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Methodological Roots**

Mauro Bussani

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The ‘Common Core of European Administrative Laws’ project: Methodological Roots

*Mauro Bussani**

Abstract

One of the basic aims of the project ‘CoCEAL – The Common Core of European Administrative Law’ is that of testing whether, and to what extent, the comparative legal methodology successfully developed under another initiative, that is, ‘The Common Core of European Private Law’ project, can be applied to the field of administrative law.

This is why this paper will start by briefly describing the overall architecture, and the methodology underlying ‘The Common Core of European Private Law’ project. After reviewing and dismissing a few critiques that have through time been moved to the ‘Common Core’ enterprise, the paper will end with a sketch of the promises and challenges that the adoption of the ‘Common Core’ methodology might entail for the comparative research on European administrative law.

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1. Introduction

One of the basic aims of the project ‘CoCEAL – The Common Core of European Administrative Law’ is that of testing whether, and to what extent, the comparative legal methodology successfully developed under another initiative, that is, ‘The Common Core of European Private Law’ project, can be applied to the field of administrative law.

This is why this paper will start by briefly describing the overall architecture (n. 2), and the methodology (n. 3-4) underlying ‘The Common Core of European Private Law’ project. After reviewing and dismissing a few critiques that have through time been moved to the ‘Common Core’ enterprise (n. 5), the paper will end with a sketch of the promises and challenges that the adoption of the ‘Common Core’ methodology might entail for the comparative research on European administrative law (n. 6-7).

2. The Experience of ‘The Common Core of European Private Law’ project

‘The Common Core of European Private Law’ project was started in 1993 by Ugo Mattei and the author of this paper¹, and has since then received quite a substantial attention in the comparative law literature². During its life, the

¹ For a more extensive and complete presentation of the project, see M. Bussani, “*The Common Core of European Private Law*” Project Two Decades After: A New Beginning”, 15(3) *The European Lawyer Journal* 9 (2015); M. Bussani and U. Mattei, *The Common Core Approach to European Private Law*, 3 *Columbia J. Eur. L.* 339 (1997-1998); M. Bussani, M. Infantino and F. Werro, *The Common Core Sound: Short Notes on Themes, Harmonies and Disharmonies in European Tort Law*, 20 *King’s Law Journal* 239 (2009).

² Among the many scholarly papers that have discussed the Common Core methodology and results, see, e.g., H. Kötz, *The Common Core of European Private Law*, 21 *Hastings Int’l & Comp. L. Rev.* 785 (1998); O. Lando, *The Common Core of European Private Law and the Principles of European Contract Law*, 21 *Hastings Int’l & Comp. L. Rev.* 809 (1998); E. Hondius, *The Common Core of European Private Law*, Trento, 15-17 July 1999, 8 *Eur. Rev. Pr. L.* 249 (2000); X. Blanc-Jouvan, *Reflection on “The Common Core of European Private Law” Project*, in *Global Jurist Frontiers*, vol. 1, issue 1, article 2, 2001; N. Kasirer, *The Common Core of European Private Law in Boxes and Bundles*, 10 *Eur. Rev. Pr. L.* 417 (2002); W. Wurmnest, *Common Core, Grundregeln, Kodifikationsentwürfe, Acquis-Grundsätze – Ansätze internationaler Wissenschaftsgruppen zur Privatrechtsvereinheitlichung in Europa*, in *ZEuP*, 2003, 714 ff.; D.J. Gerber, *The Common Core of European Private Law: the Project and its Books*, 52 *Am. J. Comp. L.*, 995 (2004); A. Lopez-Rodriguez, *Towards a European Civil Code Without a Common Legal Culture? The Link between Law, Language and Culture*, 29 *Brooklyn J. Int’l L.* 1195 (2004); A.L. Kjaer, *A Common Legal Language in Europe?*, in M. Van Hoecke (ed.), *Epistemology and Methodology of Comparative*

Common Core project has been involving more than three hundred scholars, mostly from Europe and the United States³.

Law (Hart, 2004) 377; N. Jansen, *Dogmatik, Erkenntnis und Theorie im europäischen Privatrecht*, in ZEuP, 2005, 750-773; A. Colombi Ciacchi, *Non-Legislative Harmonisation: Protection from Unfair Suretyships*, in S. Vogenauer and S. Weatherill (eds.), *The Harmonisation of European Contract Law* (Hart, 2006), 197-198; J.M. Smits, *Convergence of Private Law in Europe: Towards a New Ius Commune?*, in E. Örüçü and D. Nelken (eds.), *Comparative Law: A Handbook* (Hart, 2007), 219, 231; F.J. Infante Ruiz, *Entre lo político y lo académico: un Common Frame of Reference de derecho privado europeo*, in InDret, 2, 2008, 14, 22; S. Nadaud, *Codifier le droit civil européen, Bruxelles* (Larcier, 2008), 137 ff.; A. Metzger, *Extra legem, intra ius: allgemeine Rechtsgrundsätze im europäischen Privatrecht* (Mohr Siebeck, 2009), 20 ff.; N.J. De Boer, *Theoretical Foundations of the Common Core of European Private Law Project: A Critical Appraisal*, 17 Eur. Rev. Priv. L. 84 (2009); L. Antonioli and F. Fiorentini (eds.), *A Factual Assessment of the Draft Common Frame of Reference* (Sellier, 2010); L. Miller, *The Notion of a European Private Law and a softer side to harmonisation*, in M. Lobban and J. Moses (eds.), *The Impact of Ideas on Legal Development* (Cambridge University Press, 2012), 265, 274; T. Tajti, *The unfathomable nature and future of the European private law project*, 2 China-EU L. J. 69-77 (2013); D. Cabrelli and M. Siems, *A Case-Based Approach to Comparative Company Law*, in *Iid.* (eds.), *Comparative Company Law: A Case-Based Approach* (Hart, 2013), 1, 16-18; D. Nikolic, *Увод у систему грађанског права* (Introduction to Civil Law) (2013) 9th ed., 70; J. Basedow, *Comparative Law and Its Clients*, 62 Am. J. Comp. L. 821, 829 (2014); F. Fiorentini, *Un progetto scientifico che stimola e affascina l'Europa: "The Common Core of European Private Law"*, in *Annuario di diritto comparato*, 2014. See also M. Bussani and U. Mattei (eds.), *Opening Up European Private Law* (Stämpfli, 2007); *Iid.* (eds.), *The Common Core of European Private Law. Essays on the Project* (Kluwer Law International, 2003); *Iid.* (eds.), *Making European Law. Essays on the 'Common Core' Project* (Università degli Studi di Trento, 2000). A few anthropological studies have been devoted to the Common Core: cp. A. Schreiner, *The Common Core of Trento. A Socio-Legal Analysis of a Research Project on European Private Law*, in A. Jettinghoff and H. Schepel (eds.), *In Lawyers' Circles. Lawyers and European Legal Integration* (Elsevier, 2004), 125 f.; G. Frankenberg, *How to Do Projects with Comparative Law: Notes of an Expedition to the Common Core*, in M. Bussani e U. Mattei (eds.), *Opening Up European Law*, cit. at 2, 17.

³ The research carried out under the Common Core flag has been published in a dedicated series of volumes by Cambridge University Press. Up to now, the series comprises sixteen volumes (and many others are in preparation): *Causation in European Tort Law* (M. Infantino and E. Zervogianni eds., 2017); *Protection of Immovables in European Legal Systems* (S. Martin Santisteban ed., 2015); *The Recovery of Non-Pecuniary Loss in European Contract Law* (V.V. Palmer ed., 2015); *European Condominium Law* (C. van der Merwe ed., 2015); *Unexpected Circumstances in Contract Law* (E. Hondius and H.C. Grigoleit eds., 2014); *Time-Limited Interests in Land* (C. van der Merwe and A.-L. Verbeke eds., 2012); *Personality Rights in European Tort Law* (G. Brüggemeier, A. Colombi Ciacchi, P. O'Callaghan eds., 2010); *Environmental Liability and Ecological Damage in European Law* (M. Hinteregger ed., 2008); *Precontractual Liability in European Private Law* (J. Cartwright and M. Hesselink eds., 2008); *The Enforcement of Competition Law in Europe* (T.M.J. Möllers and A.B. Heinemann eds., 2008); *Commercial Trusts in European Private Law* (M. Graziadei, U. Mattei and L. Smith eds., 2005); *Mistake, Fraud and Duties to Inform in European Contract Law* (Sefton-Green ed., 2005); *Security Interests in Movable Property* (E.-M. Kieninger ed., 2004); *Pure Economic Loss in Europe* (M. Bussani and V.V. Palmer eds., 2003); *The Enforceability of Promises in European Contract Law* (J. Gordley ed., 2001); *Good Faith in European Contract Law* (R. Zimmermann and S. Whittaker eds., 2000). Some books were published by Stämpfli and Carolina Academic

Stating it in very simple terms, the Common Core project is seeking to unearth the common core of the bulk of European private law within the general categories of contract, tort and property⁴. The search is for existing commonalities and existing divergences in the different private laws of the European Union member States – which, as is well known, originate not only from the civil law and the common law heritages, but also from a number of other Western legal traditions or sub-traditions, depending on the taxonomy adopted⁵. The project's short-term aim is to draft the outlines of a reliable map of European private law⁶. The future use of this map is of no concern to the cartographers who are drafting it. However, if reliable, the map may be indispensable for whomever is entrusted with drafting legislation or with pursuing legal harmonization at the European level. Indeed, for the transnational lawyer, the present European situation is like that of a traveller compelled to use a number of different local maps, each containing misleading information. The Common Core project wishes to correct this misleading information. It does not wish to force the actual diverse reality of the law into one single map to attain uniformity. The project is not concerned with drafting a city plan in order to affect change or predict future developments. Rather, the Common Core project seeks only to analyze the

Press: see *Property and Environment* (B. Pozzo ed., 2007); *The Boundaries of Strict Liability in European Tort Law* (F. Werro and V.V. Palmer eds., 2004).

⁴ For a discussion on the content and scientific legitimacy of such categories, see A. Rosett, *Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law*, 40 *Am. J. Comp. L.* 683 (1992).

⁵ For instance, Scandinavian systems are considered a tradition per se by Zweigert and H. Kötz, *Introduction to Comparative Law*, 3rd ed. (T. Weir trans., Oxford University Press, 1998). Scotland, Malta, and Cyprus are generally considered mixed legal systems. See E. Reid, Scotland, in V.V. Palmer (ed.), *Mixed Jurisdictions Worldwide. The Third Legal Family*, 2nd ed. (Cambridge University Press, 2014), 216; B. Andò, K. Aquilina, J. Scerri-Diacono, D. Zammit, Malta, *ibid.*, 528; N. Hatzimihail, *Cyprus as a Mixed Legal System*, 6 *J. Civ. L. Stud.* 38 (2013).

⁶ These features bring the 'Common Core' project near to the 'Ius Commune Casebook for the Common Law of Europe' project, an initiative launched in 1994 by the late Professor van Gerven with the aim – in the short term – to produce a collection of casebooks covering the main fields of European law, and – in the long term – to 'uncover common general principles which are already present in the living law of the European countries' (W van Gerven, *Casebooks for the Common Law of Europe: Presentation of the Project*, 4 *Eur. Rev. Private L.* 67, 68 (1996)). However, what differentiates the two studies lies in their targets and their methods. The Common Core project is aimed at scholars, while the Casebooks project is for teaching purposes. Ultimately, the latter's goal is to provide students with a grasp of foreign law whilst educating them as common European lawyers, even though the casebooks mainly concentrate on the English, French and German systems, including materials from other European systems only if they provide original solutions. The Common Core project, too, may provide some useful materials for teaching purposes, but this is not its primary task. It investigates more specific areas of law, delving deeply into technical problems. Moreover, it focuses on all European legal systems, avoiding – as with the other project – placing an emphasis on systems that are, or could be, considered to be 'leading' or 'paradigmatic' ones.

present complex situation in a reliable way. While a fundamental assumption of the Common Core project is that cultural diversity in the law is an asset, the project neither takes a preservationist approach nor does it push in the direction of uniformity. This is possibly the most important cultural difference between the Common Core project and the other remarkable ‘integrative’ private law enterprises which have been carried out in Europe in the last thirty years with the aim of undertaking city planning rather than ‘mere’ cartographic drafting⁷.

3. The Parents of the ‘Common Core’ Project

Let us go into some details of the ‘Common Core’ project, starting from its scholarly roots. The ‘Common Core’ project is born of two cultural parents: the experience of the Cornell project directed by Professor Schlesinger in the 1960s (a) and the dynamic comparative law methodology as principally developed by Rodolfo Sacco over the last forty years⁸ (b).

⁷ In the field of contract law, suffice it to think of the Académie des giusprivatistes européens and its draft ‘Code Européen des Contrats’ (G. Gandolfi (ed.), *Code Européen des Contrats. Avant-projet, Livre premier* (Giuffrè, 2001)), of the so-called Lando Commission and its ‘Principles of European Contract Law’ (O. Lando and H. Beale (eds.), *Principles of European Contract Law, Parts I and II, Combined and Revised* (Kluwer Law International, 2000); O. Lando, E. Clive, A. Prüm and R. Zimmermann (eds.), *Principles of European Contract Law, Part III* (Kluwer Law International, 2003)), of the so-called ‘Insurance Group’ and its ‘Principles of European Insurance Contract Law’ (J. Basedow et alii, *Principles of European Insurance Contract Law*, 2nd ed. (Sellier, 2016)), as well as of the so-called ‘Acquis-Group’ and its ‘Acquis-Principles’ (Research Group on the Existing EC Private Law (ed.), *Principles of Existing EC Contract Law (Acquis Principles), Contract I. Pre-contractual Obligations, Conclusion of Contract, Unfair Terms* (Sellier, 2007); Id., *Contract II. Performance, Non-Performance, Remedies* (Sellier, 2008)). The European Group of Tort Law published its ‘Principles of European Tort Law’ in 2005 (*European Group on Tort Law, Principles of European Tort Law* (Speringer, 2005)), while the Commission of European Family Law has worked out three sets of ‘Principles of European Family Law’ (K. Boele-Woelki et al., *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses* (Intersentia, 2004); K. Boele-Woelki et al., *Principles of European Family Law Regarding Parental Responsibilities*, (Intersentia, 2007); K. Boele-Woelki et al., *Principles of European Family Law Regarding Property Relations between Spouses* (Intersentia, 2013)). The efforts of the ‘Study Group on a European Civil Code’ covered the whole field of the law of obligations, plus certain aspects of the law of movable property, publishing eleven volumes of ‘Principles of European Law’ (the entire list of volumes is available at degruyter.com/view/serial/179663).

⁸ See R.B. Schlesinger (ed), *Formation of Contracts: A Study of the Common Core of Legal Systems*, 2 vols (Oceana Publications, 1968); R.R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law, Installment I*, 39 Am. J. Comp. L. 1 (1991).

(a) At Cornell, Schlesinger launched in 1957 his collective comparative research project on the 'Formation of Contracts', which resulted, in 1968, in the publication under his general editorship of two monumental volumes⁹.

The fundamental problem that Schlesinger had to resolve in his worldwide comparative study 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. Thus, how to formulate each question in a uniform way to an Indian, a Spaniard, an Italian, a Pole, a German, a Norwegian, and so forth? How to obtain consistency?

These concerns led to working out one of the most critical, and significant methodological features of the research. Each question presented a case that asked the respondents about the results that would be reached under those circumstances, instead of asking about a doctrinal system. Each question was formulated with the aim of taking into account, for every legal system under review, any relevant factor affecting the answer, so as to guarantee that these factors would be considered in, and would therefore be comparable with the analysis of every other system. Thereby, another important objective was achieved. Often, the factors that operate explicitly and officially in one system are officially ignored and considered to be irrelevant in another system. These factors may still operate secretly, slipping silently in between the formulation of the rule and its application by the courts. For instance, it is well known among private law comparativists that there is a wide area of disagreement between legal systems in which offers are normally irrevocable, and legal systems in which offers are normally revocable. Yet, if one takes into consideration not only rules concerning revocability, but also the related rules dealing with the time when acceptance becomes effective, it becomes evident that courts in systems where offers are revocable are sensitive to the same policy concerns that in other jurisdictions make offers irrevocable¹⁰.

The work done at Cornell made it clear that, in order to have complete knowledge of a legal system, one cannot trust entirely what the jurists usually say, for there may be wide gaps between operative rules and the rules as commonly stated and described. This is why the Cornell methodology compelled jurists to think

⁹ R.B. Schlesinger (ed), *Formation of Contracts*, cit. at 8. For a discussion of Schlesinger's (as well as Sacco's) fundamental contributions to comparative law research, see U. Mattei, *The Comparative Jurisprudence of Schlesinger and Sacco: A Study in Legal Influence*, in A. Riles (ed.), *Rethinking the Masters of Comparative Law* (Hart, 2001), 238-56.

¹⁰ R.B. Schlesinger, *Formation of Contracts—A Study of the Common Core of Legal Systems: Introduction*, 2 *Cornell Int'l L. J.* 1, 49-50 (1969).

explicitly about all the factors that matter, regardless of whether they operate explicitly or implicitly, by forcing them to answer identically formulated questions. As a result, the respondents gave a very different picture of the law than did the monographs, handbooks or casebooks circulating in their own legal systems.

(b) The lesson learned from the Cornell Project was taken on and developed by Rodolfo Sacco. The core of his comparative law methodology is by now well known, having been translated into many languages¹¹.

To sum up Sacco's theory¹², 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 may be in a competitive relationship with one another.

From this perspective, 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. Taking into account the contribution of different legal formants allows one to understand the reasons why similar rules in different legal systems are subject to different applications and interpretations¹³, or why different rules in two systems give rise to largely similar outcomes¹⁴. By delving into what the legal formants are, and how they

¹¹ See R. Sacco, *Legal Formants*, cit. at 8; R. Sacco, *La comparaison juridique au service de la connaissance du droit* (Economica, 1991), 33.

¹² For the following remarks, see R. Sacco, *Legal Formants*, cit. at 8, 21-27.

¹³ One might think, for instance, of vicarious liability of parents for the harms caused by their children, which is enforced much more strictly in France than it is in Italy, despite similar code provisions (cp. Art. 1242(4) of the Code civil – former Art. 1384(4) in the original version of the Code – and Art. 2048 of the Italian Civil Code): see F. Werro and V.V. Palmer (eds.), *The Boundaries of Strict Liability*, cit. at 3, 399-400; on this point see also M. Bussani, *La colpa soggettiva* (Cedam, 1991), esp. 16, 180 ff.

¹⁴ A good example is compensation for pure economic loss in Germany and Austria: see M.

relate to each other, we may ascertain the factors that affect operative outcomes, making clear the weight that interpretive practices and rhetoric (grounded in scholarly writings, legal debate aroused by previous judicial decision, etc.) have in moulding those solutions. 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.

All the above makes it clear that 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. 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 much more than a mere collection of decided cases.

4. 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 the topical sessions during the general meetings that take place every year. Editors of each project are required to follow the general guideline of drafting the 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 may not have any official role but have a practical impact on the operative rules¹⁵. This method also guarantees that rules formulated in an

Bussani and V.V. Palmer, *Pure Economic Loss in Europe*, cit. at 3, 148-154.

¹⁵ To make the simplest example, think, e.g., of the impact of the presence / absence of a comprehensive health insurance system on the cases concerning damages for personal injury: for all, see D. Jutras, Alternative compensation schemes from a comparative perspective, in M. Bussani and A.J. Sebok (eds.), *Comparative Tort Law. Global Perspectives* (Edward Elgar, 2015),

identical way (e.g., by using an identical code provision), but which may produce different applications, will not be regarded as identical.

In answering the questionnaire, every contributor is asked to set her/his answers up on three levels, labeled 'Operative Rules', 'Descriptive Formants' and 'Metalegal Formants'. The level dealing with 'Operative Rules' is designed to be a concise summary of the basic applicable rules to the case and the likely outcome that would be reached under the law of the legal system concerned. Reporters are also asked to indicate whether that outcome would be considered clear and undisputed or doubtful and problematic.

The level called 'Descriptive Formants' has a twofold goal. On one hand, its aim is to reveal the reasons which lawyers feel obliged to give in support of the operative rule presented under the previous heading, and the extent to which the various solutions are consistent either with specific and general legislative provisions, or with general principles (traditional as well as emerging ones). The reporter is therefore obliged to make clear whether the solution to the hypothetical case is endorsed by the other legal formants; whether all formants are concordant, both from an internal point of view (the source of disaccord may be 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 were identical in the past). On the other hand, the goal at this level is to understand whether the solution depends on legal rules and/or institutions outside private law, such as procedural rules (including rules of evidence), administrative or constitutional provisions. Finally, the level called 'Metalegal Formants' asks for a clear picture of the other elements that may be affecting the operative and descriptive patterns, such as policy considerations, economic factors, social context and values, as well as the structure of the legal process (e.g., organization and competence of courts). From the 'Common Core' perspective, these are data a researcher can never leave out whenever the aim is to understand what the law is.

A further note on reporters is necessary. For the purpose of comparative scholarship, a domestic lawyer is not necessarily the best reporter on his or her own system. 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, a nationally-trained lawyer may control more information about the system than a comparative law-trained (or a foreign) one. Yet, lawyers who have not been exposed to legal cultures other than their own, may be less well-equipped to

151, esp. 154-164.

detect the hidden data and the rhetorical attitude of the system because they are misled by automatic assumptions. This is why the participants in the ‘Common Core’ project usually are comparativists, and, as comparativists, are asked to deal with the questionnaires as if they had to describe their own law.

Being that said, 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 ‘Common Core’ project is organized, i.e., property, contract or tort¹⁶. The responsibility of setting forth the organization and the agenda of the property, contract and tort areas is allocated to three Chairpersons, who coordinate the progress of the project under their supervision¹⁷. 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 publicly analysed and discussed during the project's general meetings. Once responses to a questionnaire are complete, the editors of the project proceed to comparatively assess the national reports, and subsequently collect them in a volume, to be published in the dedicated series mentioned above.

5. Caveats

The ‘Common Core of European Private Law’ project has so far enjoyed a remarkable success, as it is witnessed not only by the long list of its scientific outputs and by the recognition it received in academic debates, but also by the

¹⁶ Some questions have arisen regarding the cultural legitimacy of using the labels of property, contract and tort whose meanings themselves differ between legal systems. 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 (P. Catala and T. Weir, *Delicts and Torts: A Study in Parallel. Part II*, 38 Tulane L. Rev. 221, 230-236, 243-248 (1964)). Yet, 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. 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 meta-legal containers of problems that are fairly easy to locate on operational grounds.

¹⁷ Current Chairpersons for the three groups of property, contract and tort are, respectively, Anna di Robilant (Boston School of Law), Aurelia Colombi Ciacchi (University of Groningen), Marta Infantino (University of Trieste).

fact that it is today the most long-standing and largest academic network dealing with European private law¹⁸. Needless to say, through time, the project has been challenged by a series of critiques that is helpful to address here, in order to both to clarify what the project is about, and to clear the ground from possible misunderstandings.

First of all, the very title of the project might easily misguide superficial observers – and actually misguided some of them¹⁹ –, suggesting that the reference to ‘the common core’ of European private law means only, or foremost, a search for commonalities. However, nothing could be farther from the spirit of the project, whose title emphasizes commonalities over differences (not as much as for the sake of brevity) as a tribute to Schlesinger’s path-breaking work²⁰. Other misunderstandings have given rise to more substantial critiques. For instance, some commentators have stressed that the Common Core project, insofar as it relies upon Schlesinger’s and Sacco’s theories, as refined and revised by the project’s editors, implies a methodological monism that provides too strict a framework for comparative research²¹. Others have challenged the project’s methodological reliance on factual questionnaires, either because the factual focus of the questionnaire would allegedly over-emphasize judge-made law²², or because the discretionary choices made by specific projects’ editors at the time of drafting the factual cases composing the questionnaire would implicitly and inevitably channel national reporters’ answers in pre-determined, largely convergent directions²³. Still others have contested the naiveté of the Common Core project’s claim to carry out a ‘neutral’ and ‘purely descriptive’ research, noting that this claim not only seems to be based on the over-simplistic

¹⁸ This is noted, for instance, by L. Miller, *The Notion of a European Private Law*, cit. at 2, 274.

¹⁹ For this observation, see F. Fiorentini, *Un progetto scientifico che stimola e affascina l’Europa*, cit. at 2, 277-278. Even less superficial observers might fall in the same trap: G. Frankenberg, *How to Do Projects with Comparative Law*, cit. at 2, 35 (“Ultimately they intend nothing less than to seek unity [...] and to build a common European legal culture”); M. Reimann, *Of Products and Process. The First Six Trento Volumes and Their Making*, in M. Bussani and U. Mattei (eds.), *Opening Up European Law*, cit. at 2, 83, 85-88; O. Lando, *The Common Core of European Private Law*, cit. at 2, 809.

²⁰ See above, n. 3 (a).

²¹ F. Fiorentini, *Un progetto scientifico che stimola e affascina l’Europa*, cit. at 2, 300; G. Frankenberg, *How to Do Projects with Comparative Law*, cit. at 2, 34-36.

²² P. Legrand, *Paradoxically Derrida: For a Comparative Legal Studies*, 27 *Cardozo L. Rev.* 631, fn. 159 (2005) (calling the Common Core volumes “snippety compilations” accumulating “selected titbits extracted largely from legislative texts and appellate judicial decisions”).

²³ G. Frankenberg, *How to Do Projects with Comparative Law*, cit. at 2, 40-47; on the same lines, see also D. Cabrelli and M. Siems, *A Case-Based Approach*, cit. at 2, 17-18. On the institutional rather than methodological levels, others have noted that the choice of the themes on which Common Core questionnaires focus could be less fragmentary and more coordinated in light of the project’s final cartographic aim: M. Reimann, *Of Products and Process*, cit. at 19, 83, 92-93.

assumption that there is something like a ‘truth’ of legal phenomena that can be described in objective terms by ‘neutral’ observers²⁴, but also it aims to de-politicize – more or less consciously – the project and its possible outcomes²⁵. Insofar as they refer to the unavoidable limitation of any collective and comparative enterprise – that of compressing individual creativity, biases and ideologies to put them at the service of guaranteeing the comprehensibility and comparability of the results –, these critiques are fully acceptable. As to the rest, the above critiques largely miss the mark. True, the project’s methodological guidelines, as well as the ways in which questionnaires are framed and the instruction for a (as much as possible) neutral and descriptive approach, constrain national reporters in their own legal lingo. Yet, it holds equally true that none of these constraints can suppress reporters’ subjective and cultural understanding of the factual cases, and their views on how their legal system would handle these cases. When writing their responses, national reporters convey not only their picture of the legal systems they represent, but also their own commitment to given schools of thought, methodological style, deeply embedded beliefs, hopes, and self-narratives. While this might limit, to a certain extent, the heuristic value of the substance of their answers²⁶ (could it be different?), it also enriches the scientific output of the project with meta-legal information that are usually out of the reach of comparative research activities. In other words, the balance struck by the Common Core project between methodological monism and pluralism, neutrality and political transparency, as questionable as it might be, always serves the project’s final aim: getting more, and deeper knowledge.

6. From Comparative Private Law to Comparative Administrative Laws

With that aim in mind, our current CoCEAL project starts from the assumption that, like in the private law field, any comparative study of administrative law should not limit itself to a comparison between different institutions and rules,

²⁴ G. Frankenberg, *How to Do Projects with Comparative Law*, cit. at 2, 27, 36.

²⁵ See for instance D. Kennedy, *The Politics and Methods of Comparative Law*, in M. Bussani and U. Mattei (eds.), *The Common Core of European Private Law*, cit. at 2, 131 ff., 175 ff.; V. Grosswald Curran, *On the Shoulders of Schlesinger*, in M. Bussani e U. Mattei (eds.), *Opening Up European Law*, cit. at 2, 1, 10; G. Frankenberg, *How to Do Projects with Comparative Law*, cit. at 2, 35 (“the Trentinos reveal their desire to move from archaeological and cartographic work to a colonizing project with political implications for legal science and education”).

²⁶ This is emphasized, for instance, by N. Jansen, *Dogmatik, Erkenntnis und Theorie*, cit. at 2, 750-773.

but should also entail the understanding of the (technical, political, social, and cultural) factors affecting the daily life of these institutions and rules. The comparative research should look at administrative law in its actual making and re-making over time, as the by-product of many processes – from innovation to imitation to adaptation to local frameworks and needs. Comparing administrative law institutions as they actually work in two or more jurisdictions, however, may not be enough. This kind of synchronic comparison should go hand in hand with the so-called diachronic comparison, that is, with the study of how institutions and rules changed through time²⁷. In the field of administrative law too, comparative knowledge cannot but be historical knowledge, and more precisely knowledge of comparative history²⁸.

The principal questions underlying legal comparative research on administrative law therefore are: how can we carry out a comparative study of differences and similarities between legal systems? How can we draw comparisons? How can we get comparable information, given that every legal system has its own history, its own internal dynamics, its own approach to law, to the State, to the relations between public powers and citizens, as well as its own legal structures, rules and vocabulary?

The answer to these questions comes from the working methodology.

7. Adjusting the ‘Common Core’ Methodology for the Comparative Study of Administrative Law

Our CoCEAL project aims to analyse in depth specific administrative law areas. We are well aware that administrative law, as a living, multifaceted legal discipline, expresses most of its characteristic features in the particular sub-systems/domains composing it.

The CoCEAL project will therefore focus on technical issues within particular domains, such as State liability, public takings, withdrawal of administrative acts. For each issue, one or more editors will draft a factual questionnaire. Once approved, the questionnaire will be answered by (comparative) lawyers for each of the legal systems under examination. The methodological reliance on factual questionnaires will enable editors within this project too to avoid any reference to dogmatic concepts that might give rise to diverging interpretations, or that might have little (or no) meaning for some reporters. Moreover, the recourse to

²⁷ R. Sacco, *Legal Formants (I)*, cit. at 8, 24-26.

²⁸ S. Cassese, *L'étude comparée du droit administratif en Italie*, 41 *Rev. int. dr. comp.* 879, 886 (1989).

factual cases will facilitate editors' subsequent process of comparing the answers received.

In their answers, reporters will have to describe how each case would be solved under the law of the legal system they are concerned with. Following the Common Core style, reporters will also be required, when outlining the possible outcomes, to explain which legal formants – statutes, doctrinal opinions, judicial trends, bureaucratic practices, and so on – are responsible for those outcomes, and to what extent. In other words, reporters will be required to go beyond conventional wisdom and rhetoric, in order to unveil the factors that, officially or not, have an impact on their legal system's law and outcomes.

Reporters will be also asked to highlight any meta-legal factor – be it economic, social, institutional – that might influence the final result. Relevant meta-legal factors might be, for instance: the cost for accessing a given service, the dominant way of conceiving the relationship between citizens, civil society, and the administration, the cultural and sociological milieu of the administrative personnel, the organizational structure of courts, and the model of recruitment and selection of high- and low-ranking public employees. By offering such insights on the legal and meta-legal factors affecting the probable outcome of each case, answers to the questionnaires are expected to shed light on the characteristic features of legal systems, including the plurality of rules co-existing (and conflicting with one another) within them.

To illustrate, answers might provide precious information about the role played, in a legal system, by constitutional and fundamental rights litigation, or about the relationships, in the same legal systems, between the domestic legal order and supra-national ones. Further, answers might delineate the legislative and judicial approach to administrative law, the authority enjoyed by legal science, the contribution given by practitioners (from politicians, to high-ranking officials, to bureaucrats) to the daily law-making of administrative rules, and the way in which administrative law practice and science are perceived by the legal community and society as a whole. Good answers might also enlighten the scope of administrative law in the legal systems under review (especially vis-à-vis sovereign/political acts on the one hand, and other branches of law on the other hand), the structure and composition of the administration, the regime and classification of administrative acts, the principles (if any) informing the administrative procedure and administrative adjudication, as well as the models that are taken as a reference standard for comparison. It is therefore crucial that, when drafting the questionnaires, editors think thoroughly about the issues and the problems that they want to deal with. The selected issues and problems should be understandable by all reporters, and should be instrumental to unveil the (similar and diverging) characteristic features of the legal systems studied.

Questionnaires should be made up of ten to fifteen cases each, and should cover all the main issues and problems that are at the core of the legal area under investigation. The cases in the questionnaire should be drafted as short plausible stories, whose ending always poses the same questions: how would this hypothetical case be solved under the concerned legal system? What legal rules would be applicable to the case? What legal remedy, if any, can be pursued by the characters of the story to obtain justice? Which meta- or extra-legal factors are important in determining the final outcome?

As far as we know, this is the first time that a collective effort of this sort is made.