Introduction

Pier Giuseppe Monateri

Contract has never been more alive than nowadays and pervasively dominates world transactions. Notwithstanding its enduring presence and the complex apparatuses of technicians devoted to managing clauses and interpretation, the inquiry on the proper nature of contract, on its status and collocation within private legal taxonomies continues to be a controversial exercise. This comprehensive book, which collects the contribution of different scholars from different backgrounds, offers a thoughtful survey of theories, issues, cases, in order to reassess the present vision of contract law. The adjective ‘comparative’, prominent in the title, refers both to the specific kind of methodologies implied, and to the polyphonic perspectives collected on the main topics, with the aim of superseding the conventional forms of representation. In this perspective, the work engages a critical search for the fault-lines, which cross traditions of thought and globalized landscapes.

Moving from a vast array of dissimilar inclinations, which have historically produced heterogeneous maps of law along with protean representative aesthetics, the book is built around four main groups of insights, including: the genealogies of contractual theoretical thinking; the contentious relationship between private governance and normative regulations; the competing styles used to stage contract law, and the concurring opinions expressed within the domain of other disciplines, such as literature and political theory; the tensions between global context and local frames and the movable thresholds between canonical expressions and heterodox constructions.

Part I (‘Theories and Genealogies’) deals with fundamental epistemological issues and aims to dissect the underlying structure of the most accredited conceptual frameworks. How can we critically rebuild a theory of theorizing contract law as a separate field of law? How can we reassess the genealogy of contract law, managing the darker legacies embedded in Roman tradition? As it has been noted, despite the long history and the recent increase in theorizing about contract law, the nature and purpose of such theorizing remain under-discussed and many basic questions remain unanswered. Competing visions have framed the intellectual debate: autonomy theories have confronted property and

2 *Comparative contract law*

reliance theories and from their impact, if not from their collision, a new creature, a hybridized form of scientific construction has taken shape. On a parallel level, the trans-historical and inter-cultural investigation paves the way to the possible corruption or contamination of the normative purity predicated to contract law by legal science. A deeper look reveals the quest for new taxonomies, for other schemes of intelligibility apt to valorize the specific role played by 'contracticles', namely by different types of transactions to be found at the lowest level of generality. In this perspective, a supplementary bulk of fragmented knowledge opens meaningful fissures within the body of systematized codes. The reflection on the actual morphology of contract rules also reveals the growing influence of social justice in private law and uncovers the failures that can be ascribed to the liberal conceptions of classical legal thought. In the present context, an intriguing and illuminating exercise could be to explore the relationship between what would be called 'traditional' contract law and 'regulatory contract law'. This is not a well-established topic in the comparative law literature and rouses broader and more systematic inquiries.

Part II ('Market Values and Their Critiques: Private Governance and Normative Regulations'), developing the arguments introduced at the end of Part I, reports the most interesting positions on the relation between private governance and normative regulation. Once again, the issues of complexity and spontaneous order are under scrutiny, in order to pursue a strategic response to decisive questions, such as: how is it possible to maximize the satisfaction of the largest number of compatible goals in complex systems such as contemporary societies? How is it possible to secure an acceptable degree of certainty and to have efficient rules in order to achieve cooperation? On these premises, the contributors re-discover the various political representations of private autonomy and detect the key function fulfilled by the principle of 'party autonomy' within the political economy of private ordering in today's global scenery. According to a skeptical view, it could be argued that even one of the most powerful creations of the legal science underlying classical legal thought, which lasted almost unchanged through the second globalization of law, has now come to an end or, in any case, has been dramatically transformed. A critical perspective aims both to trace and dissect the epiphanies of this substantial crisis and to propose new re/de-constructive projects. Another important and closely related topic is the tense relationship between freedom of contract and judicial intervention on the agreement. In particular, the 'jurispathic' power asserted by national courts is scrutinized both in its theoretical foundations and in its operational way of functioning. The judicial creation of exceptions, of

cases of contractual terms' inapplicability, seems to construct a kind of supra-competence of the judiciary, enhancing a newfangled sovereign order, based on a hyperbolic claim.

Part III ('Representations and Narratives') stages a compelling portraiture of the representational models, which have structured the multifarious narratives on contract law. Law, literature and politics are here intersected in a fruitful interplay of mutual illuminations. The literary *emplotment* of legal traditions is disclosed with its inner strategic potentialities. A particular attention is reserved to the wavering shifts which have animated the American legal debate, from the assertive and dogmatic rise of a classical theory of contract to its fall and disintegration under the fierce attacks of legal realism. The unresolved alternation of order and crisis, stability and change, certainty and instability is captured and expressed by the means of the texts written by distinguished intellectuals. The polyphonic voices are juxtaposed and assembled; legal tradition is de- and re-composed through the accepted discourses and the prospective imaginations of scholars and judges, here presented as mindful 'legal humanists'. In a corresponding way, literature comes to vivify the normative world in which a community lives: novels, poetry, fairy tales, dramas and other genres express aspirations and perceptions, evaluations and expectations. Law lives in literature and is questioned by literature. Prospecting an unavoidable bond, an inseparable relation between law and literature, the volume offers a bright ensemble of diachronic examples, which substantiate the literary lecture of contractual theories and rules from the Renaissance to the Victorian era, and also reproduce the deep quest engaged by postmodern compositions. The interdisciplinary approach allows us to disclose the inconsistencies of the contractual paradigm (the tenet according to which the social institution we are used to naming the 'State' has been established by means of a (social) 'contract'), as one of the most appealing ideas in the history of modern and contemporary Western political thought. In fact, searching for the identification of who is entitled to sign the 'original' contract, one could find that this abstract contractor is concretely personified and identifies as a male, white and Christian human being. The two most important requirements for a man to become such a full member are heterosexuality and able-bodiedness or ableness.

Part IV ('Global Context and Local Frames') focuses on the process by which global ideas, principles and institutions could eventually be reinterpreted through local frames of reference. Dealing with the main arguments introduced in Part I, in this renovated de-contextualization and

4 *Comparative contract law*

re-contextualization framework, the theorization refers to a dis-embedding/re-localizing strategy. On this ground, the theoretical paradigms through which a contract may be read are previously identified in broader terms, emphasizing their essential characteristics and, subsequently, are measured and operationally tested with regard to the specificities of selected jurisdictions. An analogous exercise is meant to make clear the proper functioning both of doctrines and of remedies. Therefore, the doctrine of good faith is scrutinized according to its general scope and to the exceptional application made in recent decisions of US Courts. Analogously, Part IV presents a critical genealogy of promissory estoppel, dwelling upon the sharp break from the traditional approach and the paradigm shift from the reasonableness of the conduct during the negotiations and moves in the direction of the obligation to act in good faith. A stimulating analysis, conducted through comparative methodologies, probes the binomial technology/contracts and provides the observer with a comprehensive view of local responses to common universal problems and developments posed by use of technology in contracts.

Comparative Contract Law is intended to be an original contribution to the ongoing elaboration of contractual theories and a contemplative effort to explore uncharted paths of inquiry at the intersection of different fields of research.