THE TRENTO COMMON CORE PROJECT Ugo Mattei and Mauro Bussani

(Delivered at the first general meeting on July 6 1995)

It is for me a great pleasure to welcome all of you here in Trento. First of all, also in behalf of Professor Ajani who is stuck in Tirana, I wish to thank everybody to be here, both those who were in Trento last june at the preparatory meeting, and all the new participants to the Common Core project. A list of the participants is drafted in the brochure of the conference. The list, of course, is not closed.

Schlesinger’s monumental work on formation of Contract, published twenty seven years ago, was the coronation of a ten years long project. The ambition of the work in which we are engaged here in Trento is a considerable broadening of the scope of the Cornell project. We are seeking the common core of the bulk of european private law, as divided in the general cathegories of contract tort and property. On the content and scientific legitimacy of such cathegories we will spend a few words later.

The aim of my talk this morning is to give you the main lines of the project in order to re-insure you that, despite the ambition of the Trento Common Core Project, we are not asking you a thirty years committment. Let me first shortly describe the double result that we hope to reach after this three days session.

According to what a number of us have decided in the june 94 meeting, all of you should have received some drafts on rather specific areas. The shape of this drafts is variable. Strome’s one is already very detailed ( it is actually so detailed that in has scared Professor Mayerhofer out of today’s meeting !!) Zimmerman’s and Monateri’s are mere factual descriptions, while the “intentional tort” one has not reached the actual written form. This happens in scholarship!

The general discussion of this afternoon will serve the purpose of writing down two sort of guides: a “Guide to draft the questionnaire” and a “Guide to answer the questionnaire”. We should focus on what are the issues that should be adressed and covered for each legal system. (Strome’s work shows us a way on how the factual situation can actually become a questionnaire). Some of these issues may be general and mandatory for each topic (like for example : consider in your answer each legal formant separately). This is deeply differentiating our task from any project à la U.S. Restatement of Law. Other should probably vary from topic to topic: for example, the role of insurance law in each system should probably be considered for tort law and the role and the structure of the landregister should be considered for property). Other should probably be different from subtopic to subtopic ( like the role of zoning law should be considered for nuisance while it can be neglected in the area of trust). Also the role and the state of reception of enacted European law is possibly different from area to area but to consider it should be of course part of the general guide. We suggest therefore to focus this afternoon’s discussion on guidelines to the drafting of the “general guide” as well as on suggestions on how to go from the actual form of our tentative drafts to model questionnaires.

Our methodological discussion that will continue in tomorrow topical sessions should have therefore as focusing point the preparation of two aspects: a guide to the Editors of each subtopical volume on how to draft the questionnaire (or how to edit and integrate it in Storme’s case) and a guide to each one engaged in giving answers on how to frame them.

In the course of all our preparatory work for this meetings (which has included two trips to California to discuss in detail with professor Schlesinger) we have decided that our project will take two forms. It will appear first as a published set of subtopical small volumes (one for each subtopical questionnaires) edited under the responsibility of each questionnaire drafter. Such volumes will be published by our University Press shortly after they are submitted by each volume editor. This allows the work which is already done to be published at once without waiting for the other late colleagues. Also it should allow us to profit of a larger degree of decentralization and of diversity from subtopic to subtopic. Accordingly, each subtopical volume editor will receive a small budget (about 1500 USD) in order to compensate or refund him/ her of the editorial work or of expenses incurred in persuading the colleagues to cooperate in answering the questionnaires. Such budget, roughly corresponding to one hundred dollars per questionnaire answered for each legal system, is our maximum financial possibility at the moment. For administrative reasons it can be payd when the volume is accepted for publication. Hopefully, during our path, our financial conditions will improve. Only in a second stage the actual small subtopical volumes will be updated and published toghether in three topical books ( of one or more volumes) for contract, tort and property. For this later stage a larger publisher will be seeked.

For each topic the number of subtopical volumes should be of about twenty. This, again, because while we do not have the ambition of a complete Restatement-like coverage, we still need a rather extensive scope to give to our project scholarly significance, impact, visibility and appeal also outside of academic circles. This character of our project is its main difference with the Cornell Common Core one and it is
one of the differences with other projects on European Private Law like the Lando Commission on which Professor Storme will address us. For the same need to reach sufficient detail without overwhelming ourselves and the future readers with an excessive number of data, the number of issues in the questionnaire, although slightly variable, should not be more than 15, maximum 20. The questionnaire Editor should write a comparative introduction to his or her small volume.

This ambitious task is not over-ambitious for a number of reasons that can be expressed by the metaphor of the dwarf standing on the shoulders of the giant. Professor Sacco has already addressed us on what could be called a methodological ripening of the international comparative legal culture in these last thirty years. Schlesinger’s methodological caveats are today in the cultural heritage of anybody who claims to do comparative law, and are certainly written in the cultural DNA of each one of us. From a generational point of view our group is made practically completely of people born as scholars after Cornell.

What was possibly the result of the Cornell project can be today assumed as a point of departure of our path. : " At least in terms of actual results, as distinguished from the semantics used in reaching and stating such results, the areas of agreement among legal systems are larger than those of disagreement” nt 1. This statement conveys us a double teaching. First, it shows how common core research is a very promising hunt for analogies hidden by formal differences. Such common core should be unearthed in order to obtain at least the main lines of one reliable geographical map of the law of Europe. What the use of this map will be is not concerned for the cartographers that are drafting it, although we may all agree that this kind of research should be very useful for and deserve more attention from official institutions that are encharged to draft European legislation (directives, regulations ecc.) For the transnational lawyer the present situation is like that of a traveller compelled to use a number of different local maps each one containing misleading information. We wish to correct this misleading information; we do not wish to force the actual diverse reality of the law within a map to reach uniformity. We are not drafting a city plan for something that will develop in the future and that we wish to affect. We are neutral in front of future developments. This project only seeks to describe 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 we wish to push in the direction of uniformity. This is possibly the most important cultural difference between the Trento project and other very publicized enterprises such as the Unidroit Principles (and probably also the Lando commission) which are doing city planning rather than chartographic drafting.

Out of the geographic metaphor, it is the rhetoric of the local lawyers, full of unexplained assumptions (cryptotipos), the false friend of the lawyer seeking information about one foreign legal system. Cornell shows us that this rhetoric conveys to foreign lawyers a message that overemphasizes the differences. It also shows us that the factual approach can unmask such hidden assumptions improving the knowledge of the law not only for foreigners but also for lawyers belonging to the given legal system.

Second and very important teaching, despite what we have just observed, both the semantic and the actual results must be considered in our analysis in order to draft a reliable map. To put it in Sacco’s terminology, it will be sufficient to duly consider the fundamental distinction between the descriptive formant and the operational rules to solve many of the methodological problems that have absorbed much energy in the ages of Cornell.

The rhetoric of the law is not something useless that can be neglected 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. Maybe such a map would show us the shortest way between Trento and Maastricht. For sure, it would not offer us a satisfactory chart of the geography between the Dolomites and the Dutch boarder. This fundamental distinction, should lead us also in the drafting of the questionnaires on which we will engage in the next three days.

Rudolf Shlesinger, in the letter that we have circulated and in the acceptance talk for the Honoris Causa degree in Trento which is reproduced for our use today, tells us two things that we should keep in mind during our work and that require some thoughts on our part. First, that Sacco’s dissectioning the legal rule in a number of legal formants is the methodological step forward most useful for modern common core analysis. Second, that differences should not be overemphasized but should not be neglected. In other words, that comparativists should not go to the opposite extreme claiming that after all the differences between the common law and the civil law are negligible. The same points are made by Alan Watson in his forthcoming paper " From Legal Transplants to Legal Formants". The word legal formant is not only a neologism for the traditional distinction between "Loi ", "Jursprudence" and "doctrine" i.e. between enacted law, case law and scholarly writings. Within one legal system the legal rule is not uniform not only because one rule may be given by case law, one by scholars and one by statutes. Also, within each one of these sources there are competing formants, like , for example, the rule described in the headnotes of a case can be incoherent with the actual ratio decidendi (whatever this means) or the definition of a code can be incoherent with the detailed rules contained in the code itself.
This complex dynamic may change a lot from legal system to legal system as well as from one area to the other of the law. In particular, certain legal formants are clearly leading in each legal systems in a different way. Differences in formant leadership are particularly clear in the distinction between common law and civil law. This is why a ripe factual approach does not become a mere collection of decided cases or, in other words, does not overfocus on case law.

Certain rather insulated critics, like D. Tallon, have criticized the factual approach stating that it was too much common law based. This comment is rather ungenerous since the issue of how to cope with the great sources distinction between common law and civil law has consumed a lot of time and methodological efforts in Cornell. It should not absorb too much of our time. To be sure, today the analysis based on different formants makes even more clear that factual approach does not mean mere case law analysis. Each formant can be considered a source of the law in its own right competing with all the other sources to make the actual rule. nt 2

What we need to do here, in dealing with our questionnaires, is to put all these competing sources (the different formants) in the right place in our geographic map. Always remembering that mere rhetorical differences may end up sometimes affecting even the applied dimension of the law in a process of constant flux and change.

We'll simply have to organize our questionnaires in such a way that all of the circumstances which affects the law in any one of the systems that we are considering, should be addressed also in all the other systems in which such circumstances may have no practical impact or a different one. This should guarantee us that rules formulated in a identical way (say by a identical code provision) 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 in one system may play an official and declared role and that in another system may be at work in a rather cryptic, unsystematic and unofficial way. The role of such criptic elements may be crucial in the drafting of the map of the applied law. nt 3

This is particularly important, as I 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 that was described by John Merryman, can not be neglected if we wish to obtain good results. It is in the structure of the legal process, that municipal lawyers assume as given, in which most of the differences can be detected, understood and possibly explained. All of this had to be worked out rather ex novo in Cornell but today it is part of the state of the art in comparative law.

We do not even have to spend much time in another issue that had to be discussed in Cornell but that now is strait forward. We can assume, for our purpose, that the comparative knowledge of the law has a different nature from the internal knowledge of it, since the former is scientific and the latter is practical (legal scholars acting within a legal system are themselves legal formants of it since they "make" the law although indirectly). This means that we will not use the style of the "national reports" even in those cases in which an Italian lawyer will report on Italy or a French lawyer will report on France. We assume that for the purpose of comparative scholarship the internal lawyer is by no means a better reporter. To be sure, she may control a larger number of informations about the system than a foreign lawyer. But she may be less equipped in detecting the cryptotipes because she may be mislead by automatic assumptions. The participants to our project are comparativists, and as comparativists we will deal with the questionnaires also if we will have to describe our own law. We personally believe that the attitude of considering a local rapporteur better than a foreign one, spread because of the triumph of the state centered positivistic legal culture, is anticultural. It has long been the dominant attitude even among comparativists, since it informed the International Academy of Comparative Law and the Faculte’ Internationale de Droit Compare’. Signs of change are however visible, and in the next Session of the Faculte’, in Rostock, most Common Law courses are taught by civilians.

In this project we should not consider only nationals entitled to deal with their own law. This is why so many of the participants from Reimann to Watson to Legrand are of "unspecified belonging" and why we have involved american scholars like Gordley and Palmer as well as comparativists like Werro and Hagstrom who work in non E. U. Universities. Committed nationals of all member States are of course a big asset of any project on comparative law, since they may serve in directly answering to questionnaires or in advising on whom to contact for reliable answers to different problems. This is why we have tried to find participants from all member States. Some recruiting is still to be done particularly from Austria, Ireland and Spain although there is already sufficient expertise in the present group to cover all of the fifteen member States. Coordinating such a big group of people (we are at the moment about thirty five covering fifteen nationalities) will require an organizational effort that we should already begin in these days by filling up the forms with each of the small groups secretaries.

Another general point that should be made and which makes our work much easier than in Cornell is that
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 and a rather common social and political background. I say rather common, of
course, because we do not wish to deny that there are differences from Sweden to Italy.

Such differences, however, are not on the very conception of the rule of law and in any case are not
differences perceivable in the lawyer’s law. We may consider them in our analysis if we find some proper
informations that may be required for each legal system in the questionnaire. Possibly one due to the
different political process and beaurocratic organization is reflected by the different timing of reception
of the directives. More generally, the different delay of justice.

A rather important point that we have already discussed in our preparatory meeting of last june, is the
legitimacy of a tripartition such as contract property and tort in a comparative law project. Also this
problem should not be overemphasized or overdiscussed.

Someone has argued that these categories are not homogeneous in the different legal systems and that
therefore there may be boundary issues. It is indeed easy to observe that “nuisance” is classified as tort
in Common law while “Troubles de voisinage” is classified as property in France. It is however sufficient
to take a problem solving approach such as the one that for example is endorsed by Law and Economics
to see that these two legal categories just describe the same problems of boundaries between property
rights. In all case books on property you will find in the chapter of land use cases (like Boomer vs.
Atlantic Cement Co.) that are technically dealing with a tort.

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

Annyhow, Contract Tort and Property may be used in this project as metalegal containers of problems that
on operational grounds are rather easy to locate. They are not used in any positive legal meaning but
they are models that have the only function to detect the areas of general expertise of the contributors.
That same metalegal approach that conveys us economic rationales to distinguish these three categories
nt 4, is also showing us that the difference can not be overemphasized but that the whole private law is
indeed communicating to solve concrete problems. nt 5 In any case the practical choice of separate
publication of subtopical volumes should solve any possible problem. The editors will gladly solve any
conflict of jurisdiction.

Our second small group session day, therefore, should be focused on different targets. First, as already
seen, it should be devoted to finding out the different peculiar formants of the specific areas that should
be considered. This task should be facilitated by the presence within each session of the questionnaire
drafters that may convey their experience.

Second, the different subtopics should be selected in order to come out with a tentative index. Third,
each participant should give his or her availability to one or more subtopical editorships as well as
suggestions of other possible editorships available. Between the scholars that, for different reasons, are
not with us today, we already have the availability of Professor Ghestin to serve as a topical editor in
Contract (he was suggesting pre-contractual liability) and Professor Lupoi for property (he was
suggesting something on trust). The remaining time (if there is some) should be devoted to attempt the
solution (or at least to begin tackling in different legal systems) the Monateri, Storme and Zimmermann’s
drafts. Each subgroup will have available a very basic workinglibrary and will be assisted by Prof.
Antonioli (Contract) Prof. Graziadei (Property) and Dr. De Lorenzo (Tort) that are fast books hunters in
case something else is needed from the library.

Finally, during our closing session on Saturday morning, we will have chair reports from the three groups
and we will discuss the future development and timing of our project as well as different practical
questions, such as the possibility to create a multilateral project in order to have access to E.U.fundings.

Finally, thirty five years after Cornell we should be able to profit of the remarkable technological
developments in the domain of communication. Within the Cardozo Electronic Law Bulletinin, which
Monateri and myself are editing, a whole section with four internet accounts is ready for the Common
Core Project. This should allow all of us to stay in touch and to exchange information in a very much time
saving way.
NOTES

1 see SCHLESINGER-BAADE-DAMASKA-HERZOG, COMPARATIVE LAW, V 39
2 This point is made in U. Mattei and F. Pulitini, A Competitive Model of Legal Rules, in Breton Galeotti Salmon Winthrobe (Eds.), The Competitive State (1991)
3 see Sacco, Comparazione giuridica e conoscenza del dato giuridico positivo, in R. SACCO ed. L’ APPORTO DELLA COMPARAZIONE ALLA SCIENZA GIURIDICA (1980).
4 See COOTER-ULEN, LAW AND ECONOMICS (1987)