

Contents

List of Contributors	xiii
1. The Harmonisation of Private Law in Europe: Some Misunderstandings	1
<i>Mark van Hoecke</i>	
1. Introduction	1
2. Law and its underlying legal culture	3
2.1. The impossible internal point of view	5
2.1.1. Cultures are changing	5
2.1.2. The integration of cultures	8
2.2. A different concept of law: no “rules”, no “rights” in the common law	10
2.2.1. “Rules” or “regularities”?	10
2.2.2. Rights or actions?	10
2.3. A different “time conception” as regards the sources of law	11
2.4. A different methodology	12
2.4.1. Inductive reasoning from facts <i>vs.</i> deductive reasoning from rules	12
2.4.2. (Lack of) systematisation	15
3. Conclusion	19
2. Mistaken Identities: The Integrative Force of Private Law	21
<i>Burkhard Schäfer & Zenon Bankowski</i>	
1. Introduction: <i>Ceci n’est pas un article</i>	21
2. Comparative law going mental	22
3. Playing games	26
4. On making cont(r)acts	29
5. Mistaken identities	31
6. Playing games and private law theory	32
6.1. Playing computer games	33
6.2. Playing the patriot game	35
6.3. Playing power games	41
7. Conclusion	44
3. English Private Law in the Context of the Codes	47
<i>Geoffrey Samuel</i>	
1. Introduction	47
2. The private and public law divide	47

3. The structure of private law	49
4. Demarcation between contract and property law	52
5. Legal reasoning and harmonisation: from an axiomatic to a post-axiomatic stage	58
4. The Debate on a European Civil Code: For an “Open Texture”	63
<i>Anthony Chamboredon</i>	
1. Introduction	63
2. An indictment against a European civil code	66
2.1. The traps of stereotype and “ <i>rétrodition</i> ”	66
2.1.1. A stereotype of a Civil Code	66
A. A caricature of a Civil Code	67
B. A “de-dialectised” Civil Code	68
2.1.2. Traps of “ <i>rétrodition</i> ”	68
A. A hypothetical “ <i>rétrodition</i> ”	68
B. The taking-up of historical discourse	68
2.2. Codification and <i>jurisprudentialisation</i> , or the oscillation and fragmentation of the sources of law	70
2.2.1. The development of a kind of codification in the common law	70
A. The historical evolution of the sources of law: towards a codification?	70
B. With nuances	73
2.2.2. The “ <i>jurisprudentialisation</i> ” of the French Civil Code	74
A. The classical model of the French Civil Code: an “official fiction”	75
B. Case Law, an “unofficial” legal source of the French Civil Code	77
3. A plea for the idea of a European contract code with “open texture”	81
3.1. Topicality of a codification	82
3.1.1. Why a codification?	82
A. The perils of a <i>decodification</i>	82
B. The meaning of codification	83
3.1.2. The limits of the current French co-ordination model of “codification”	84
A. Methods of codification	84
B. Limits of the method of reordering existing law	85
3.2. For a European contract Code with “open textured rules”	87
3.2.1. Doctrinal contributions to a Contract Code with “open textured rules”	88

A. A common concept: “open textured European legal rules”	89
B. Two examples: the “Unidroit principles” and the “Lando Commission”	91
B.1. Unidroit	91
B.2. The Lando Commission	92
3.2.2. Case law’s contributions to a European Contract Code with “open textured rules”	92
A. A common case law interpretation between form and substance	93
B. The “open texture” conception and the restraints in interpretation	94
B.1. The creation of “open textured rules” by the European judges	94
B.2. Open texture and restraints in interpretation	95
4. Conclusion	97
5. European Private Law: A New Software-Package for an Outdated Operating System?	101
<i>Alain Wijffels</i>	
1. Introduction	101
2. The concept of European private law	102
3. European <i>ius commune</i> and legal history	103
4. <i>Ius commune</i> : a legal-historical controversy	105
4.1. Systematising the law	106
4.1.1. <i>Mos Italicus</i>	107
4.1.2. <i>Usus Modernus</i>	108
4.1.3. <i>Vernunftrecht</i> and Codification	109
4.2. <i>Ius commune</i> and <i>iura propria</i>	111
4.2.1. <i>Ius Commune</i> and municipal law until the sixteenth century	113
4.2.2. <i>Usus Modernus</i> and national developments	113
5. Conclusion	114
6. Studying Judicial Decisions in the Common Law and the Civil Law: A Good Way of Discovering Some of the Most Interesting Similarities and Differences that exist Between these Legal Families	117
<i>Basil Markesinis</i>	
1. Introductory remarks	117
2. Similar litigation found in most countries	118
3. Similarities between the systems	119
4. Differences between the systems	121
5. The influence of legal background on the outcome of these cases	122

6. Inductive and deductive reasoning	125
7. Concepts: verbal devices, which formulate judgments but do not really explain them	128
8. Concluding remarks	132
7. Monism and Dualism within the European Jurisdictions	135
<i>François Rigaux</i>	
1. Introduction	135
2. The <i>Law of nations (ius gentium)</i> , earliest formulation of a European law	136
3. Conflict between internal and international law	138
4. Criticism of the monolithic conception of each juridical order	146
5. The two instruments of European integration	151
6. The delimitation of a private European space	160
8. The Adjudication of Law and the Doctrine of Private Law	167
<i>Fritz Jost</i>	
1. The law, rules and the individual case	167
2. Legal doctrine-dogmatics	168
3. The ingredients	170
3.1. The elements of legal doctrine	170
3.2. A case study	171
4. Producing legal dogmatics	172
5. The status of legal doctrine, genesis and problems of application	174
5.1. Legal Doctrine: not a source of law	174
5.2. Legal doctrine as an intermediate level	174
5.3. Doctrinal rules vs statutory rules	174
6. Legal doctrine in Europe	176
7. Conclusions	177
9. Unfair Terms in Consumer Contracts: An Anglo-Italian Comparison	179
<i>Paolisa Nebbia</i>	
1. Introduction	179
2. Means of implementation	179
3. Pre-existing legislation	180
4. Judicial developments	183
5. The impact of the directive	186
6. Concluding remarks	188

10. Current Problems of Legal Dogmatics in European Regulation: The Principle of Equality and the Policies of Affirmative Action	189
<i>José García Añón</i>	
1. Introduction: The limits of legal dogmatics	189
2. Some problems of legal dogmatics in the configuration of European law regarding equality: the policies of affirmative action	191
3. The influence of North American antidiscrimination law on European law	192
3.1. Regulation within the European Union	192
3.2. From Kalanke to Marschall	193
4. Problems of affirmative action policies in European law	195
4.1. Lack of precise concepts	195
4.2. The lack of connection between concepts and terminology of doctrine in relation to national or European norms and judicial decisions	197
4.2.1. The problem from the point of view of a European interpretation of law	197
4.2.2. The requirements of “tolerated” discrimination	198
A. Rights and guarantees	198
B. “Tolerated discrimination”	201
C. The automatic preference	202
D. The uselessness of the opening clause	203
4.3. Conceptual elaborations with lack of foundation, or with reductive foundations: the problem of concept and conception in European Law	204
5. Conclusions	205
11. The Kalanke Case and the Marschall Case in the Court of Justice of the European Communities. The Women’s Quota and Alexy’s Principles Theory	207
<i>María Elósegui</i>	
1. Introduction	207
2. The concept of affirmative action	210
3. Alexy’s theory of principles. Its application to the problem of quota laws for women. Rules and principles	215
4. Individual rights and collective rights	216
5. Collision between individual rights and collective rights	218
6. Subjective rights as fundamental rights and objective norms	218
7. Conflict between a subjective right and an objective norm	221
8. Conclusion	223

12. The Right to Personal Identity in Italian Private Law: Constitutional Interpretation and Judge-Made Rights	225
<i>Giorgio Pino</i>	
1) The right to personal identity: a definition	225
2) Personal rights in general	227
2.1. The Personalistic Principle in the Italian Constitution	228
2.2. Personal Rights, or the General Right to Personality?	230
3) A right in the making	232
3.1. The Object of the Right to Personal Identity	233
3.2. Cases and Legislation	235
4) Concluding remarks	237
13. The Power of Aspiration: The Impact of European Law on a non-EU Country	239
<i>Ireneusz C. Kaminski</i>	
1) Historical background	239
2) Desperately looking for good patterns . . .	241
3) . . . and making places for them	243
4) Preparing for membership	248
Index	253