; R. Sacco, 'Legal Formants: a Dynamic Approach to Comparative Law' (1991) 39 AJCL 1-34, 343-401.

¹² 'Instructions about how to answer the questionnaires', published as Annex 1 in Bussani and Mattei, 'The Common Core Approach to European Private Law', above n. 2.

questionnaires' also point out that it will often be possible to group together answers on levels II and III and for different questions.¹³

2. Methodological criticism

Since the beginning of the Trento Common Core Project in 1993 many prominent theorists of comparative law have visited the yearly general meetings of the Project. On these occasions they have been invited to express their views on the aims and method of the project. These views have been published by the general editors.¹⁴

a. Functionalism

The first line of criticism is a specific instance of the general attack on functionalism in comparative law. Until quite recently the functional method was the dominant method of comparison. A classical statement of functionalism was given by Konrad Zweigert and Hein Kötz.¹⁵

The basic methodological principle of all comparative law is that of *functionality* . . . The proposition rests on what every comparatist learns, namely that the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results.

A first criticism of the functional method has been that there is more to law than its function; law is a cultural expression just like, for example, a song or a work of architecture.¹⁶ A second, more undermining criticism is that there is no such thing as the objective function of a legal rule or doctrine which can be scientifically established. Therefore, the findings and conclusions of any comparative research are dependent on the way in which the functional question was formulated. In other words, a comparatist necessarily imposes his or her own functional categories on the law of a foreign country.¹⁷ This criticism was formulated by Günter Frankenberg in 1985.¹⁸

¹³ Ibid.

¹⁴ Bussani and Mattei, *Making European Law: Essays on the 'Common Core' Project*; Bussani and Mattei, *The Common Core of European Private Law*.

¹⁵ Zweigert and Kötz, *Introduction to Comparative Law*, p. 34 (emphasis in original).

¹⁶ See, e.g., Legrand, *Que sais-je? Le droit comparé*, p. 119: 'La comparaison des droits sera culturelle ou ne sera pas.'

¹⁷ Cf. generally Said, *Orientalism*.

¹⁸ G. Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 *Harv Int'l LJ* 411.

However, the element in Zweigert and Kötz's version of functionalism that aroused the strongest criticism was probably their claim that legal systems, such as those in the European Union, answer the needs of legal business in the same or in a very similar way; and that this idea could provide a useful starting point for legal comparison ('*praesumptio similitudinis*').¹⁹

[A]s a general rule developed nations answer the needs of legal business in the same or in a very similar way. Indeed it almost amounts to a '*praesumptio similitudinis*', a presumption that the practical results are similar. As a working rule this is very useful . . . the comparatist can rest content if his researches through all the relevant material lead to the conclusion that the systems he has compared reach the same or similar practical results, but if he finds that there are great differences or indeed diametrically opposite results, he should be warned and go back to check again.

Among the many critics of this is Pierre Legrand:²⁰

Ainsi le respect de l'altérité ne se présente pas comme le résultat d'une comparaison des droits: il en est le pré-requis . . . Il incombe donc au comparatiste de protester vigoureusement contre l'axiomatisation de la ressemblance, contre l'impérialisme du Même, tout particulièrement lorsque l'illusion simplificatrice devient tellement excessive qu'elle conduit à suggérer que le chercheur qui constaterait avoir mis au jour des différences entre divers droits devrait revoir ses conclusions.

Other functionalists have tried to limit the damage by severing the functional method from the *praesumptio similitudinis*. See, for example, Jaakko Husa:²¹

The idea [i.e. the idea of presumed similarity] is, to me, an unnecessary auxiliary to hardcore functional method. Why is it not always important to treat any 'results' of comparative study with natural built-in suspicion? This does not have anything to do with the fact whether or not the comparison shows similarities or differences . . . Functionalism is better without this overstretched universality presumption; the hardcore of functional method in comparative law does not support similarity-presumption, on the contrary, it encompasses both similarities and differences.

However, it is doubtful whether this rescue operation can be fully successful. The problem seems to lie deeper. As Frankenberg said,

¹⁹ Zweigert and Kötz, *Introduction to Comparative Law*, p. 40.

²⁰ Legrand, *Que sais-je? Le droit comparé*, pp. 36–8.

²¹ J. Husa, 'Farewell to Functionalism or Methodological Tolerance?', *RabelsZ* 2003, 419, 424–5.

'The sameness of the problems produces the relative sameness of results.'²²

How does the criticism of functionalism affect the Common Core Project? As to the first criticism (law is culture), most participants in the Project are well aware that the law consists of more than mere black-letter rules. Moreover, as has already been said, the 'Instructions about how to answer the questionnaires' ask the national reporters to go beyond what are traditionally regarded as the sources of law and to address also the deeper levels of their 'descriptive formants' and 'metalegal formants', which include such things as economic and/or social factors, social context and values. Indeed, the three-level method that has been adopted looks rather like the '*comparaison à étages*' that Pierre Legrand proposes as an alternative to functionalism.²³

The reply could, of course, be given that in their national reports most reporters do not go much beyond the black-letter rules (understood as code, statutes and case law) of their systems. But then, could such an attitude not be regarded as typical of the national '*mentalité*' of the reporter? Is a cultural comparatist allowed to tell a national reporter that he has too narrow a conception of his own law; that his national law comprises much more than he, as local lawyer, has always thought? Any other answer seems to imply that there exists such a thing as a national legal system or national legal culture of a given country 'out there', that can be described in a better way by the comparatist than by a national reporter who has been asked explicitly to dig deep into the deepest layers of his own legal culture. As Bussani and Mattei say, 'the common core project wishes to compare rather than to preach how we should compare'.²⁴

The second criticism (functional categories are imposed on foreign systems), does not seem to apply fully to the Common Core Project either. First, this is because the questionnaires are agreed upon by all the national reporters together, therefore functional categories and formulations of the facts of the cases are not imposed upon another legal

²² Frankenberg, 'Critical Comparisons', above n. 18, p. 436.

²³ See Legrand, *Que sais-je? Le droit comparé*, p. 28: 'La positivité de surface d'un droit dissimule des strates qui restent essentielles à un riche entendement de ce positivisme même. En effet, ce sont ces structures cognitives – cette mentalité – qui soutiennent le droit positif, dans lesquelles ce droit positif se trouve ancré. Ce sont ces étais que le comparatiste doit mettre au jour à travers une "comparaison à étages", et c'est là la spécificité de la contribution qu'il peut apporter à l'éclairement du droit.'

²⁴ Bussani and Mattei, 'The Context', above n. 2, p. 2.

system. Secondly, within the Project reporters are encouraged to report whether a certain perceived problem is actually considered to be a problem in the national legal system. However, it must be acknowledged that the way in which the facts of the cases and the questions are formulated, and the way in which the cases are selected (which cases belong to a particular subject) are crucial. Moreover, a very basic question is what counts as an (interesting) subject of study. In this regard, it has to be acknowledged in particular, that the names of the sub-groups of the Project ('Contract', 'Tort' and 'Property') and of the specific projects that have been finalised so far,²⁵ are highly conceptual ('good faith', 'the enforceability of promises', 'pure economic loss', 'the boundaries of strict liability', 'security rights in movable property', 'mistake, fraud and duties to inform', 'commercial trusts').

Finally, the *praesumptio similitudinis* is certainly not a part of the Common Core method. Not only have the general editors emphasised time and again that they are interested in producing reliable maps, but also the editors of the projects are as keen on finding differences ('look, here French and Spanish law are clashing!') as similarities ('you see, in this case the odd ones out are France and England'). Of course, the deeper criticism of the *praesumptio* does apply to the Common Core method: the sameness of the problems produces the relative sameness of results. The fact that the reporters and editors of a questionnaire have agreed on the way in which cases and questions have to be formulated in a given questionnaire implies that they have limited their investigations to a 'common frame of reference' which excludes potentially important differences in the way that they and their co-nationals look at the world.

Twenty years after his seminal article on comparative legal method, Günter Frankenberg came to Trento and commented upon the Common Core Project and its method.²⁶ His main methodological criticism is inspired by fact scepticism.²⁷ The 'Trentinos', he argues, are guilty of 'reductionism' and 'sterilization of facts'. That is a somewhat surprising reproach to make to someone who is trying to draw a map. Are not maps always sterilised? Does that make them less useful? Or does that make them biased in the sense that they are only useful for tourists who

²⁵ Above n. 1.

²⁶ G. Frankenberg, 'How to Do Projects with Comparative Law: Notes of an Expedition to the Common Core' (2006) 2(2) *Global Jurist Advances* Article 1.

²⁷ Ibid. Section V.

want to travel to the same destinations, using the same roads, as those who drew up the map? Moreover, the critique of reductionism and sterilisation of facts seems to suggest that there is a better way to find the common core; that it exists 'out there' and that the Trento method is not the best way to find it. Again, the question is: what would be a better method of giving an impression of the existing similarities and differences in the private laws of Europe?

b. Neutrality, scientific method and the politics of comparative law

A second line of criticism is directed against the Project's proclaimed 'critical neutrality'. The general editors of the Project have consistently argued that the Common Core Project is neutral towards the general question of whether private law in Europe should be further harmonised and the specific question of the desirability, feasibility and possible content of a European Civil Code:²⁸

[W]e still believe that the most important cultural difference between the 'Common Core Project' and other remarkable enterprises – such as the Unidroit Principles, the Lando Commission, or von Bar's Study Group – is that they may be seen as doing city planning rather than cartographic drafting... the 'common core' research may be a useful instrument for legal harmonization, 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 itself, which is devoted to produce reliable information, whatever its policy use might be.

Observers have pointed out that one of the general editors has published a provocative article in which he rejects the soft approaches towards private law harmonisation in Europe, such as the drafting of principles and a 'Common Frame of Reference', and calls for a 'hard code now'.²⁹ Moreover, it can be added that the Common Core Project participates, together with (among others) the Study Group on a European Civil Code and the Acquis Group, in the Joint Network on European Private Law (CoPECL),³⁰ a 'network of excellence', funded by the European Commission, which has the task of preparing for the

²⁸ Bussani and Mattei, 'The Context', above n. 2, p. 4.

²⁹ See Frankenberg, 'How to Do Projects with Comparative Law', above n. 26. The article is U. Mattei, 'Hard Code Now!', (2002) 2(1) *Global Jurist Frontiers* Article 1.

³⁰ See www.copecl.org.

European Commission a 'Common Frame of Reference' that may one day provide the basis for an (optional) European Code of Contracts.³¹

What should we make of such criticism? First, it should be pointed out that the Common Core Project also includes opponents of a European Civil Code. Indeed, some editors have explicitly rejected the idea.³² Secondly, the general editors are right to the extent that, in theory, it is at least conceivable that one could conduct a project like the Common Core Project with exactly the opposite aim: to show as many differences as possible with a view to making a case against a European Civil Code – there are too many differences; it will be impossible to reach agreement; or with all these different traditions the code would be applied differently; or it may be possible but it would destroy cultural diversity.

The reality, however, is different. It is probably fair to say that most participants are not hostile, in principle, to the idea of further private law harmonisation in European, even in the shape of an (optional) European Code. This is not surprising. The project has brought together through the years hundreds of enthusiastic scholars (often young) from all Member States and far beyond. Not only did they share an initial curiosity towards what might be the common core of their legal systems; also, over the more than ten years that the project has been conducted, it has contributed to shaping a non-nationalistic but common European culture of legal scholarship, as this (somewhat immodest) account by the general editors describes:³³

in the process of drafting the map we are changing the landscape of European private law by affecting the mode of thought of one of the most important formants of professional law: i.e. legal doctrine . . . In the course of these years that we have spent more or less intensely worrying about the same methodological problems, the same difficulties in communication due to the lack of common taxonomies, the same need to make our own law, including its more tacit assumptions, understandable by all the other members of our group, we have actually changed, we have augmented our comparative sensitivity and perhaps we have learned to think a bit more like European lawyers rather than like Italians, French, Greeks or Scottish.

³¹ Communication from the Commission to the European Parliament and the Council: a more coherent European contract law; an action plan: COM(2003) 68 final (12.2.2003) (OJ 2003 C63/01).

³² See R. Zimmermann, 'Roman Law and European Legal Unity' in Hartkamp *et al.*, *Towards a European Civil Code* (3rd edn), pp. 21–39; R. Sefton-Green, 'Cultural Diversity and the Idea of a European Civil Code' in Hesselink, *The Politics of a European Civil Code*, p. 71.

³³ Bussani and Mattei, 'The Context', above n. 2, p. 3.

It is not surprising that such a cosmopolitan community tends to reject legal nationalism and to be curious and even enthusiastic towards attempts to construct a truly common European private law.

The criticism of the neutrality of the Common Core method raises the further question whether other methods of legal comparison might be (more) neutral, objective or scientific. Several critics of the Project (or of functionalism in general) seem to imply that their own methods are more appropriate for academic comparative legal studies.³⁴

This brings us to the broader debate on scientific method that has been going on among philosophers of science. Today, the possibility of drawing categorical distinctions between knowledge and opinion, between science and non-science, and of a 'scientific method' which can lead to objective, true and scientific knowledge, seems to be very doubtful.³⁵ Historical and sociological approaches to science and knowledge, which focus on what scientists actually *do* when they are producing scientific knowledge, seem to be more promising than prescriptive theories of scientific method.³⁶ What are the implications for the debate on the method of legal comparison, in particular for the debate on the Common Core approach? First, of course, that the general editors' initial claim of objective and neutral cartography is indeed implausible. However, the emphasis of critics on that metaphor seems unfair. The project has been going on for more than a decade and all the participants seem to have moved well beyond such naive scientism. In the meantime we have learned much more about both legal comparison and European private law. Indeed, with hindsight most of the initial contributions to the debate on the Europeanisation of private law actually were rather naive.³⁷

³⁴ See, e.g., Legrand, *Que sais-je? Le droit comparé*, p. 28 (emphasis in original): 'Nonobstant les objections prévisibles des "résonneurs" du droit, la complexification de l'objet de la comparaison juridique s'impose en raison de ce que seule la compréhension approfondie ou l'interprétation dense d'un aspect quelconque d'un droit étranger et du croisement de ce droit avec l'expérience juridique du comparatiste lui-même peut justifier l'entreprise comparative pratiquée dans le milieu universitaire, laquelle ne mérite d'être sanctionnée par la communauté savante que dans la mesure où elle veut bien accepter de s'intellectualiser. Quant à elle, la connaissance fouillée dont je me fais le défenseur ne saurait pouvoir être obtenue que si le comparatiste intervenant comme observateur d'autres droits se montre prêt à s'émanciper de la dimension positive ou dogmatique du droit, éphémère et contingente, c'est-à-dire friable, pour situer le phénomène juridique dans un contexte culturel.'

³⁵ See, e.g., such different authors as Feyerabend, *Against Method*; Rorty, *Philosophy and the Mirror of Nature* and Derrida, *L'Université sans condition*.

³⁶ See, e.g., Latour, *Science in Action* and Shapin, *The Scientific Revolution*.

³⁷ See, e.g., Hartkamp *et al.*, *Towards a European Civil Code* (1st edn).