

**Making European Private Law - Book Review;**  
**Fabrizio CAFAGGI and Horatia MUIR WATT, Making European Private Law: Governance Design, Chaltenham, Elgar, 2008**

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**I. Introduction**

In February 2009 the final version of the Academic Draft Common Frame of Reference was published;<sup>1</sup> its political fate is however still not entirely clear.<sup>2</sup> The book under review here is a major contribution to the debate about *what kind of European Private Law do we want*: is it a European civil code (hereinafter ECC), some other sort of uniform ordering, or has the time come to consider different possibilities. Edited by Fabrizio Cafaggi and Horatia Muir Watt, it exposes the unexplored fundamentals of European private law and its future direction. Broader debate on desirability of the ECC or full harmonisation of consumer *acquis* has been forcefully launched by the Memorandum of Social Justice Group;<sup>3</sup> the book under review here brings, equally powerfully, some other perspectives which may justify reconsidering the whole process of construction of the EPL.

This is not to say that the book at hand does not have even broader standing. It goes to the heart of the following question: *what is private law today, who creates it and what are its functions*. It exposes questionable tendencies to promote the 19th century, classical conception of ‘pure’ autonomy-based private law. The sentiments toward the ‘pure private law’ based on the respect for private autonomy should be, as this book attempts to show, to a great extent abandoned in order to better understand and make use of the possibilities given by the contemporary evolution of private law in a globalised world<sup>4</sup>.

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<sup>1</sup> See: [http://www.sgecc.net/pages/en/home/191.new\\_dcf\\_r\\_outline\\_edition.htm](http://www.sgecc.net/pages/en/home/191.new_dcf_r_outline_edition.htm)

<sup>2</sup> See: the Report of the Justice and Home Affairs Council at: [http://ec.europa.eu/consumers/rights/concl\\_JHAC\\_1108\\_en.pdf](http://ec.europa.eu/consumers/rights/concl_JHAC_1108_en.pdf)

<sup>3</sup> **Study Group on Social Justice in European Contract Law**, “Social Justice in European Contract Law: A Manifesto”, *European Law Journal*, 2004, pp. 653-674.

<sup>4</sup> To this effect, see: **F. CAFAGGI and H.M. WATT**, “Introduction”, pp. 1-37; **W. KERBER**, “European System of Private Laws: An Economic Perspective”, pp. 64-97; **C. SCOTT**, “Regulating Private Legislation”, pp. 254-268; **H. COLLINS**, “Governance Implications for the European Union of the Changing Character of Private Law”, pp. 269-287; **F. CAFFAGI**, “The Making of European Private Law”, pp. 289-350; all in **F. CAFAGGI and H.M. WATT**, *Making European Private Law: Governance Design*, Chaltenham, Elgar, 2008.

It is not valid only at the European level, but should be remembered also at the national level. Many countries, mainly among the new member states, are in the process of adopting the new civil codes. Other EU member states are in the process of re-codification or substantial amendment of their old civil codes. And all these countries stand in front of the difficult task of reconciling the traditional private law with the trends emanating from European law.

In this piece I intend to look into four major issues explored by the book under review, characterising the contemporary private law and the problems we face in relation to it. First, I will look at the dynamics of the changes of character and functions of contemporary private law. Secondly, I will address the question of different sources of private law making and actors involved in that process. Further, I will tackle the question of multi level character of contemporary private law and the possible benefits stemming therefrom and finally I will draw some lessons for the member states.

## **II. Character and functions of contemporary private law**

Nineteenth century civil codes were based on the principle of private autonomy of the parties, rising from the *laissez-faire* theory, where the parties were considered best suited to regulate their mutual relationships.<sup>5</sup> Public law values were supposed to be only exceptionally brought into the private law realm through public policy / morality clauses. With the great world crisis (1929), the contention that the consent makes the transaction fair was already wholly compromised and regulation, along with competition law, was introduced to discipline the oligopolies and monopolies in most of the ‘Western world’.<sup>6</sup> However, this movement still did not touch the ‘pure contract law’, based on the principle of private autonomy, and consisting predominantly of default rules. It is only after World War II that the first mandatory rules -mainly in relation to consumer protection- found their way into contract law. These mandatory rules were designed, similarly to the competition law rules or regulation in a

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<sup>5</sup> To this effect, see: **M. FREEDLAND**, “Private Law, Regulation and Governance Design and the Personal Work Contract”, in **F. CAFAGGI and H.M. WATT**, *Making European Private Law, o.c.*, p. 231.

<sup>6</sup> Of course, the process started considerably earlier but the crisis was the last blow.

narrow sense, as a tool to address market failures.<sup>7</sup> Therefore, we can say that contract law has acquired a *regulatory* function.<sup>8</sup>

Another development distinguishing contemporary private law is the so-called ‘constitutionalisation’ of private law, or, as Collins puts it, the “inter-legality in reasoning”.<sup>9</sup> It basically means the use of human rights or other constitutional law principles in private law reasoning, giving indirect horizontal effect to human rights. Nothing changes the fact that the courts do so through the old good public policy / morality clauses. Similar practice would hardly have been imaginable before World War II.<sup>10</sup>

Finally, the last crucial development in private law is the multi-level character of contemporary private law. This is not to say that some kind of multi-level system was not present also in the past. Beside international law, the *lex mercatoria* is a great example of early acknowledgement of the beneficial character of both private lawmaking and some sort of multi-level private law. However, the more or less marginal importance of these new phenomena dramatically increased with the creation of European Communities on the one hand and the deepening of globalisation on the other. Giuliano Amato in his contribution develops his understanding of the relation between the level of trust and the multi-level system of law.<sup>11</sup> The question of the multi-level character of private law is further developed in the following contributions, exposing its desirability from various perspectives, and trying to find an answer to the question whether the multi-level character of private law is something to be abandoned, by adopting a European Civil Code or other forms of uniform ordering at the EU level, or whether there are some advantages stemming from this characteristic, which render it worth maintaining.

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<sup>7</sup> It is perceived as a less intrusive venue to protect consumers, compared to price regulation or other more ‘rudimentary’ techniques.

<sup>8</sup> See, e.g., the contributions by **K. CSERES**, “Governance Design for European Private Law: Lessons from the Europeanisation of Competition Law in Central and Eastern Europe”, p. 142; **H. COLLINS**, “Governance Implications for the European Union of the Changing Character of Private Law”, p. 276; **F. CAFFAGI**, “The Making of European Private Law”, p. 294; all in **F. CAFAGGI and H.M. WATT**, *Making European Private Law*, o.c.

<sup>9</sup> **H. COLLINS**, “Governance Implications for the European Union of the Changing Character of Private Law”, o.c., p. 279.

<sup>10</sup> See: **A. COLOMBI CIACCHI**, “The Constitutionalisation of European Contract Law”, *European Contract Law Review*, 2006, p. 169.

<sup>11</sup> **G. AMATO**, “Multilevel Europe and Private Law”, in **F. CAFAGGI and H.M. WATT**, *Making European Private Law*, o.c., pp. 39-45.

### III. Sources of private law making

Traditionally, private law has been created by national legislators, who would typically enact typically a civil code.<sup>12</sup> As already mentioned, the private law making (*lex mercatoria*) had some influence in the past, however limited to the small number of transactions. Today, the situation has changed considerably, mainly due to the increased complexity of the problems that have to be tackled and the multi-level character of private law, which prompted higher inclusion of other actors involved in the private law making. By this we do not mean only powers delegated to governmental bodies and regulatory agencies, eventually EU institutions, but also functions performed by standardisation organisations, sport associations, professional associations, trade associations and other private actors engaged in private law making, binding their members or even wider group; of course, ever since raising the question of legitimacy of such private law making.<sup>13</sup>

Colin Scott<sup>14</sup> helps us to develop a more appropriate account for assessing legitimacy of private law making, since standard public law principles for assessing legitimacy are not suitable for this purpose. He rather proposes the principle of ‘extended legitimacy’,<sup>15</sup> both procedural and substantive. Procedural legitimacy in cases of private law making can be conceptualised through the principle of *interdependence*, the key actors can not act alone, and/or principle of *redundancy*, failure of any mechanism will be met by another overlapping mechanism. Substantive legitimacy should be measured on the basis of the *competition* pressures to which rules of private law making are exposed.

Tony Prosser<sup>16</sup> shows, on the other hand, in his contribution, possible venues through which regulatory agencies are involved in private law making. He draws a distinction between two visions of regulation; *private law vision of regulation* and *public law vision of regulation*, which imply different regulatory tools used by regulators and consequently different ways in which the regulators are involved in private law making.<sup>17</sup> His analysis leads him to the

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<sup>12</sup> Of course, with the exception of Common Law countries.

<sup>13</sup> To this effect, see: C. SCOTT, “Regulating Private Legislation”, *o.c.*, pp. 261-ff.

<sup>14</sup> *Ibid.*, pp. 254-268.

<sup>15</sup> *Ibid.*, pp. 261-262.

<sup>16</sup> T. POSSNER, “Regulatory Agencies, Regulatory Legitimacy, and European Private Law”, in F. CAFAGGI and H.M. WATT, *Making European Private Law*, *o.c.*, pp. 235-253.

<sup>17</sup> *Ibid.*, pp. 242-248.

fundamental questions raised also by the book at hand: which principles should govern regulation, what vision of regulation should we adopt, what regulatory tools are the most appropriate to perform regulatory tasks and who is best suited to do so.

#### **IV. Plea for maintaining the flexibility in private law making**

The existence of multi-level private law is a hardly disputable fact: taking the EU as a point of reference, at least three levels can be detected; the member states, European and global or international levels.<sup>18</sup> Additional regional levels are also possible as well as, depending on the definition we adopt, a high number of non-territorial sectoral levels. The question that arises, and that is tackled by the book at hand, is *whether such incidence is positive or negative?* The responses differ: the Commission, the European Parliament, the creators of DCFR, the authors of this book and other scholars all have different opinions and different reasons for this. In addition, they tend to change over time.

Wolfgang Kerber<sup>19</sup> in his contribution offers the analysis of this question on the basis of the economic theory of legal federalism and institutional economics. He gives us many reasons why a more decentralised solution should be preferred over a centralised one, such as a European civil code. It starts from the question of the heterogeneity of preferences and problems and the fact that the more remote the rule-giver is, the less s/he can accommodate differences. Furthermore, the problem of decentralised knowledge arises, which is related to the fact that not only the knowledge of the preferences and the problems are missing at the central level, but also the more substantive knowledge of how to solve the problems. Another question is that of innovation and adaptability, where uniformity shrinks the space for experiments and innovation, but also the possibility to adapt to the newly acquired knowledge promptly at the central level. Finally he offers also some additional normative grounds, like furthering individual freedom and private autonomy, as a reason to maintain a multi-level, un-centralised system of private law in Europe. Michele Taruffo,<sup>20</sup> on the other hand, shows in a

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<sup>18</sup> To this effect, see: **H. v. LOON**, “Remarks on the Needs and Methods for Governance in the Field of Private International Law at the Global and Regional Levels”, in **F. CAFAGGI and H.M. WATT**, *Making European Private Law*, o.c., pp. 197-ff.

<sup>19</sup> **W. KERBER**, “European System of Private Laws: An Economic Perspective”, o.c., pp. 64-93.

<sup>20</sup> **M. TARUFFO**, “Harmonising Civil Litigation in Europe?”, in **F. CAFAGGI and H.M. WATT**, *Making European Private Law*, o.c., pp. 46-63.

somewhat parallel discussion on a European procedural code, what kind of obstacles and deficiencies the yearning for the uniformity may bring.

The contributions of K. Cseres<sup>21</sup> and A. Bakardieva<sup>22</sup> respectively offer examples of governance setbacks in two subfields of law and the perspective of the new member states. Their contributions once again confirm that the ‘one solution fits all’ adage is not the most appropriate solution. EU competition law has never taken adequately into account the specific character and needs of the newly born markets, where market creation coincided with the obligation to adopt the developed EC *acquis*, fitted primarily to the needs of the developed Western European markets.<sup>23</sup> In the field of consumer protection, the EC tendency towards regulation and enforcement by the centralised public agencies may have even exacerbated negative legacies from the period of centrally planned command and control economy.<sup>24</sup> And any accommodation of territorial or sectoral differences requires a certain level of flexibility.

The answers offered indicate that the heterogeneity of sources of private law as well as the levels of private law making in the EU are exactly the tools which could enable the accommodation of the existing differences in preferences and problems, and provide us with the most efficient solution. According to Hugh Collins, this may very well include a European civil code. However, today, the process of harmonisation must differ from that of the nineteenth’s century codifications in two vital respects: “it must accommodate the requirements of a different governance system comprised of a multi-level system of rule-making and adjudication and incorporate into its reasoning processes the modern characteristics of private law systems [...] and systems of transnational self-regulation”.<sup>25</sup>

Kerber maintains that a European civil code as an optional instrument functioning through the choice of law tools might be in some respects an efficient solution. But the private law scholars should not perceive this inevitably as a transitional instrument, since it may be a more permanent and efficient solution. Of course, as Giuliano Amato has pointed out, a

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<sup>21</sup> K. CSERES, “Governance Design for European Private Law”, *o.c.*, pp. 138-ff.

<sup>22</sup> A. BAKARDJIEVA ENGELBREKT, “The Impact of EU Enlargement on Private Law Governance in Central and Eastern Europe: The Case of Consumer Protection”, in F. CAFAGGI and H.M. WATT, *Making European Private Law*, *o.c.*, pp. 98-ff.

<sup>23</sup> K. CSERES, “Governance Design for European Private Law”, *o.c.*, pp. 156-163.

<sup>24</sup> A. BAKARDJIEVA ENGELBREKT, “The Impact of EU Enlargement on Private Law Governance in Central and Eastern Europe”, *o.c.*, p. 127.

<sup>25</sup> F. CAFFAGI, “The Making of European Private Law”, *o.c.*, p. 286.

balance has to be found between the need for flexibility and the potentially incomprehensible regulation coming from too many sources. This may be accomplished by a careful governance design.

## **V. Governance design**

How to bring a sensible pattern into the multi-level European private law? What needs to be considered is the division between the different levels, most importantly between the EU and the member states. This has largely been done by the EC Treaty as well as some ‘softer’ legal tools, which have been developed over time; in particular, technical standardisation, OMC. Private actors are involved both in the public law-making, through co-regulation or delegated self-regulation, and outside of it. This is a resource which any law maker should benefit from, both in terms of learning and innovation. In addition, a set of meta-norms should be developed, which would govern this multi-level private law.<sup>26</sup> Such need is present in all multi-level systems, and as Loon tries to convince us, it is also strongly felt in private international law at the member states, EU and global levels.<sup>27</sup>

Mark Freedland develops an interesting inquiry into governance on the basis of personal work contracts. He identifies three major governance issues in personal work contracts, but valid equally for the rest of EPL; namely, *conflict of laws*, *OMC and derogation and hierarchies of norms*. He exposes their weaknesses and raises questions that are yet to be resolved in this regard.

The most comprehensive proposal for the design of governance in European private law is offered in the contribution by Fabrizio Cafaggi.<sup>28</sup> According to Cafaggi, the divergences in interpretation in EPL are presumed to be solved by the degree of harmonisation. Yet improving the governance design is a more suitable solution for reaching integration, which can bring more efficiency without compromising the diversity.<sup>29</sup> Cafaggi argues that coordination should appear between institutions and policies, not only between the

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<sup>26</sup> W. KERBER, “European System of Private Laws”, *o.c.*, p. 87.

<sup>27</sup> H. v. LOON, “Remarks on the Needs and Methods for Governance in the Field of Private International Law at the Global and Regional Levels”, *o.c.*, pp. 197-208.

<sup>28</sup> F. CAFFAGI, “The Making of European Private Law”, *o.c.*, pp. 289-350.

<sup>29</sup> *Ibid.*, p. 331.

rules;<sup>30</sup> this being precisely the reason why the full harmonisation strategy taken by the Commission<sup>31</sup> would not lead to the fulfilment of harmonisation objectives and genuine integration. Finally Cafaggi proposes a number of concrete ways how to improve the governance of EPL on three levels: legislative design, implementation of legislation and coupling institutions with legislation in order to avoid resorting to complete harmonisation.

The number of contributions suggested as a tool to improve the coordination and governance of European private law the creation of the ‘*European ALI*’ or European Law Institute.<sup>32</sup> Lance Liebman describes the historical development of the American Law Institute (henceforth, ALI) and outlines the ways in which we should think about the creation of such an institution in practical terms.<sup>33</sup> The sole fact that many scholars think about the creation of ELI is a reaction to the legitimacy problems connected to the creation of the Academic Common Frame of Reference. Despite many substantial differences between the EU and USA, which could turn into considerable obstacles,<sup>34</sup> the fact that so many scholars see this as a viable option should be understood as an expression of the need for a more democratic and reflective creation of EPL.

## **VI. Concluding remarks: Lessons to be learned at the national level**

Private law is going through a period of upheaval in many European Countries. Many new member states are going through the process of adoption of new civil codes as a final ‘good-bye’ to the old communist codes. It would be highly desirable for the creators of these new codes to look at private law today as it stands, recognising the evolution which took place in private law over the past century, and being thereby able to create a code which would correspond to the changing face of private law.

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<sup>30</sup> *Ibid.*, p. 332.

<sup>31</sup> See the Proposal of the Directive on Consumer Rights:

[http://ec.europa.eu/consumers/rights/docs/COMM\\_PDF\\_COM\\_2008\\_0614\\_F\\_EN\\_PROPOSITION\\_DE DIRECTIVE.pdf](http://ec.europa.eu/consumers/rights/docs/COMM_PDF_COM_2008_0614_F_EN_PROPOSITION_DE_DIRECTIVE.pdf)

<sup>32</sup> Compare: L. LIEBMAN, “The American Law Institute: A Model for Europe”, p. 222; H. COLLINS, “Governance Implications for the European Union of the Changing Character of Private Law”, p. 284; F. CAFFAGGI, “The Making of European Private Law”, p. 347; all in F. CAFAGGI and H.M. WATT, *Making European Private Law*, o.c.

<sup>33</sup> L. LIEBMAN, “The American Law Institute”, o.c., pp. 209-223.

<sup>34</sup> Such as languages, representation, selection of the members, who is the one to take the initiative, considerably different tasks that the ELI would have to undertake as compared to ALI, acquiring authority at all levels of our multi-level system, etc.

The same is valid for the old member states. There is a need for scholars, legislators and the public in general to react adequately to the fact that private law is not any more solely a matter of private autonomy and formal equality of the parties, as it was the case in 19th century, but that it has acquired many other functions. It is time to stop ‘closing our eyes’, hoping that all these ‘new trends’ are going to disappear if we wait long enough, and instead to undertake steps to consciously incorporate these new trends into the body of traditional private law.

The book at hand is a very instructive tool, allowing us to put private law today in a contemporary perspective, which -whether we like it or not- includes a number of new actors participating in the creation of private law on different levels of our multi-level globalised world. It advances the idea that this development is, if not to be applauded, at least to be considered seriously, which would enable us to make an informed choice about the future development of European and national private law.