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IMMORALITY OF CONTRACTS IN EUROPE

Four Approaches

Chantal MAK

1. LAW, MORALITY AND EUROPEAN INTEGRATION

The project of European integration that was embarked upon in the 1950s finds itself at a crossroads. Its internal and external borders are put under pressure in an actual sense by the refugee crisis as well as in an economic sense by the consequences of the economic crisis that has impacted the EU's development in recent years. Law, which forms one of the pillars of the integration project, does not remain unaffected by this. European contract law may be conceived of as the combination of EU law on contractual transactions and national systems of contract law. It provides the framework for the conclusion of transactions within the EU's internal market and, thus, shapes the internal market (e.g. determining which products can be traded in the EU and among Member States) as well as brings out, into the open, tensions among Member States and the Union (e.g. whether a common rule can be decided upon and which institution has the final say on that). The questions of how to conceptualise the European legal order and how to handle conflicts among rules deriving from different levels of governance are discussed by constitutional theorists¹ and, increasingly often, scholars in the field of European private law.²

¹ N. WALKER, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317–359; M. POIARES MADURO, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in N. WALKER (ed.), *Sovereignty in Action*, Hart Publishing, Oxford 2003; M. KUMM, 'Who is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice' (1999) 36 *Common Market Law Review* 351–386.

² H.-W. MICKLITZ, 'Monistic Ideology versus Pluralistic Reality – Towards a Normative Design for European Private Law' in L. NIGLIA (ed.), *Pluralism and European Private Law*, Hart Publishing, Oxford 2013, pp. 29–51; M.W. HESSELINK, 'How Many Systems of Private Law are there in Europe?' in L. NIGLIA (ed.), *Pluralism and European Private Law*, Hart Publishing,

In contract law, these questions are not as new as they may seem. All European countries have rules that establish which transactions can be made the subject of a contract.³ Mandatory rules of law may prohibit the conclusion of certain types of contract; for example, a law may forbid the conclusion of a contract for sex work, mediation in surrogate motherhood arrangements, or the organisation of a lottery. Furthermore, contracts infringing public policy or good morals are held to be null and void. Rules of contract law, thus, express the relationship between law and morality; they determine which issues can be made the subject of a legally valid and enforceable agreement according to the values underlying the legal order to which they pertain.⁴ Since different Member States adhere to values that sometimes converge and sometimes diverge, while the demarcation between illegal and immoral contracts also differs from one country to another, European contract law has long faced the question of how to approach Member States' diversity from a European perspective. In particular, Member States' views on morality may clash with the EU's market-oriented approach.

In this chapter, it will be investigated to what extent there is consensus on the handling of contractual morality in the EU (incl. legislative, judicial and academic views) and what way forward can be envisaged for the debate on this topic. Four approaches to the question of harmonising views on morality in European contract law will be looked into. These provide a chronological overview of the developments in this field as well as insights into legislative, judicial, political and academic contributions to the development of European contract law. Firstly, the handling of diversity in EU legislation and case law will be sketched; a deferential approach emerges here, in which certain common values or principles are defined, but the specification in legal rules is mostly left to national legislatures and judiciaries. Secondly, academic endeavours to further harmonise contract law in Europe will be addressed, in particular the Principles of European Contract Law (PECL) and

Oxford 2013, pp. 199–247; V. MAK, 'The Character of European Private Law' (inaugural lecture, Tilburg University, 2015); C. MAK, 'The One and the Many. Translating Insights from Constitutional Pluralism to European Contract Law Theory' (2013) 21 *European Review of Private Law* 1189–1210.

³ H. BEALE et al. (eds.), *Cases, Materials and Text on Contract Law. Ius Commune Casebook*, 2nd ed., Hart Publishing, Oxford 2010, Chapter 12 Immoral and Illegal Contracts; M.R. MARELLA, 'The Old and the New Limits to Freedom of Contract in Europe' (2006) 2 *European Review of Contract Law* 257–274.

⁴ For the regulation of surrogacy contracts, the different functions of (contract) law in this respect have been insightfully analysed by B.C. VAN BEERS, 'Is Europe "Giving in to Baby Markets"? Reproductive Tourism in Europe and the Gradual Erosion of Existing Legal Limits to Reproductive Markets' (2014) 23 *Medical Law Journal* 103–134.

Draft Common Frame of Reference (DCFR); as the name of the first instrument indicates, a more principled approach results from these. Thirdly, the reception of this academic work in the European Commission's proposal for a Common European Sales Law (CESL, proposed in 2011, withdrawn in 2015) will be assessed; the choice *not* to include any rules on immorality and illegality in this document stands out and may be seen as a missed opportunity to facilitate a debate on values underlying European integration. Finally, the approach adopted in this book, and in the Common Core project in general, will be compared to the three above-mentioned approaches in order to clarify what a case-based comparative method can teach on moral views expressed in the rules of contract law that govern the European internal market. In conclusion, it will be submitted that the discourse on integration through (contract) law should take into account questions of morality. While it may be a difficult task to ever establish common rules on immorality and illegality of contracts in Europe, it is important to foster spaces for deliberation of the morality of certain contracts in legislative, judicial and academic processes.

2. PRELIMINARY QUESTION: LAW AND MORALITY

Before looking into the different approaches that have emerged on the question of morality in European contract law, some preliminary notes may be made on the importance of clarifying to what extent consensus should be found on the approach that is taken in legislative, judicial and academic initiatives. Is it feasible and desirable to establish a (partly) common conception of contractual morality? Should the question of morality in European contract law only be addressed from a descriptive, analytical perspective, or is a programmatic, normative approach called for?

This query concerns the relationship between law and morality. One of the most eloquent and influential rebuttals of the positivist thesis of separability of law and morality was developed by Ronald Dworkin throughout his life's work. The separation thesis held that it could be determined what the law was in a certain field without making any statements as to what would be morally just and right in that area.⁵ Dworkin considered moral argument to be inseparable from legal interpretation. In his penultimate and comprehensive book *Justice for Hedgehogs*, Dworkin went as far as to argue that the two do not only interact, but

⁵ See, for a discussion of Dworkin's challenge to this thesis, J. WALDRON, 'Jurisprudence for Hedgehogs', *New York University Public Law and Legal Theory Working Papers*, paper 417 <https://law.yale.edu/sites/default/files/documents/pdf/Intellectual_Life/LTW-Waldron.pdf>.

can be united; law should be considered a branch of political morality.⁶ This is a radical statement, as elucidated by Jeremy Waldron:

Dworkin's position now is not just that arguments and judgments in legal *theory* are moral in character, but that *legal* judgments are moral judgments and legal arguments are moral arguments.⁷

Not only does this imply that a judge in interpreting a provision of law has to take into account moral arguments, but her task of finding out what the law requires is a moral task itself.⁸

Conceptualising law as morality is controversial as it suggests that the adjudication of a case (e.g. on the validity or performance of a contract) should not follow a two-system approach, in which first a separate system of positive law governing the case is identified, and then the applicable rules are interpreted in light of the community's system of morality – particularly in “hard cases” that raise interpretive controversy. Rather, moral analysis would already be part of the first stage too, encompassing legal interpretation in a one-system view of political morality. Legal rights, thus, should be considered political rights.

Legal rights, however, in this view form “a special branch” of political morality because they can be enforced through “adjudicative and coercive institutions” without there being a need for further legislation on the topic concerned.⁹ In this view, law is distinguished from other branches of political morality in institutional terms, i.e. on the basis of the particular attitude it embodies towards state force:¹⁰

The law of a community on this account is the scheme of rights and responsibilities that meet that complex standard: they license coercion because they flow from past decisions of the right sort. They are therefore “legal” rights and responsibilities.¹¹

Considering legal rights as political rights in this way raises questions. One may wonder, on the one hand, whether the institutional dimension of law does not actually set it apart from what Dworkin deems to be other branches of political morality. Does the institutional, coercive dimension of law not distinguish it from political morality as such by adding another feature to the rights involved? One may also ask, on the other hand, whether a full integration of law in

⁶ R. DWORKIN, *Justice for Hedgehogs*, Harvard University Press, Cambridge, Massachusetts 2011, p. 405. See also R. DWORKIN, *Justice in Robes*, Harvard University Press, Cambridge, Massachusetts 2006, p. 34.

⁷ J. WALDRON, above n. 5, p. 7.

⁸ Ibid.

⁹ R. DWORKIN, *Justice for Hedgehogs*, above n. 6, p. 407.

¹⁰ J. WALDRON, above n. 5, p. 8.

¹¹ R. DWORKIN, *Law's Empire*, Harvard University Press, Cambridge, Massachusetts 1986, p. 93.

political morality would not seem to imply that no (promise of) institutional enforcement of rights would be required anymore to warrant their (legally and morally) binding force. Yet, what would then be the difference between legal rights and other political rights, and how could enforcement be guaranteed?

A less radical response to legal positivism's separation thesis can be found in Dworkin's earlier work. There, he focused on the interaction between law and morality rather than on the possibility to unite them. In his theory of "law as integrity", Dworkin submitted that two principles should guide legislative and adjudicative processes. A principle of legislative integrity asks the legislature to try to make the total set of laws governing a society morally coherent, whereas a principle of adjudicative integrity requires the coherent interpretation and application of the law.¹²

Accordingly, in cases concerning the validity of a contract in light of good morals and public policy, a judge's task would be to identify the legal rights and duties of the parties against the background of a coherent legal system.¹³ Rather than requiring judges to assess a legal question from a moral point of view from the outset, this theory seems to indicate that judges have to interpret the available legal materials in light of the political morality of a society, which have already been translated, as far as possible, in laws enacted by the legislature.¹⁴ This does not mean, however, that law and morality are separated. In Dworkin's (earlier) view, judges would take a community's moral views into account when fixing legal rights.¹⁵

When contemplating these views on the relationship between law and morality, it becomes clearer why harmonisation of the rules on contractual morality – which by definition concern the relationship between law and morality – in Europe is difficult. This is because monist theories of law, such as Dworkin's, assume that a coherent political morality forms the background to the solution of specific cases. Such a coherent political morality in principle is related to a specific society or community, in other words the political unit of the nation state. Yet, in a European contract law that seeks to find a common approach to contractual morality, different national approaches cannot all decide a case at the same time. A legislature trying to develop common rules on immorality of contracts will, thus, either have to impose one European standard (fully monist model) or accommodate the plurality of Member States' approaches, insofar as possible (pluralist model).

In monist theories, it is assumed that all rules of contract law within a legal system can be traced back to a single goal, value, right or principle, whereas

¹² Ibid., p. 176.

¹³ R. DWORKIN, above n. 11, p. 225 ff.; R. DWORKIN, *Taking Rights Seriously: New Impression with a Reply to Critics*, 4th ed., Duckworth, London 1984, Chapter 4.

¹⁴ R. DWORKIN, above n. 11, pp. 243–244.

¹⁵ R. DWORKIN, *Taking Rights Seriously*, above n. 13, pp. 125–126.

in a pluralist theory different values are assumed to underpin private legal rights, since these rights address qualitatively different kinds of questions.¹⁶ From a monist point of view, moral limits to market transactions expressed in rules of contract law should, thus, be coherent and justifiable. From a pluralist perspective, however, moral limits may be drawn differently for different legal dilemmas, based on the specific values underlying certain queries; still, a pluralist will seek to determine which value decides a specific case.

An intermediate model, which could be named moderate contract law pluralism,¹⁷ acknowledges the plurality of conceptions of morality and of legal limits to markets in EU Member States. At the same time, it aspires to find a common point of reference to establish which rule decides a specific case to which rules or principles deriving from different levels of governance (national and European) apply. Harmonisation is, thus, sought not on the level of specific detailed rules indicating which contracts are valid and which are not, but rather on a more abstract level: the approach that is taken to handling questions of contractual morality in a multi-level legal order.

In the following, four approaches will be discussed, focusing on the ways in which they handled questions of plurality: the CJEU's deferential approach, the PECL's and DCFR's principled orientations, the missed opportunities in the CESL, and finally the common core approach that has been adopted in the book project lying before you.

3. CJEU: A DEFERENTIAL APPROACH

While EU law contains certain rules that entail the nullity of contracts (e.g. Article 101 TFEU on cartels), no European legal instrument has so far introduced any general provisions on illegality or immorality of contracts. Consequently, it has been for the Court of Justice of the EU to handle questions relating to the interpretation of rules of Union law having an impact on the validity of contracts in light of good morals and public policy.

The Court seems to be hesitant to interfere with national demarcations of morality of contracts. Its approach is well illustrated by its judgment in the *Omega* case, concerning the prohibition of laser gaming in Germany.¹⁸ Omega was a company that wished to organise games in which people would wear jackets with sensory tags and aim at hitting others with laser guns. Following demonstrations against the opening of Omega's laserdrome in Bonn, the

¹⁶ S.A. SMITH, 'The Rights of Private Law' in A. ROBERTSON and H. WU (eds.), *The Goals of Private Law*, Hart Publishing, Oxford 2009, pp. 113–138.

¹⁷ Inspired by constitutional pluralism. C. MAK, above n. 2.

¹⁸ Case C-36/02, *Omega Spielhallen- und Automatenaufstellungen-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, ECLI:EU:C:2004:614.

local policy authorities issued an order against the company, forbidding it to organise games in which participants would “play at killing each other”. The prohibition was based on the ground that Omega’s activities posed a risk to public order, since the acts of simulated killing and trivialisation of violence in its laser games were contrary to fundamental values prevailing in public opinion.¹⁹ The importance of the case surpassed the boundaries of the German legal order as Omega acquired its technology and equipment from a British company, Pulsar. In the administrative proceedings that followed, Omega therefore argued that the prohibition to organise laser games infringed EU law insofar as it hampered the freedom to provide services (the old Article 49 EC; now Article 56 TFEU). The German Federal Administrative Court, the Bundesverwaltungsgericht, was of the opinion that the order against Omega could be upheld under national law but was in doubt as to the compliance of this result with the European provisions on free movement of goods and services. Through a preliminary reference, the CJEU was given the opportunity to consider this question.

In its *Omega* decision, the Court held that EU law in principle does not interfere with national conceptions of good morals and public policy and, thus, took a deferential approach. Although the case fell within the scope of Union law and the Court deemed the freedom to provide services to be infringed, exceptions to the free movement provisions allowed the CJEU to circumvent the delicate topic of what consensus may be found among Member States’ laws as to questions of morality. On the basis of Articles 46 in conjunction with 55 EC (now Articles 62 in conjunction with 52 TFEU), the infringement of the free movements could be justified for reasons of public policy.²⁰ Still,

the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty (*Van Duyn*, paragraph 18, and *Bouchereau*, paragraph 34).²¹

Accordingly, the Court established that protection of human dignity, as a general principle of EU law, can fill in the concept of public policy but left it to the Member States to determine the consequences for specific cases:

It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected. Although, in paragraph 60 of *Schindler*, the Court

¹⁹ Ibid., para. 7.

²⁰ Ibid., para. 28.

²¹ Ibid., para. 31.

referred to moral, religious or cultural considerations which lead all Member States to make the organisation of lotteries and other games with money subject to restrictions, it was not its intention, by mentioning that common conception, to formulate a general criterion for assessing the proportionality of any national measure which restricts the exercise of an economic activity.²²

Here, the CJEU confirmed and further elaborated its deferential approach towards the national interpretation of public policy exceptions in light of human dignity.²³ As in earlier decisions relating to sex work²⁴ and gambling,²⁵ respectively, the Court chose not to substitute its own assessment of the morality of certain contracts for that of national legislatures.

While recognising human dignity as a principle shared by the EU Member States, the CJEU almost entirely²⁶ left it up to national authorities to determine what would be necessary to protect human dignity. The Court's approach might, therefore, be considered to account of a relatively pluralist view of the European legal order.

4. PECL AND DCFR: A PRINCIPLED APPROACH

While the European judiciary, understandably, was hesitant to interfere in domestic demarcations of morality of contracts, legal scholarship ventured beyond the *status quo* to explore possibilities for further harmonisation of contract law rules. Pioneer work was done by the Lando Commission, which developed the Principles of European Contract Law (PECL) as a model for judicial and legislative development of contract law and a basis for further harmonisation.²⁷ The PECL lay at the basis of the academic Draft Common Frame of Reference that was prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), with support from the European Commission.²⁸

²² Ibid., para. 37.

²³ See also J. KLIJNSMA, 'Harmonisatie van menselijke waardigheid in het Europees privaatrecht?', *Nederlands Juristenblad* 2011, 1472; M.R. MARELLA, 'The Old and the New Limits to Freedom of Contract in Europe' (2006) 2 *European Review of Contract Law* 257.

²⁴ Case C-268/99, *Jany and others v. Staatssecretaris van Justitie*, ECLI:EU:C:2001:616.

²⁵ Case C-275/92, *Her Majesty's Customs and Excise v. Schindler*, ECLI:EU:C:1994:119.

²⁶ Apart from a proportionality test conducted by the Court; Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, ECLI:EU:C:2004:614, para. 39.

²⁷ O. LANDO and H. BEALE (eds.), *Principles of European Contract Law*, Parts I and II, Kluwer Law International, The Hague 2000, pp. xxiii–xxiv.

²⁸ C. VON BAR and E. CLIVE (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference*, full edition, Sellier, Munich 2009.

The PECL's Chapter 15, on illegality, offers the following rule:

Article 15:101: Contract Contrary to Fundamental Principles

A contract is of no effect to the extent that it is contrary to principles recognised as fundamental in the laws of the Member States of the European Union.

The Comments to Article 15:101 PECL specify that its formulation

is intended to avoid the varying national concepts of immorality, illegality at common law, public policy, *ordre public* and *bonos mores*, by invoking a necessarily broad idea of fundamental principles of law found across the European Union, including European Community law.²⁹

Accordingly, recourse to national conceptions of morality should be avoided when interpreting this provision, and guidance may be found in EU Treaties, the EU Charter of Fundamental Rights and the European Convention on Human Rights.³⁰

In the DCFR, which equally avoids references to the “illegality” or “immorality” of contracts, the following provision is included:

II.-7:301: Contracts infringing fundamental principles

A contract is void to the extent that:

- (a) it infringes a principle recognised as fundamental in the laws of the Member States of the European Union; and
- (b) nullity is required to give effect to that principle.

The drafters aimed for the terminology to be “descriptive and neutral”. They followed the PECL in seeking guidance in European human rights documents rather than national conceptions of morality.³¹

Both the PECL and the DCFR, thus, are based on a universalist ideal that aims to ensure that contracting parties get the same decision on their dispute independent of in which state their case is adjudicated. As Ole Lando, chairman of the committee that drafted the PECL, once explained, choice-of-law rules in private international law could in his opinion not guarantee that predictability.³² Moreover, applying the law of the forum would

²⁹ O. LANDO, E. CLIVE, A. PRÜM and R. ZIMMERMANN (eds.), *Principles of European Contract Law*, Part III, Kluwer Law International, The Hague 2003, p. 211.

³⁰ Ibid.

³¹ C. VON BAR and E. CLIVE (eds.), above n. 28, p. 536.

³² O. LANDO, ‘My life as a lawyer’ (2002) *Zeitschrift für europäisches Privatrecht*, 508, 516 and 519.

encourage forum shopping. Therefore, Lando sought to unify substantive contract law in the EU. The drafters of the DCFR, who aimed to identify best solutions for contractual questions, adopted this approach. They took into account national contract laws as well as the EC *acquis communautaire* in the field of contract law and relevant international instruments, in particular the Vienna Sales Convention.³³

Unlike the CJEU, which deferred to Member States' laws, the drafters of the PECL and DCFR chose to address contractual morality by embedding it in a uniform rule entailing the nullity of contractual provisions that are contrary to or infringe upon fundamental principles.³⁴ In doing so, they recognised that “illegality and immorality are areas in which satisfactory general rules are difficult to formulate in any detail and even harder to apply”.³⁵ Yet, the idea was that a comprehensive instrument of contract law should include rules on the topic,³⁶ which could be made operational through a discretionary and flexible approach.

This principled approach seems to be in line with the Dworkinian idea that law is not detached from morality. It could be read and applied in line with the principles of legislative and judicial integrity that determine that a judge should interpret the law in a coherent manner to establish which party has the strongest right to win the case.

And yet, looking at the PECL and DCFR from a Dworkinian perspective, a weakness of the principled approach adopted in these instruments immediately becomes clear. Law as integrity assumes that it is possible for a Herculean judge³⁷ to define a scheme of principles that fit all legislative materials and case law within the political community in which he assesses the case. In European contract law, however, such a coherent scheme of principles is not generally thought to be available as the EU can at this moment hardly be said to embody a political community with shared moral views.

Nevertheless, the fact that a group of academics from all over the EU managed to agree upon a model provision regarding contractual morality suggests that

³³ Communication from the Commission to the European Parliament and the Council: European contract law and the revision of the ‘acquis’: the way forward, COM (2004) 651 final, para. 3.1.3; C. VON BAR and E. CLIVE (eds.), above n. 28, pp. 19–20.

³⁴ This contribution does not address the technical differences in wording of the PECL and DCFR. On deviations from the PECL in the DCFR, see C. VON BAR and E. CLIVE (eds.), above n. 28, p. 16.

³⁵ H.L. MACQUEEN, ‘Illegality and Immorality in Contracts: Towards European Principles’ in A.S. HARTKAMP et al. (eds.), *Towards a European Civil Code*, 4th ed., Kluwer Law International, Alphen aan den Rijn 2011, p. 570.

³⁶ *Ibid.*, pp. 555–557.

³⁷ R. DWORKIN (1984), above n. 13, Chapter 4.

at least some common ground can be found on this topic.³⁸ As we shall see, the European Commission's choice not to include a similar provision in its proposal for a Common European Sales Law may, therefore, in some respects be considered a missed opportunity. The search for a "common core", however, could further the debate on immorality of contracts in European contract law.

5. CESL: A MISSED OPPORTUNITY

The PECL and DCFR formed the basis for the Common European Sales Law (CESL, October 2011), an optional instrument that was developed by the European Commission in close cooperation with an Expert Group on European Contract Law.³⁹ While the Commission withdrew the proposal in 2015, following a lengthy academic and political debate, the CESL still merits discussion here, if only for the fact that it was the most comprehensive legislative proposal on European contract law so far.

Not surprisingly, in light of differences between Member States, the Commission chose not to include certain sensitive topics. The CESL's preamble reads:

(27) All the matters of a contractual or non-contractual nature that are not addressed in the Common European Sales Law are governed by the pre-existing rules of the national law outside the Common European Sales Law that is applicable under Regulations (EC) No 593/2008 and (EC) No 864/2007 or any other relevant conflict of law rule. These issues include legal personality, the invalidity of a contract arising from lack of capacity, *illegality or immorality*, the determination of the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law and the law of torts. Furthermore, the issue of whether concurrent contractual and non-contractual liability claims can be pursued together falls outside the scope of the Common European Sales Law. [emphasis added]

This approach may, on the one hand, be considered to accept legal plurality among the Member States. It may, on the other hand, be seen as a missed opportunity to find out to what extent there is consensus on how to handle questions of contractual morality or to what extent consensus may be reached.

³⁸ See also C. MAK, 'Constitutional Aspects of a European Civil Code' in A.S. HARTKAMP et al. (eds.), *Towards a European Civil Code*, 4th ed., Kluwer Law International, Alphen aan den Rijn 2011, p. 348.

³⁹ 'Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law', COM (2011) 635 final.

In particular, by not including a provision similar to Article II.-7:301 DCFR in the proposed CESL, the EU legislature excluded contractual morality from the political debate on a common sales law. Furthermore, had the proposal been successfully adopted, inclusion of a provision on contractual immorality would have made it possible to test in practice how European judges would have applied such a provision.

6. LOOKING FOR A COMMON CORE: A CASE-BASED COMPARATIVE APPROACH

The debate on contractual morality, consequently, at least for the moment has fully returned to the domain of legal scholarship. This volume on “immoral contracts” attests that development. It forms part of the project on the Common Core of European Private Law, coordinated by Ugo Mattei and Mauro Bussani.⁴⁰ In line with the project’s overall aims, the following chapters give an overview of similarities and differences in the solution of specific cases in EU Member States. Uniquely, as many as 26 of the 27 current Member States (post-Brexit), as well as England and Scotland, have been included. National reporters from each country have analysed 12 cases in light of the rules on contractual immorality in their legal system. Comparison of the answers of the national reporters clarifies to what extent a common core can be found on the question of how immorality of contracts is dealt with in the Member States.

The common core approach has some features that make it especially useful for analysing topics that cannot fully be understood by only looking up the relevant provisions in national civil codes or case law. While an overview of national rules on topics of private law was also included in the notes to the PECL and DCFR, the common core approach goes further than enumerating rules. It requires national reporters to analyse legal problems and, thus, indicate to what extent a specific problem may be solved in a similar manner in different countries, irrespective of the differences in national legislation, case law and procedure. As Mattei and Bussani state, common core research may be considered “a very promising tool for unearthing deeper analogies hidden by formal differences”.⁴¹

Another distinguishing feature of the common core methodology is that it explicitly takes into account factors that go beyond the applicable rules in determining the outcome of a case. Building on the work on legal-comparative

⁴⁰ M. BUSSANI and U. MATTEI, ‘The Common Core Approach to European Private Law’ (1997/1998) 3 *Columbia Journal of European Law* 339, 339–356; see also <www.common-core.org>, below n. 41.

⁴¹ <<http://www.common-core.org>> About, Approach, 1) Goals.

methodology of Schlesinger and Sacco,⁴² “legal formants” that influence decision-making on specific cases are described in the national reports.

A weakness of this method of research might be seen in its lack of guidance on how to proceed from the findings of the comparative analysis. In this respect common core research differs from principles projects, which aim at unification:

If we should sum up in one word the differences between the common core research and the common principles approach, that word might be “skepticism”. The common core project, just as the Cornell project, uses value skepticism as the most important guideline: its aim is to provide a picture of the law existing in the European systems in a number of important areas which has to be as reliable and exact as possible. Whether this situation is legally efficient or rational is of no concern to the scholars involved.⁴³

Importantly, this implies that common core research on principle does not take a stand on the question of how law relates to morality and how legal plurality should be dealt with in rules on contractual morality. The project does not aspire to prescribe how European contract law should develop but aims at contributing to a common legal culture.

Nevertheless, the importance of the national reports on immoral contracts included in this volume should not be understated. Unlike the proposal for a CESL, which did not include any rules on the topic and accordingly discouraged further debate, the mapping of national approaches in order to establish to what extent there is common ground can further the discussion on whether and how to deal with questions of contractual morality in the EU. This can be done for specific subjects that regard multiple Member States, such as cross-border surrogacy or credit services. Furthermore, the maps drawn in this book may also inspire scholarly debate, and eventually legislative initiatives and case law, on the general question of how to approach immoral contracts in the multi-level European legal order.

7. CONTRACTUAL MORALITY IN TIME AND SPACE

In times in which the EU is under economic and societal pressure, it may be emphasised that the discourse on integration through (contract) law should take into account questions of morality. This topic, perhaps more than any other

⁴² R. SACCO, ‘Legal Formants: a Dynamic Approach to Comparative Law’ (1991) 39 *American Journal of Comparative Law* 1, 1–34 and 343–402. See also <www.common-core.org>, About, Approach, 3) and 4) Method.

⁴³ <www.common-core.org>, About, Approach, 5) Method – The common core approach in the European context.

doctrine of contract law, underlines differences in Member States' moral views on specific legal questions. Its analysis, thus, serves to map where tensions arise and to provide an informed basis for discussion of delicate topics in such fields as employment (sex work, dwarf tossing cases), family (surrogate motherhood), and credit (usurious contracts).

Apart from the territorial dimension, finally, a complicating factor that may be added to this overview is the inherently fluid nature of contractual morality. As the comments to Article II.-7:301 DCFR aptly state, “[t]he public policy underpinning principles recognised as fundamental may change over time, in accordance with the prevailing norms of society as they develop”.⁴⁴ Defining the relationship between law and morality in contract cases is not an exercise that is done once for eternity but has to be repeated for each case that arises.

The following chapters may, therefore, be considered to present a picture of contractual morality in the EU as it now stands. In a broader sense, however, they illustrate the importance of creating and maintaining spaces for public discourse on morally sensitive matters – in legislative processes, judicial interaction and academic projects. While a truly European society or community of values may not exist and may not come into existence in the near future, Dworkin's moral assignment for lawyers finds a justification in the unrest characterising the interaction of EU and Member States on these sensitive issues. It requires legislators, judges and scholars alike to act morally responsibly by not postponing moral analysis of specific problems until they have defined which legal rules govern the cases at hand but rather make moral analysis part of their reasoning.⁴⁵

⁴⁴ C. VON BAR and E. CLIVE (eds.), above n. 28, p. 537.

⁴⁵ See also J. WALDRON, above n. 5, p. 28.