Current Trends in European Comparative Law: The Common Core Approach

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By MAURO BUSSANI*

This paper presents and discusses the cultural reasoning that supports a scholarly project launched five years ago by Professor Ugo Mattei and myself at the University of Trento, Italy. The purpose of this paper is not so much to praise the debatable merits of the initiative, but to thank and celebrate the person with whom we first discussed the enterprise, the scholar who gave us the cultural blessing and strong encouragement for this project. I am talking about modestly celebrating and thanking Rudolf B. Schlesinger.

I. Introduction

The project is entitled “The Common Core of European Private Law.” Today it involves more than one hundred scholars, mostly from Europe and the United States. In due course, Cambridge University Press will publish the first outcome of this project.

In sections II and III, I will describe the immediate and long-term goals of the project. In sections IV and V, I will discuss the methodological evolution that has taken place within the comparative law scholarship from the well-known Cornell Project to our work. Section VI will underline the structural guidelines of our project, and Section VII will finally tackle the main differences between the “common core approach” and a series of apparently similar “integra-

* J.D. 1983 University of Trieste, Italy; Associate Professor of Comparative Law at the University of Trento, Italy; Visiting Professor of Comparative Law at the University of Paris-II Panthéon-Assas, France (1998) and University of Paris-I, Panthéon-Sorbonne, France (1999).


2. For a more extensive and more complete presentation of the project, see Mauro Bussani & Ugo Mattei, The Common Core Approach to European Private Law, 3 COLUMBIA J. EUR. L. 339 (1997-1998).
tive," to use Schlesinger's terminology, comparative law enterprises.

II. Cartography vs. City Planning

Stating it in very simple terms, we are seeking to unearth the common core of the bulk of European private law within the general categories of contract, tort and property. The search is for any existing commonalties in the different legal forms of the European Union member States. These legal forms are differentiated not only along the lines of civil law versus common law heritage but also by a number of other Western legal traditions or sub-traditions, depending on the taxonomy adopted. The task we are pursuing, though challenging and ambitious, is not unwieldy.

Initially, Schlesinger's methodological caveats are now part of the cultural heritage of anybody who claims to engage in comparative law, and they are certainly encoded in the cultural DNA of each participant in our project. As a matter of fact, from a generational point of view, our group is composed almost exclusively of people who became scholars after the Cornell Project.

Secondly, previous comparative scholarship, both in Europe and the United States, shows us how common core research is a very promising tool for unearthing deeper analogies hidden by formal differences.

Furthermore, a common legal core must still be revealed to obtain, at a minimum, the outlines of a reliable map of European law. The future use of this map is of no concern to the cartographers who are drafting it. However, if reliable, it may be indispensable for whomever is entrusted with drafting European legislation. It may be-

3. Schlesinger, supra note 1, at 479.
4. For a discussion on the content and scientific legitimacy of such categories, see Arthur Rosett, Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law, 40 AM. J. COMP. L. 683 (1992).
6. See infra Part IV.
come particularly important as Europe gradually moves towards the adoption of a restatement and/or codification.Indeed, for the transnational lawyer, the present European situation is like that of a traveler compelled to use a number of different local maps, each one containing misleading information. We wish to correct this misleading information; we do not wish to force the actual diverse reality of the law into one single map to attain uniformity. We are not drafting a city plan with a goal towards affecting change in the present situation or predicting future developments.

This project seeks only to analyze the present complex situation in a reliable way. While we believe that cultural diversity in the law is an asset, we neither wish to take a preservationist approach nor do we wish to push in the direction of uniformity. This is possibly the most important cultural difference between the Common Core Project and other remarkable enterprises such as the UNIDROIT Principles, the Lando Commission or Gandolfi's work on the feasibility of a European Contract Code, which may be seen as undertaking city planning rather than cartographic drafting.

III. A Common Legal Culture

While drafting the map is our immediate short-term concern, in the long run, this experience is itself part of building a common European legal culture. This common culture building task is shared by a number of projects, including the European Erasmus exchange of students and European law casebooks.

The idea of shaping a truly common legal education drove some leading scholars in the field of comparative and European law to launch a project for the preparation of a series of casebooks on the

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7. See infra Part VI.
8. Professor Giuseppe Gandolfi is the head of this group composed of more than seventy scholars from all over the European Union. For more information regarding the work of this Pavia University-based group, see INCONTRO DI STUDI SU UN FUTURO CODICE EUROPEO DEI CONTRATTI [STUDY GROUP ON A FUTURE CODE ON CONTRACTS] (Peter Stein ed., 1993); Giuseppe Gandolfi, L'unificazione del diritto dei contratti in Europa: mediante o senza la legge? [Unification of Contract Law in Europe: With or Without Support of Written Law], 39 RIVISTA DI DIRITTO CIVILE 149 (1993); Giuseppe Gandolfi, Pour un Code européen des contrats [For a European Code of Contracts], 31 REVUE TRIMESTRELLE DE DROIT CIVIL 707 (1992); Giuseppe Gandolfi, Verso il tramonto del concetto di "obbligazione" nella prospettiva di un codice unico per l'Europa? [The Ending of the Concept of "Obligation" with the Coming of a Unified Code for Europe], 41 RIVISTA DI DIRITTO CIVILE 203 (1995).
9. See infra Part VI.
common law of Europe.\textsuperscript{10} The example of the United States has inspired this enterprise. In spite of the many relevant differences among the laws of each state, U.S. legal education is based on a single national model which produces lawyers capable of moving from state to state with no overwhelming difficulties.\textsuperscript{11} The authors of the European casebooks project declare that their goal is to:

uncover common general principles which are already present in the living law of the European countries . . . . [R]ather than setting up a European law school, teaching materials are developed which can be used in such a law school, and in the curricula of other law schools as well, and by courts looking for rules and principles to decide a case, throughout Europe.\textsuperscript{12}

This description highlights important similarities between the European casebook and the Common Core Project. Both aim at understanding the common features of private law in European national legal systems. Neither has a goal of imposing new rules or categories. In addition, both are analytical and not openly prescriptive. Echoing the declaratory theory fashionable among common lawyers until Blackstone, “[T]he emphasis is not so much to create uniform rules as to find similar solutions and rules in the existing laws (and if they cannot be found, to state the differences) and to analyze and compare the legal reasoning behind them . . . .”\textsuperscript{13}

While this aim of developing culture is common to both the Common Core and the European casebook approach, their targets render them partially different. To begin with, the Common Core Project is aimed at scholars, while the European casebooks project is aimed at students. Producing suitable materials for didactic purposes implies that accurate materials must be chosen that will provide students, lacking or wishing to improve specific comparative backgrounds, with the necessary elements for understanding legal systems.

\textsuperscript{10} The project was first proposed during a conference organized at the University of Maastricht in 1991 on “The Common Law of Europe and the Future of Legal Education.” Among the members of the steering committee are Walter van Gerven, Bruno de Witte, Thijmen Koopmans and Hein Kötz.


\textsuperscript{12} Walter van Gerven, Casebooks for the Common Law of Europe: Presentation of the Project, 4 EUR. REV. PRIVATE L. 67, 68 (1996) (emphasis supplied).

\textsuperscript{13} Id. at 69 (emphasis supplied).
different from their own. Making this selection is the province of academics. In fact, the idea of this group of scholars is to collect different materials in the form of cases, legislation and legal doctrine materials, particularly short notes putting the other materials in their context. Ultimately, the goal is to provide students with a grasp of foreign law while educating them as common European lawyers.

The Common Core Project may also provide some useful materials for teaching purposes, but this is not its primary task. The project investigates more specific areas of law, delving in depth into technical problems. The development of a common work methodology is itself an educational enterprise for those who are participating in its development. Hence, it may facilitate sophisticated technical communication among professional lawyers already educated in their own legal traditions rather than assisting the creation of prospective common European lawyers. Additionally, it focuses on all European legal systems, rather than emphasizing, as the casebooks do, only paradigmatic or leading systems. Nevertheless, these seem to be differences of degree and of timing rather than of nature. It is likely that the two enterprises will have many common features and that they may well profit from one another.

IV. The Parents of the Common Core Project

A. The Cornell Project

Our project is born of two cultural parents: the experience of the Cornell Project directed by Professor Schlesinger in the 1960s and the dynamic comparative law methodology as principally developed by Rodolfo Sacco over the last thirty years.

14. The group selected a number of subjects suitable for the study of common core principles: constitutional and administrative law, contracts, torts, conflict of laws, company and economic law, criminal law and social law. The casebooks mainly concentrate on the English, French and German systems. Materials from other European systems are included if they provide original solutions. The first book produced with this method is TORT LAW: SCOPE OF PROTECTION (Walter van Gerven et al. eds., 1998).

15. The importance of the role of legal science in shaping the basis for a common law of Europe is emphasized by Paolo Grossi in his article. Modelli storici e progetti attuali nella formazione di un futuro diritto europeo [Historic Models and Actual Projects in the Formation of a Future European Law], 42 RIVISTA DI DIRITTO CIVILE 281 (1996).

Every comparativist knows what the Cornell Project label refers to and what that project has represented for comparative law scholarship. The label refers to the collective comparative research project on the “Formation of Contracts” directed by Professor Schlesinger from 1957 to 1968, leaving in its wake a monumental mass of data.

The preliminary problem that Schlesinger had to resolve was how to obtain comparable answers to the questions he wished to pose about different legal systems. The answers had to refer to identical questions interpreted as similarly as possible by all those replying. Additionally, the answers had to be self-sufficient, needing no additional explanations and, hence, had to be on par with the most detailed rules.

Professor Schlesinger formulated each question taking into account any relevant circumstance of the legal systems analyzed to be sure that these circumstances would be considered in and therefore comparable with the analysis of every other system.

Thereby another important objective was achieved. Often, the circumstances that operate explicitly and officially in one system are officially ignored and considered to be irrelevant in another system. Those circumstances may still operate secretly, slipping silently in between the formulation of the rule and its application by the courts. The special feature of the work done at Cornell was that it made jurists think explicitly about all the circumstances that matter, regardless of whether they operate explicitly or implicitly, by forcing them to answer identically formulated questions.

One of the most significant methodological features of the research was the solution to the problem of how to formulate a question in a uniform way to an Indian, Spaniard, Pole, German, Norwegian and so forth. To obtain consistency, each question was formulated by presenting a case that asked the respondents about the results that would be reached in particular cases, instead of asking about a doctrinal system. As a result, the respondents gave a very different picture of the law than did the monographs, handbooks or casebooks circulating in their own countries.

The studies at Cornell taught us that in order to have complete knowledge of a country’s laws, we cannot trust entirely what the jurists say, for there may be wide gaps between operative rules and the rules as commonly stated.
B. The Theory of Legal Formants

The lesson learned from the Cornell Project was taken and developed by Rodolfo Sacco. The core of his comparative law methodology is by now well known, having been translated into many languages.

To sum up Sacco’s theory, a list, even an exhaustive one, of all the reasons given for the decisions made by the courts is not the entire law. The statutes are not the entire law nor are the definitions of legal doctrines given by scholars. In order to know what the law is, it is necessary to analyze the entire complex relationship between what Professor Sacco calls the “legal formants” of a system, those formative elements that make up any given rule of law. Legal formants include statutes, general propositions, particular definitions, reasons, holdings and so forth. All of these formative elements are not necessarily consistent within each system. Only domestic jurists assume such coherence. To the contrary, legal formants usually conflict and are in a competitive relationship with one another.

For example, we must know not only how courts acted, but we must also consider the influences to which the judges are subject. Such influences may have a variety of origins. They may arise because scholars gave wide support to a doctrinal innovation, or they may arise because of a judge’s individual background. A judge appointed from an academic position will tend to emphasize scholarly opinion more than a judge who was a practitioner. The text of a statute is also one of these influences, and even when previous judicial decisions have disregarded it, there is always the possibility that courts will return to the letter of the statutory provision.

All this, however, may still be insufficient to understand the law of a given system. Statutes or code provisions in a given system may be similar to provisions in other systems yet be applied differently. For example, vicarious liability of parents for the harms caused by their children is enforced much more strictly in Italy than it is in France, despite similar code provisions. On the other hand, statutes or general definitions in two systems can differ, whereas the operative rules are the same. A good example is compensation for pure economic loss in Germany, the Netherlands, France and U.S. common law. A full understanding of what the legal formants are and how they are related to each other allows us to ascertain the factors that

17. For the following remarks, see Sacco, supra note 16, at 21-27.
affect those solutions, making clear the weight that interpretive practices (grounded in scholarly writings, legal debate aroused by previous judicial decision, etc.) have in molding actual outcomes.

Scholarly writings, in turn, can be rhetorical. In some civil law countries, for example, general statements insist that contracts are made by consent, while the operative rules require not only consent but a reason, or cause, for the enforcement of the contract. In common law systems as well, one can find general statements that property is transferred by the will of the parties, while the operative rules require additional elements such as consideration, delivery and conveyance.

In addition, the above mentioned legal methodology allows us to go further. Take the simple example of the role of consideration in common law systems as compared with the role of causa in French and Italian law. Roughly speaking, causa means there is a good reason for the parties to enter into a contract and for the law to enforce it. According to both the French and Italian codes and scholarly doctrine, a contract must have a cause to be enforced. However, French and Italian case law do not allow the enforceability of a contract to turn on the presence of a cause but on the presence or the absence of a non-liberal cause. The courts treat the absence of cause and the presence of a liberal cause in the same way. Therefore, the presence or absence of a liberal cause as a screening factor implicit in the French and Italian legal systems is explicit in Anglo-American systems.

Herein lies the importance of distinguishing between the rule announced by the court and the rule as it is actually applied, or, as a common lawyer would say, between the court's statement of the rule and the holding of the case, the facts on which the court based its result.

As we have already said, the notion of legal formant is more than an esoteric neologism for the traditional distinction between "loi," "jurisprudence," and "doctrine," i.e., between enacted law, case law and scholarly writings. Within a given legal system, a legal rule is not uniform, in part because one rule may be given by case law, one by scholars and one by statutes. Within each of these sources there are formants competing with one another. For example, the rule described in the headnotes of a case can be inconsistent with the actual

rationale of the decision. Further, the definition of a code can be inconsistent with the detailed rules contained in the code itself.19

This complex dynamic may change considerably from one legal system to another as well as from one area of the law to another. In particular, each legal system has certain legal formants that are clearly leading in different directions. Differences in formant leadership are particularly clear in the distinction between common law and civil law. Awareness of those differences and of how they are at work explains why the exploitation of a ripe factual approach in the Common Core Project is not going to result in a mere collection of decided cases.

V. How to Do Projects with Details: The Framework of the Research

As in the Cornell Project, the key tool of the Common Core Project is the questionnaire. The three principal areas of property, tort and contract are divided into a number of topics. Each participant, when charged with the responsibility of editing a particular topic volume, is first required to draft a factual questionnaire and to discuss it at one of the topical sessions during general meetings that so far have taken place every July at the University of Trento.

We follow the general guideline of drafting our questionnaires to a sufficient degree of specificity so as to require the reporters to answer them in such a way that all of the circumstances affecting the law in his or her system are addressed, including circumstances that do not have any official role but have a practical impact on the operative rules. This method should guarantee that rules formulated in an identical way (by using an identical code provision, for instance), but which may produce different applications, or even different commentator rhetoric, will not be regarded as identical. It should also identify the elements that may play an official and declared role in one system yet work in a more cryptic, unsystematic and unofficial way in another system. The role of such cryptic elements is, of course, crucial to drafting the map of applied law.20

This focus is particularly important, as we have already men-

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20. See Rodolfo Sacco, Comparazione giuridica e conoscenza del dato giuridico positivo [Comparative Law and Knowledge of Law], in L'APPORTO DELLA COMPARAZIONE ALLA SCIENZA GIURIDICA 241 (Rodolfo Sacco ed., 1980); Rodolfo Sacco, Mute Law, 43 AM. J. COMP. LAW 455 (1995).
tioned, because we are approaching common law as well as civil law systems. The structure of the judicial process and the "style" of the legal system, in the broad sense described by John Merryman, cannot be neglected if we wish to obtain good results. Indeed, it is in the structure of the legal process, which municipal lawyers typically assume, that most differences can be detected, understood and possibly explained.

Each questionnaire, edited by one or more co-editors, is the embryo of a topical volume and is discussed within one of the three general areas in which the project is organized, i.e., property, contract or tort. Scholars participating in one of the three areas work together, discussing the newly proposed questionnaires to help the editors reach the required level of facticity and the proper semantic level given the nature of each topic. The tentative answers and the progress status of the topical volumes are discussed during the project's


22. In the course of our organizational and methodological discussions, we did not have a lot of time to spend on another issue that required a lot of attention in Cornell but is now straightforward. We are able to assume, at least for our purposes, that a comparative knowledge of the law is of a different nature than an internal knowledge of it. The former is inherently theoretical, and the latter is practical (legal scholars acting within a legal system can themselves be seen as legal formants since they "make" the law, though indirectly). Hence, we assume, for the purpose of comparative scholarship, that the domestic lawyer is not necessarily the best reporter on his or her own system. She or he may control more information about the system than a foreign lawyer, and it is an understatement to say that committed nationals of all member States are a big asset to our project. Nationals, however, may be less well-equipped to detect the hidden data and the rhetorical attitude of the system because they are misled by automatic assumptions. In the drafting of the questionnaires, and particularly in the directions on how to answer them, we tried to take care of this problem. The participants in our project are comparativists, and as comparativists, are asked to deal with the questionnaires as if they had to describe their own law.

general meetings. Additionally, the responsibility of setting forth the organization and the agenda of the tort, property and contract sessions has been allocated to Professors Mathias Reimann (Universities of Michigan and Trier), Antonio Gambaro (University of Milano) and Simon Whittaker (Oxford), respectively.

VI. The Common Core Approach in the European Context

The final part of this essay discusses the differences between the Common Core Project and the projects aiming, in various ways, at achieving uniformity of law. Hopefully, this section will cast a light on methodological and functional distinctions that characterize each initiative with respect to the others.

24. Some questions have arisen regarding the cultural legitimacy of using the labels of property, contract and tort whose meanings themselves differ between legal systems. This problem, too, should not be overemphasized. It is argued that these categories are not homogeneous among legal systems, and therefore, boundary issues may exist. For example, it is indeed easy to observe that “nuisance” is classified as a tort in common law while “troubles de voisinage” is classified as property in France. It is sufficient, however, to take a problem-solving approach to see that these two legal categories describe the same problem of boundaries between property rights. An objection to this tripartite scheme seems, therefore, rather formalistic. We believe that the very transversal nature of many problems usually approached within one of these schemes conveys a clearer picture of the different ways to solve the same problem in different systems (and within each of them). It also exposes the legacy of a tradition that may either cover the homogeneous operational rules in the different systems or the different operational rules. See also Zweigert & Kotz, supra note 5. In this project, contract, tort and property are not used in any positivistic legal sense. Their role, besides that of labels useful to detect the areas of general expertise of the contributors, is to serve as metalegal containers of problems that are fairly easy to locate on operational grounds. These are the same grounds that show us how the whole of private law is indeed communicating to solve concrete problems. After all, and as always, taxonomy is not an end in itself. It is a problem-solving device, the validity of which depends on the task of each research project. Its principal function is to organize complex materials, not to impose a structure.

A. The "Lando Commission" and the "UNIDROIT Principles"

It is true that through the use of the comparative method many common features that remained obscure in traditional legal analysis will be unearthed. This is because the instruments and techniques provide more accurate and correct analysis, not that they force convergence where it does not exist. Of course, from better knowledge may follow more integration, and therefore, the common core research may also be considered as pushing indirectly towards more uniformity and less diversity. This objection, however, should not impress us. Change following knowledge is a phenomenon that can be avoided only through obscurantism.

It is also true that 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. But this has nothing to do with the common core research itself, which is devoted to producing reliable information, whatever its policy use might be.

This distinction strongly differentiates our project from any restatement-like enterprise. The latter involves the pursuit of rationality, harmony and reform ideals, whereas the Common Core Project implies the selection of the legal rules and materials best suited for the task. The restatement-like enterprise discards whatever does not fit into its framework. This approach is anathema to an analytical perspective: the very fact that rules and materials exist in a legal system requires that they be taken into consideration in the analysis and become part of the final "map."

This clearly demonstrates the distance between our research and the Lando project on the principles of European contract law, whose primary objective is to serve as a basis for a European Code of Contracts.26 As Ole Lando himself explains, the principles of European contract law differ from the U.S. Restatement on Contracts because they require a more radical approach. They do not simply select among several solutions extant in a single legal system; because they have to provide workable solutions for a widely divergent legal environment, the solutions sometimes embody rules that do not exist as such in any European legal system.27

26. Ole Lando, Principles of European Contract Law: An Alternative to or a Precursor of European Legislation, 40 Am. J. Comp. L. 573, 577 (1992) (this article is also published at 56 RABE LSZ 261 (1992)).
27. See id. at 579.
Despite all of these differences, however, the aims and the techniques of the two types of work (Lando and U.S. Restatement) are very much the same; they share the basic idea that they have to create new law (no matter how new with respect to the pre-existing legal situation) and not simply analyze the existing one.

This normative attitude is also shared by the UNIDROIT Principles on international commercial contracts. These are meant as soft, non-binding laws, and in this respect, they are opposed to the idea of "political" codification. They aim at promoting a uniform legal environment, not at imposing it through legislative means. Their philosophy assumes that differences among the legal systems are so great that they would defeat any attempt to impose uniformity.28

The characteristic of having persuasive authority is common also to the Principles of the European Contract Law Project which, although meant to be finally embodied in a code, provides a common framework that functions as a legal guideline. The choice of a soft-law approach, however, does not eliminate the prescriptive nature of these projects: the change of the existing law has to be attained by indirect means, but the final aim remains legal change.

If we sum up the differences between the common core research and the common principles approach into one word, that word might be "skepticism." The Common Core Project, like the Cornell Project, uses value skepticism as the most important guideline. It aims to provide a reliable and exact picture of the law existing in the European systems in a number of important areas. Whether this situation is legally efficient or rational is of no concern to the scholars involved. By way of contrast, the projects whose main task is to promote common solutions to legal problems, not only have to make a value-loaded selection, but they are already embedded in non-skeptical values because of the tension between uniformity and diversity. Such projects try to find out, on the basis of comparative research, which solution may best regulate certain legal problems in a common way.

28. S. Michael Joachim Bonell, The Need and Possibilities of a Codified European Contract Law, 5 EUR. REV. PRIVATE L. 505 (1997). "Harmonization will occur for reasons exogenous to the law. Our efforts to draft unified laws are symptoms and indications of the process of unification, not their cause." Rosett, supra note 4, at 684.

same time, they discard the possibility that core divergences (and certainly not only details) might be justified on many grounds.

Moreover, normative projects are value loaded in a different sense. Their choices cannot be made on nationalistic or discriminatory grounds (as they can be for a piece of politically supported legislation), and they must be defended with reasons of general acceptability and rationality. Since the projects lack political legitimacy and advocate seemingly neutral ideas, they are forced into the narrow limits of areas of law where no open value choices are made (mainly contract law). Nevertheless, these areas cannot be neutral from the values point of view; the rules that are finally selected must be coherent as they relate to the participants' essential values (chosen or taken as a matter of course), values that usually end up corresponding with market ideology.

The common feature of the two kinds of enterprises is the use of comparative methods, but this common methodology serves diverging purposes. Consequently, it produces different results.

B. A European Civil Code

The ideas of perspective, skepticism and neutrality are also relevant in the current debate on the feasibility and usefulness of a European civil code. Within the debate, there is strong disagreement among experts. Some of them think that a code is absolutely necessary in order to shape a truly common European law. Others think that the project is not workable, either because the divergences among national systems are still too strong (implying that in the future the situation may change, and a code may eventually be feasible), or because legal harmony can or must be attained by means other than a code.

The disagreement is not limited to technical legal aspects; it in-

volves the question of who is in charge of the choice of whether to have a code and what materials to include in it. The European Parliament, by two resolutions, endorsed the idea of a European code on private law, but the contents of such an action are not entirely clear. 33 The European Union, as shaped by the Treaty of Maastricht, has the task of creating an ever closer union among the peoples of Europe by attaining the economic and social aims set forth in the Treaty itself. This implies the possibility of enacting measures that provide a common legal framework by eliminating legal differences that may hamper the development of a truly common European area. 34 It is far from clear, however, whether the powers of the Union extend to the enactment of a code. 35

In fact, many scholars think that the principle of subsidiarity, embodied in the Treaty of Maastricht, bars such an action. 36 The principle of subsidiarity contends that, in the fields where the European Union does not have exclusive powers (and private law is definitely one of those areas), the Union can intervene only if its objectives cannot be sufficiently attained by State actions. The question of whether a European code is needed because several different national codes are not suited to regulate community legal relations is a highly debated issue. 37 The answer cannot be merely technical; it depends on the value assigned to legal pluralism as opposed to legal uniformity. 38


34. See Luigi Mengoni, L'Europa dei codici o un codice per l'Europa [A Europe of Codes or One Code for Europe], 10 RIVISTA CRITICA DEL DIRITTO PRIVATO 515 (1992). This article is also published as Paper No. 30 of the series. SAGGI. CONFERENZE E SEMINARI (Michael Joachim Bonell ed., 1993).

35. For an affirmative reply, see Jürgen Basedow, A Common Contract Law for the Common Market, 33 COMMON MKT. L. REV. 1169, 1176-78 (1996) (arguing that the legal basis for such an action stems from Treaty establishing the European Community art. 100(a)).


37. On this, see Hondius, supra note 31, at 455; see also Reimer von Borries, Die Regierungskonferenz 1996 und das Privatrecht, 4 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 193 (1996).

38. See Pierre Legrand, Sens et Non-sens d'un Code Civil Européen [The Sense and Nonsense of a European Civil Code], 48 REVUE INTERNATIONAL DE DROIT
It is not the task of the Common Core Project to provide answers to this complex problem. Nevertheless, we hope that the results of the research will provide useful information for evaluating the advantages and disadvantages of both positions. After all, in order to make a choice between pluralism and unity, the first step is to gain reliable knowledge of what is at stake.

VII. Conclusion: Still Savigny vs. Thibaut?

The methodological awareness developed after five years of common core research also shows another important point that should be kept in mind in approaching the issue of European codification. Some scholars are involved in a polemic that resembles, in a somewhat vichian way, the nineteenth century discussion between Savigny and Thibaut about German codification. In the present debate, “code” and “culture” still seem to be perceived as antithetic and exclusive of one another. It is as if in modern Western societies, enacted law could live without legal culture, and the two could ignore each other.

This perceived opposition is similar to that between “top down” and “bottom up” reform. Indeed, if there is one thing that the experience in the Western legal tradition should show, it is that the contrast between top down and bottom up legal change is a false opposition. All legal changes have aspects of both. Law is in part politics (top down) and in part culture (bottom up). Put in other terms, institutional change is due in part to the invisible hand and in part to the visible hand phenomena. It is partially the local evolution of institutions and partially the recognizable work of a political or professional elite, as Alan Watson argued.

Consequently creating a code does not cancel the existence or importance of other legal formants. Neither is academic opposition


likely to be successful if the proper political conditions exist. Certainly, even if successful, such opposition will not enlarge the domain of scholars over that of Brussels bureaucrats. A lot of European private law is already, if not codified in the civilian sense, at least enacted. It is likely that more and more enactments will occur. The production of supernational law, far from making common core research useless, makes it even more necessary for the development of a somewhat homogeneous interpretive community. Certainly, even if the whole of private law were codified, there would be space for “common core” research, at least until such a uniform interpretive community fully developed.

Codification implies producing rules that are new for the whole or, at least, a part of legal actors in the systems concerned. Implementation of such rules needs a class of interpreters: judges, practitioners and scholars acquainted with the new rules and with their rationales. The unavoidable lack of knowledge in the short run, and even in the long run, and the strength of deeply rooted traditions regarding different concepts, notions and their interrelations, may deadlock every codification effort. Hence, as far as codification is concerned, the real issue at stake is the building of a common legal culture. As we have already seen, this is an endeavor whose only tools seem to be a common legal education grounded in the knowledge of what is common and what is different between the different European systems.