The Common Core Approach to European Private Law

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INTRODUCTION

This paper discusses the aim, method, and organization of the Common Core Project, a scholarly project launched five years ago by the present authors. [FN1] The Project today involves more than one hundred scholars, most of them from Europe and the United States, and should produce in due course the first published outcome. [FN2] We will try to place the Project in the context of a number of apparently similar "integrative" comparative law enterprises, to use the terminology of our Honorary Editor, the late Professor R. Schlesinger. [FN3]

Accordingly, Part I describes both the immediate and the long-term goals of the Project. Part II discusses the methodological evolution that has taken place from Schlesinger's Cornell Project to our work. [FN4] It also tackles the main differences between the Common Core approach and other "integrative" projects *340 taking place in Europe today. Finally, Part III describes the Project's framework and organization.

I. GOALS

A. Legal Cartography

In very simple terms, we are seeking to unearth the common core of the bulk of European private law, i.e., what is already common, if anything, among the different legal systems of European Union Member States. Such systems 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), according to the taxonomy one wishes to adopt. [FN5] These differences could impede the comparative task, particularly if the perspective should encompass procedure and legal institutions where the diversity of legal tradition may be even more important. [FN6] Consequently, we decided to limit our search to private law, within the general categories of contracts, torts, and property. [FN7]

The task we are pursuing may seem ambitious, but is not overly so. Pursuant to the Newtonian metaphor of standing on the shoulders of the giant ("If I have seen further it is by standing on the shoulders of giants"), [FN8] our task is feasible.
First of all, Schlesinger's methodological caveats [FN9] are today part of the cultural heritage of anyone who claims to engage in comparative law, and are certainly encoded in the cultural DNA of each participant in our project. From a generational point of view, our group is composed almost exclusively of people who became scholars after the Cornell project. Secondly, the previous comparative scholarship both in Europe and in the United States shows how common core research is a very promising tool for unearthing deeper analogies hidden by formal differences.

Such a common core must be revealed in order to obtain at least the main lines of a reliable geographical "map" of the law of Europe. What the use of this map will be is of no concern to the cartographers who are drafting it. However, if reliable, such a map may become indispensable for those entrusted with drafting European legislation. This may be particularly so in the ongoing process that appears to lead incrementally towards restatement and/or *341 codification. [FN10]

For the transnational lawyer, the present European situation is equivalent to that of a traveler compelled to use a number of different local maps, each one containing misleading information. [FN11] We wish to correct this misleading information. We do not wish to force the actual diverse reality of the law within one single map to attain uniformity. Building on the analogy, 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. While we believe that cultural diversity in the law is an asset, we do not wish to take a preservationist approach. Nor do we wish to push in the direction of uniformity. This is probably the most important cultural difference between the Common Core Project and other remarkable enterprises (such as the Unidroit Principles or the Lando Commission), which may be seen as engaging in city planning rather than cartographic drafting.

In order to perform such a reliable drafting, we need the more sophisticated tools of comparative law, but we shall hold further discussion on this subject until we reach the methodological part of this paper. For the time being, however, we anticipate that the rhetoric of municipal lawyers, so rich in unexplained assumptions, may be the real "false friend" of the cartographer. It may convey a message that overemphasizes the differences. Nevertheless, both the rhetoric and the actual results must be considered in the comparative analysis in order to draft a reliable map. Rhetorical differences, in fact, may sometimes end up affecting even the applied dimension of the law.

That is why the rhetoric of the law is not something useless that can be disregarded in the drafting of a geographical map of European law. It would be like drafting a map with no signs of different scenic beauties or of different monuments. While such a map could show us the shortest way from Trento to Maastricht, it would not offer us a satisfactory map of the geography between the Alps and the Dutch border. This cartographic aim is what makes the methodological aspect of the project so crucial.

B. Building a Common Culture

While drafting a map is our immediate short-term concern, in the long run, this task is part of building a common European legal culture. Our culture-building task is shared by a number of projects, including the European Erasmus Student Exchange, and, unofficially, the creation of European Law casebooks.

The idea underlying our project is that the best means to achieve an open legal space in Europe is through the "creation of a model "European law school" capable of shaping a truly common legal
education. To this end, some leading scholars in the field of comparative and European law have launched a project for the preparation of a series of casebooks on the common law of Europe. Our enterprise has been inspired mainly by the example of the United States. Despite the many relevant differences among individual states' law, U.S. legal education is based on a single national model which produces lawyers capable of moving between states with no overwhelming difficulties. The authors of the European casebook project declare that their project "wishes to uncover common general principles which are already present in the living law of the European countries . . . ; besides, rather 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."

This description shows the important similarities between the European Casebook and the Common Core Project. Both projects seek to identify the common features of private law in the European national legal systems, but it is not their goal to impose new rules and categories. They both are analytical, not openly prescriptive. Echoing the declaratory theory fashionable among common lawyers before Blackstone, "the 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 analyse and compare the legal reasoning behind them. . . ."

But essentially what differentiates the two projects is their target. The Common Core Project is aimed at scholars, while the European Casebook project is aimed at students. Producing suitable materials for didactic purposes implies that an accurate choice must be made between materials that will provide students (lacking or wishing to improve a specific comparative background) with the elements needed to understand legal systems 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 a "cases and materials" text, i.e., to use cases, legislation, and legal doctrine materials, particularly in the form of short notes situating the other legal materials in their context. Ultimately, the goal is to provide students with a grasp of foreign law while educating them as common European lawyers.

While the Common Core Project may provide some materials useful for teaching purposes, that is not its primary task. The Common Core Project seeks to investigate in depth more specific areas of the law, especially focusing on technical problems. The development of a common work methodology is in itself an educational enterprise to those who are participating in it. Hence, it may facilitate sophisticated technical communication among professional lawyers already formed in their own legal tradition, rather than having as a target the creation of prospective common European lawyers. Besides, it focuses on all European legal systems, de-emphasizing (as does the other project) the ones that are or could be considered leading or paradigmatic.

Nevertheless, these seem to be differences of degree and of timing rather than of nature. It seems likely that the Common Core and European Casebook enterprises will have many common features, and that they may well profit from one another.

II. METHOD

A. The Cornell Project

Our project is born with two cultural parents: the experience of the Cornell Studies directed by R. Schlesinger in the 1960's and the dynamic comparative law methodology as principally developed by R. Sacco in the last 30 years.
The preliminary problem that Schlesinger had to resolve was how to obtain answers susceptible of comparison to the questions he wished to pose about different legal systems. The answers had to refer to identical questions interpreted as identically as possible by all those replying. Additionally, the answers had to be self-sufficient, needing no additional explanations, and hence they had to be on a par with the most detailed rules.

Schlesinger formulated each question with a view to taking account of any relevant circumstance in any 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. And yet, in that other system, they operate secretly, slipping silently between the formulation of the rule and its application by the courts. [FN21] Thus, the special feature of the work done at Cornell was that it made jurists think explicitly about the circumstances that matter, by forcing them to answer identically formulated questions.

One of the most significant methodological features of the whole research was the solution to the problem of how to formulate a question in a uniform way for an Indian, a Spaniard, a Pole, a German, a Norwegian, and so on. To obtain consistency, each question was formulated by presenting a case. This factual approach thus asked the respondents about the results that would be reached in particular cases, not about a doctrinal system. As a result, the respondents gave a highly different picture of the law than the monographs, handbooks, or casebooks circulating in their own country did.

What the studies at Cornell have taught us is that in order to have complete knowledge of a country's law, we cannot trust entirely what the jurists say, for there may be wide gaps between operative rules and the rules as commonly stated.

B. Legal Formants

Legal formants constitute the lesson that Rodolfo Sacco took and developed. The core of his comparative law methodology is by now well known, translated as it has been into many languages. To sum up Sacco's theory, [FN22] a list, even an exhaustive one, of all the reasons given for the decisions made by the courts is not the entire law. Neither are the statutes the entire law, nor are the definitions of legal doctrines given by scholars. In order to know what the law is, Sacco's reasoning continues, it is necessary to analyze the entire complex relationship among what he calls the "legal formants" of a system, i.e., all those formative elements that make any given rule of law amidst statutes, general propositions, particular definitions, reasons, holdings, etc. All of these formative elements are not necessarily coherent with each other within each system. Only domestic jurists assume such coherence. To the contrary, a system's legal formants are usually conflicting and can better be pictured in a competitive relationship with one another.

For example, we must not only know how courts have acted but we must also consider the influences to which the judges may be subject. Such influences may have a variety of origins. They may arise because scholars have given wide support to a doctrinal innovation, but they may also concern the judge's individual background. A judge appointed from an academic position will likely tend to put more stress on scholarly opinion than a judge who has always practiced law. The actual text of a statute is another of these influences, even when previous judicial decisions have disregarded it, because there is always the possibility that courts will return to the letter of the
statutory provision.

*345 All this, however, may still be insufficient to understand the law in a given system. Statutes or code provisions in a given system can be identical to the provisions enacted 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 in France, in spite of identical code provisions). On the other hand, provisions or general definitions in two systems can differ while operative rules are the same (a good example is compensation for pure economic loss in Germany, the Netherlands, France, and United States common law). [FN23] A full understanding of what the legal formants are and how they relate to each other allows us to ascertain the factors that affect those solutions. This clarifies the weight that interpretative practices (grounded on scholarly writings, on legal debate aroused by previous judicial decision, etc.) have in molding the actual outcomes.

Scholarly writings in turn can be rhetorical. In some civil law countries, for example, general statements insist only that contracts are made by consent, while the operative rules also require a reason, or cause, for the enforcement of a contract. Similarly, in common law systems, one can find general statements that property is transferred by the will of the parties, while the operative rules require additional elements, viz., consideration, delivery, or conveyance.

But that is not all; the aforementioned legal methodology allows us to go further. Let us take such a simple example as the role of consideration in common law compared with the role of cause and causa in French and Italian Law. [FN24] Causa means, roughly speaking, a good reason for the parties to enter into a contract and for the law to enforce it. According to both scholarly doctrine and the French and Italian codes, a contract must have a cause to be enforced. However, French and Italian case law does not allow the enforceability of a contract to turn on the simple presence of a cause, but rather on the presence or absence of a non-liberal cause. Courts treat the absence of cause and the presence of a liberal cause in the same way. [FN25]

We can therefore see the presence or absence of a liberal cause as a screening factor implicit in the French and Italian legal systems, whereas it is explicit in Anglo-American systems. Herein lies the importance of distinguishing between the rule announced by the court and the rule that is actually applied, or, as a common lawyer would say, between the court's statement of the rule and the holding of the case, i.e., the facts which lead the court to arrive at a certain result.

The notion of legal formant is more than an esoteric neologism for the traditional distinction between loi, jurisprudence, and doctrine, i.e., between legislation, case law, and scholarly writings. Within a given legal system, the legal rule is not uniform, not only because one rule may be given by case law, *346 another by scholars and yet another one by statutes. Within each one of these sources, there are also formants competing with each other. For example, the rule described in the headnotes of a case can be inconsistent with the actual rationale of the decision, or the definition of a code can be inconsistent with the detailed rules contained in the code itself. [FN26]

This complex dynamic may change considerably between legal systems, as well as between different areas of the law. In each legal system, certain legal formants are clearly leading in a different way. Differences in formant leadership are particularly clear in the distinction between common law and civil law. The awareness of those differences and of how they are at work explains why the exploitation of a ripe factual approach in our project is not going to yield as a result a mere collection of decided cases.

Certain scholars have indeed criticized the factual approach, stating that it was too much based
on a common law approach. This comment seems ungenerous because today, an analysis based on different formants makes it even clearer that a factual approach does not mean mere case law analysis, and that each formant is to be considered a source of the law in its own system, competing with all the other sources to make the actual rule. [FN27] Our project aims to put all these competing sources (the different formants) in the right place in our geographic map.

Let us conclude this section on another point. There is a growing awareness that the development of a common law in Europe is inevitably bound to the capability of developing a common background for all lawyers, practitioners and scholars alike. We are constantly being told that the biggest obstacle to the development of a common European law is the lack of a common system of concepts and techniques applicable to legal problems. Some comparativists consider this to be one of the major obstacles, both technical and scientific, to the feasibility of a "civil code of Europe." [FN28] They argue that the common law and civil law traditions have significant convergence if one analyzes the operational rules, but that through the centuries, each system has developed autonomous bodies of rules, concepts, sources, and techniques.

The common core approach, as enriched by the analysis of legal formants, shows how the ongoing debate on whether common law and civil law are converging can come out as quite sterile. Indeed, rather than discussing whether a glass is half empty or half full, it would be better to acquire some further knowledge about the level at which convergences are occurring or diversities are retained.

*347 C. The Common Core Approach in the European Context

We now proceed to discuss the differences between a common core research project and the projects aiming, in various ways, at achieving uniformity of law. [FN29] Thus, we will cast a light on methodological and functional distinctions that characterize each initiative with respect to the others.

1. The Lando Commission and the Unidroit Principles

The fundamental characteristic of the common core research is that it analyzes the existing situation without trying in any way to force uniform solutions; its purpose is to provide with the highest degree of precision a map of the relevant elements of different legal systems.

It is true that through the use of the comparative method, many common features that remained obscure in traditional legal analysis will be unearthed, but this is because the instruments and techniques provide more accurate and correct analysis, not because they force convergence where it did not already exist. Of course, more integration may follow from better knowledge, and therefore common core research may also be considered as pushing indirectly towards more uniformity and less diversity. This is not, however, an objection that should 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 in itself, which is devoted to producing reliable information, whatever its policy implications might be.

This marks a strong difference between our project and any restatement-like enterprise. The latter involves the pursuit of rationality, harmony, and reform ideals, and such a task implies the selection of the legal rules and materials that are best suited for the task. Whatever does not fit in a
A restatement-like framework is discarded. This is anathema for 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 makes clear 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. They are intended as a first step." [FN30] As Lando himself explains, the principles of European contract law project differs from the American Restatement on Contracts because it requires a more radical approach. It does not simply select among several solutions extant in a single legal system. By having to provide workable solutions for a widely diverse legal environment, it sometimes embodies rules that do not exist as such in any European legal system. [FN31]

In spite of all these differences, however, the goals and the techniques of the two types of work (Lando and the American Restatement) are very much the same: they share the basic idea that they have to create new law (no matter how new in respect to the pre-existing legal situation), not simply analyze the existing law.

This normative attitude is shared also by the Unidroit principles on international commercial contracts. These are meant as "soft" (i.e., non-binding) law, and in this respect they are contrary 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 between the legal systems are so great that they would defeat any attempt to impose uniformity. [FN32]

This characteristic of having persuasive authority is common also to the principles of European contract law project which, although meant to be finally embodied in one code, provides a common framework that functions as legal guidelines. [FN33] 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 should sum up in one word the differences between common core research and the common principles approach, that word might be "skepticism." The Common Core Project, just as the Cornell project, uses value skepticism as the most important guideline: its aim is to provide a picture of the law existing in the European systems in a number of important areas that is as reliable and exact as possible. Whether this law 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 are already imbedded in non-skeptical values because of the tension between uniformity and diversity. Such projects try to determine, on the basis of comparative research, which solution may best regulate certain legal problems in a common way, discarding at the same time the possibility that core diversity (and certainly not only in its details) might be justified on many grounds.

Moreover, normative projects are also value-loaded in a different sense. Their choices cannot be made on nationalistic or chauvinistic grounds (as might be the case for a piece of politically supported legislation), but of course they must be defended with reasons of general acceptability and rationality. Being by now lacking of political legitimacy, they end up advocating seemingly neutral ideas which have so far forced them into the narrow limits of areas of law, where no open value choices seem to be made (mainly contract law). Nevertheless, these areas cannot be neutral from the point of view of values: the rules that are finally selected must be coherent to the values that have been chosen as essential (or taken as a matter of course) by the participants, 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, and consequently produces different results.

2. European Civil Code

The idea of perspectives of skepticism and neutrality is also relevant in the current debate on the feasibility and usefulness of a European civil code. 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 this project is not feasible, either because the diversities among the national systems are still too strong (and this implies 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.

This disagreement is not limited to technical legal aspects; it also involves 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," has endorsed the idea of a European code on private law, but the contents of such an action are not entirely clear. The first resolution uses both the terms "harmonization" and "codification," but these two have a different meaning. The first kind of action implies the convergence of rules only to a limited extent, in order to attain a workable coordination among them. On the contrary, codification involves the creation of legal unity, thereby eliminating legal diversity.

*350 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. But it is far from clear whether the powers of the Union extend to the enactment of a code.

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

It is not our task to provide answers to this complex problem, but we hope that the result of our research will provide information that will be useful in evaluating the advantages and disadvantages of both positions. After all, in order to make a choice between pluralism and unity, the first necessary step is to gain reliable knowledge of what is at stake.

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" appear still to be perceived as antithetical to and exclusive of one another, 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 experience in the western legal tradition should have taught, it is that the opposition 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 "invisible hand" and in part to "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 has argued. Consequently, on the one hand, creating a code does not cancel the existence and importance of other legal formants. Nor, on the other hand, is an academic opposition to it likely to be successful if political conditions favorable to the code exist. Certainly, even if successful, such opposition will not enlarge the domain of scholars over that of Brussels bureaucrats. Much of European private law is already, if not codified in the civilian sense, at least enacted. More and more such enactments are likely to occur. Such production of supernational law, far from making common core research useless, actually makes it even more necessary for the development of a somewhat homogeneous interpretive community.

Certainly, even if the whole of private law were to be codified, there would be space for common core research at least until such a uniform interpretive community was fully developed.

Codification implies producing rules which 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, scholars-acquainted with the new rules and with their rationales. The unavoidable lack of this knowledge in the short run, as well as-even in the long run-the strength of deeply rooted traditions as to different concepts, notions and their interrelations, may lead every effort at codification to a deadlock.

Hence, where codification is concerned as well, the real issue at stake is represented by the building of a common legal culture. This is an endeavor whose only tools seem to be, as we have already seen, a common legal education grounded upon the knowledge of what is common and what is different between the different European systems.

III. ORGANIZATION

As with the Cornell project, the key tool of the Common Core of European Private Law Project is the questionnaire. The three principal areas of property, torts, and contracts 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 in one of the topical sessions during general meetings that so far have taken place every July at the University of Trento.

The general meetings are organized in plenary and topical sessions that are also a crucial part of the project's organization. The plenary discussions that open and close the general meetings are the venue of much of the necessary methodological debate that accompanies the actual comparison. The instructions on how to answer the questionnaires were actually produced in the course of such general discussions. It has been a tradition to open the Trento meetings by inviting senior scholars involved in similar projects or recognized as leaders in the field of private law, comparative law, or European law to address the participants, commenting on the common core approach. Among those featured so far, we list Professors R. Sacco, G. Horsmans, J. Bonell, H. Kotz, U. Drobnig, O. Lando, C. Atias, and G.P. Fletcher. The final plenary section opens with reports of the topical group chairs and develops through the discussion on the future path to be taken.
During the plenary sessions of the first two meetings, one major issue has been the semantic level of the questionnaires, i.e., the degree of specificity and detail of the factual situations described in them.

We have followed the general guideline of drafting our questionnaires with a sufficient degree of specificity so as to require the reporters to answer it in such a way that all of the circumstances affecting the law in any one of the systems that we are considering are addressed. We also include all the other systems in which such circumstances may have either no practical impact or a different one. This should guarantee that rules formulated in an identical way (by an identical code provision, for instance), but which may produce different applications, or even different commentator's rhetoric, will not be regarded as identical. This should also allow us to see the elements that may play an official and declared role in one system, and that in another system may work in a more cryptical, unsystematic, and unofficial way. Of course, the role of such cryptic elements is crucial when drafting the map of the applied law. [FN45]

This is particularly important, as we have already mentioned, because we are approaching systems belonging to the common law as well as to the civil law tradition. The structure of the judicial process and the "style" of the legal system, in the broad sense described by John Merryman, [FN46] cannot be neglected if we wish to achieve good results. It is indeed in the structure of the legal process, which municipal lawyers assume as given, that most of the differences can be detected, understood, and possibly explained. All of this had to be worked out rather ex ante in Cornell, but today it is part of the state of the art in comparative law.

In the course of our organizational and methodological discussions, we did not have to spend a lot of time on another issue that required much attention in Cornell but which is now straightforward. We have been able to assume, for our purposes at least, that a comparative knowledge of the law has a different nature than an internal knowledge of it, the former being inherently theoretical, while the latter is practical (legal scholars acting within a legal system can themselves be seen as legal formants thereof since they "make" the law, though indirectly). Hence, we assume that for the purpose of comparative scholarship the internal *353 lawyer is not necessarily the best reporter of his or her own system. [FN47] He or she may control a larger amount of information about the system than a foreign lawyer, and it is beyond question that committed nationals of all Member States are a big asset of our project. The point is, however, that nationals may be less well equipped in detecting the hidden data and the rhetorical attitude, because they may be misled by automatic assumptions. In the drafting of the questionnaires and particularly of the directions on how to answer them, we have tried to address this problem. The participants in our project are comparativists, and as comparativists are asked to deal with the questionnaires also if they have to describe their own law.

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, contracts, and torts). Scholars participating in one of the three areas work together in discussing the newly proposed questionnaires to help the editors reach the required level of factual analysis and the proper semantic level given the nature of each topic. The tentative answers and the progress status of the topical volumes are also discussed during the project's meetings. The responsibility of setting forth the organization and agenda of the torts, property, and contracts sessions has been allocated respectively to Professors M. Reimann (Universities of Michigan and Trier), A. Gambaro (University of Milano), and S. Whittaker (Oxford University).

Some questions have arisen with regard to the cultural legitimacy of using the labels of
property, contracts, and torts, notions whose meaning itself differs between legal systems. This problem too should not be overemphasized.

It has been argued that these categories are not homogeneous in the different legal systems, and that therefore boundary issues may exist. It is indeed easy to observe that "nuisance" is classified as a tort in common law while troubles de voisinage is classified under property law in France. It suffices, however, to take a problem-solving approach to see that these two legal categories describe just the same problems of boundaries between property rights. The same can be said as to many problems related to the "compensation for pure economic loss." Such problems are often regarded as belonging either to contracts or to torts in the general propositions of scholarly writings or in the case headnotes of many systems. But in the same systems, as far as actual results are concerned, we can see the same problems construed and solved through the mirrored technicalities of either tort or contract law.

An objection to this tripartite scheme seems therefore rather formalistic. We believe that the very transversal nature of many problems that are usually approached within one or the other scheme conveys a clearer picture of: (a) the different ways to solve the same problem in different systems (and within each of them); and (b) the legacy of a tradition that may cover either the homogeneous operational rules in the different systems, or the different operational rules by the rhetoric on the identity of the applicable legal provision. [FN48]

In any case, contracts, torts and property in this project are not used in any positivistic legal sense. Their role besides that of labels to help in detecting the areas of general expertise of the contributors—is to serve as metalegal containers of problems fairly easy to locate on operational grounds, the same grounds that show us how the whole of private law is indeed communicating to solve concrete problems.

After all, 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 on them.

APPENDIX 1

Instructions About How to Answer the Questionnaires

General Guidelines

(a) As to each subtopic as a whole, the most essential literature (whether foreign or domestic) should be indicated.

(b) References to sources (legislation, case law, scholarly writings, etc.) should remain in proportion to the importance of that source within the legal system.

(c) Although the main task is to provide answers about the legal system(s) one represents in the working group, remarks and information involving other systems in comparison are welcome.

(d) Not every question, or subquestion, is to be answered as thoroughly as indicated below. Also, it will often be possible to group together answers on level II or III for different questions (or subquestions).

Level I. Operative Rules
Indicate:

(1) how the case would be solved by case law in the given legal system;

*355 (2) whether this is or not the solution given by the other legal formants, i.e., (according to a prima facie interpretation of) legislation, primary and/or delegated; legal doctrine; custom and usage;

(3) whether all these formants are concordant, both from an internal point of view (indicate minority doctrines, including dissenting opinions in leading cases, opposite opinions in scholarly writings, etc.), and from a diachronic point of view (whether the various solutions are recent achievements or they are identical in the past);

(4) if appropriate in the legal system, also the level of facticity or juridicity of the solution, i.e, whether the solution is considered to be a question of fact or a question of law (see Schlesinger, Formation, supra note 4, at 56)-this is in order not only to determine the degree to which the solution can be enforced by supreme courts against lower courts, but also the impact of judicial precedent on the matters implied by the solution.

Level II. Descriptive Formants

Indicate the reasons for which lawyers feel obliged to give the solution(s) mentioned in Level I, and where appropriate, the different reasons for the different approaches and formants-including, for example:

(1) consistency/inconsistency of the solution with specific and general legislative provisions, with general principles (traditional as well as emerging ones), and with constitutional provisions directly affecting the subject; is the solution considered a historical accident? are there any reform proposals?

(2) whether the solution is dependent on legal rules and/or institutions outside the private law, such as procedural institutions (including rules of evidence), or administrative and constitutional (different than those at Point 1, supra) provisions;

(3) how the solution is dogmatically explained; how do/must the lawyers reason in order to come to that solution; how do they use legal reasoning to eliminate contraindications which could lead to a different solution.

Level III. Metalegal Formants

Indicate the other elements affecting the solution(s) mentioned at Level I, such as policy considerations, economic and/or social factors, social context and values, and the structure of legal process (organization of courts, administrative structure, etc.).

APPENDIX 2

Volumes in Progress and Editors

Contracts:

Good Faith (Reinhard Zimmermann, Regensburg & Simon Whittaker, Oxford)
Causa and Consideration (James Gordley, Berkeley)

*356 Mistake, Fraud, and Misrepresentation (Jacques Ghestin & Ruth Sefton Green, Paris I)

Pre-contractual Liability (John Cartwright, Oxford & Jan Hesselink, Utrecht)

Property:

Security in Movable Property (Mathias Storme, Leuven)

Information as Property (Sjef Van Erp, Maastricht & Vincenzo Zeno Zencovich, Sassari)

Property on the Environment (Barbara Pozzo, Milano)

Torts:

Pure Economic Loss (Vernon Palmer, Tulane & Mauro Bussani, Trento)

Strict Liability (Franz Werro, Freiburg Ch. & Vernon Palmer, Tulane)

Complex Liability (P.G. Monateri, Torino)

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[FN2] See infra Part III and the Appendices for organizational details; volumes from the Trento Common Core Project will be published by Cambridge University Press.

[FN3] Schlesinger, supra note 1, at 479.


[FN5] Scandinavian systems are considered a tradition per se by Zweigert and Kotz; see Konrad Zweigert & Hein Kotz, Introduction to Comparative Law (2d ed. 1987). The civil law is divided into Roman-inspired and German-inspired by the same authors and by David. See Rene David & John E.C. Brierley, Major Legal Systems in the World Today (3d ed. 1985). Scotland is generally considered a mixed legal system.

(surveying the main procedural and substantive law institutions and their origins in several developed legal systems).

[FN7] On the content and scientific legitimacy of such categories we will spend a few words later.


[FN9] See infra Part II. A.


[FN11] For an example, see the element of causa within French and Italian law discussed infra Part II. B.

[FN12] 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 W. van Gerven, B. De Witte, T. Koopmans, and H. Kotz.


[FN16] Id. at 69.

[FN17] The group has 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 first books to be produced with this method are scheduled for 1998. The casebooks will mainly concentrate on the English, French, and German systems, including materials from other European systems only if they provide original solutions. In the Italian context, a first effort to provide suitable teaching materials and to raise scholarly debate is the publication Diritto privato europeo (Nicolo Lipari ed., 1997).

[FN18] The importance of the role of legal science in shaping the basis for a common law of Europe is emphasized by Paolo Grossi, Modelli storici e progetti attuali nella formazione di un futuro diritto europeo, 42 Rivista di Diritto Civile 281 (1996). The crucial issue of the formation of the "European private lawyer" is addressed by G.B. Ferri, La formazione del "civilista europeo," 1 Contratto e impresa/Europa 463 (1996).

[FN19] As every comparativist knows, the Cornell Studies label refers to the collective comparative research project on Formation of Contracts, directed by Rudolf B. Schlesinger over a span dating from 1957 to 1968, leaving in its wake a monumental mass of data.


[FN21] See elaboration infra Part II. B.

[FN22] For the following remarks, see Sacco, supra note 20, at 21-27.

[FN23] Pure economic loss is the topic of the Common Core Project volume being edited by Mauro Bussani and Vernon Palmer.

[FN24] Causa and consideration is the topic of the Common Core Project volume being edited by James Gordley.


[FN26] See Sacco, supra note 20, at 31-33.


[FN31] Id. at 579.


[FN33] See Lando, Principles, supra note 30, at 577-578, 584.


(forthcoming 1998): "[The various domestic legal systems in Europe] are indeed too far apart at present. However, in ten or twenty years this may be different."


[FN44] See infra Appendix 1.


[FN47] To a certain degree, our work is much easier than that of the Cornell project (i.e. we are only dealing with countries belonging to the Western Legal Tradition). This means that we can assume a common conception of the law (at least of private law) as a circuit, distinguished from both politics and religion, as well as a fairly common social and political background. I say fairly common, of course, because it cannot be denied that there are differences between, say, Spain and Sweden. Such differences are not in the conception of the rule of law itself, however, and in any case, whenever they provide us with some proper information that may be required, the participants are always invited to take them into consideration. Think, for example, of the different political processes and bureaucratic organizations affecting the different timing of the adoption of directives, or more generally, differing delays of justice.
See also Zweigert & Kotz, supra note 5.