The Contract Law Codification Process in Europe: Policies, Targets and Time Dimensions

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I. INTRODUCTION

This contribution addresses the issues implied by the following questions: (a) What is the contract law to be codified? (b) What is the possible impact of a European Contract Law Codification upon the other private law fields? (c) Which are the driving forces behind and ahead of the European codification process?

The paper approaches these issues by focusing sub (II) on the fragmentation in different layers of European Contract Law within and across national frontiers, and on the bearing that this ‘stratification’ can have on the choice of adopting a code with either a ‘regional’ or a world-wide scope. In the perspective pursued by the Conference, sub (III) I will emphasize a true borderline subject such as the recoverability of pure economic loss in European law. This is particularly meant to stress the kind of awareness required by the debate when dealing with a piecemeal codification effort. Sub (IV) the paper tackles some issues implied by – and not always made explicit within – the discussions about the European codification: the alleged parallelism between economic and legal integration, the role of scholarship within the European legal stage, the ‘pride and prejudice’ aspects of the legal uniformity v. legal diversity debate.

II. THE CONTRACT LAW TO BE CODIFIED

1. A Broken Glass

a) Coherence in Contract Law?

In approaching this subject I do not aim to tackle the technical aspects of each field of contract law.¹ I will rather point up a general feature of the domain,

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¹ I will not focus either on other crucial problems for the would-be Code, i.e. the linguistic choice and appropriate semantic level to be attained by its wording. On the latter problems see e.g. A. di Robilant & U. Mattei, in ‘The Art and Science of Critical Scholarship’, (2001) 75 Tulane Law R., 1053; K. Kerameus, ‘Problems of drafting a European Civil Code’, (1997) 5 ERPL, 475, 482. As far as the feasibility of a code is concerned, there is no doubt that a great deal depends on the quality and the semantic level chosen by its drafters, on its capacity to codify common understandings, and on its ability to reflect the diversity of

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which runs across technicalities and, nonetheless, seems to be of critical importance in view of whatever ‘harmonizing’, not to mention ‘codifying’, purpose.

One can easily realize that in the contract law field not everything is as clear or plainly readable as the common legal discourse would expect it to be. Looking at this area of the law from a domestic standpoint, national contract law everywhere appears far from being compact, namely far from showing an inner and coherent logic that corresponds to the features of what the municipal lawyers regard as a ‘system’. Observing the same area from the comparative law point of view one finds that there exists not only a differentiation across legal concepts and languages – it is well known, for instance, that contract, Vertrag and contrat are not synonyms\(^2\) – but also a stratification affecting legal rules.\(^3\) I will dwell on the latter phenomenon.

\(b)\) Contract Law Layers

European contract law systems are deeply and increasingly characterized by an evident fragmentation.

(aa) First, we have consumer contracts – a consumer being ‘a natural person who is acting for purposes which are outside his trade, business or profession’: to comply with the definition of article 2(b) of the Directive on Unfair Terms in Consumer Contracts of 5 April 1993. These are contracts whose one remarkable feature is the attenuation of the widespread dogma of consensualism, namely the idea according to which the whole of the effects of a contract descend from the meeting of wills fixed at the moment of its formation. Indeed, suffice to recall that the consumer, regardless of any different

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the legal cultures that operate in Europe today. See A. Gambaro, ‘Codice Civile’, in: Digesto IV, Civile, II [1988], 442. Moreover, a European Civil Code would not meet, in and of itself, the need for a European interpretative community: the former and the latter, a common code and a common culture, call for each other. See infra; nn. 5, 7 and 9.


clause s/he has subscribed to, can usually withdraw his/her offer, can rescind the contract, or can terminate it.4

(bb) Secondly, we find the special and very important niche of employment contracts, which are still quite strictly controlled by national collective agreements and specific legislative rules across the continent.5

(cc) Then, we have the so-called business contracts, where the parties are both entrepreneurs. These contracts, even though they are not always impervious to review in terms of inequality of bargaining power, are out of reach of EU consumer law and only in some fields (e.g., technology transfers, franchising, late payments in commercial transactions, payment and security settlement systems) are they subject to pieces of EU legislation. Moreover, business contracts – particularly when international and involving large corporations6 – usually either self-regulate the choice of both forum and applicable law, or (most of the time) get possible disputes out of ordinary jurisdictions by resorting to arbitral awards made by private arbitrators.

(dd) Finally, we have the large body of what we could call, by default, ‘civil’ or, as some may prefer, ‘ordinary’ contracts. This is the layer, together with that of the consumer’s, to which the current European codification debate usually refers.

2. The Business Practice

On this stratification some further remarks must be added. The first concerns the ‘business layer’, the second will deal with the ‘ordinary’ contracts.

A distinctive feature of most business contracts, especially when international, is that they consist to a significant extent of the actual contracting practices of lawyers and their clients, including what they say to one another at the negotiation stage.7 All this flows into the written contract and for this reason contract


6 Especially when these are international contracts they entrust their legal regime to the kind of customary law commonly known as lex mercatoria. On the critical choice of whether or not to include these contracts within the Code, see K.D. Kerameus, ‘Problems of drafting a European Civil Code’, (1997) 5 ERPL, 475 and infra n. 5.

practice has since long been and still is moving from short to long contracts. But the foregoing also implies that specific national law may come to matter increasingly less as contracting parties and their counsel write increasingly more of their own law.

This occurrence is worth stressing especially when one notes that most of the written private parties' contract law is specifically designed to amend or evade specific national legal provisions, or to substitute specific agreements between the parties for generally applicable rules or principles.\(^8\) To be sure, some of the most extreme of these evasions or substitutions would not be enforced by courts if litigated.\(^9\) Indeed, many contract terms that would not be enforced by courts at the time when they were written are not submitted to courts, and when one party challenges them, the other usually settles.\(^10\) This is why some contract terms may be written in contracts for years without being subject to judicial veto. The longer they survive, and the more prevalent in practice, the more likely they are to eventually be approved by courts as long-standing business practices when they are finally challenged. Hence, certain contract terms that 'good lawyers' are convinced are not judicially enforceable are precisely those that will constitute future contract law.\(^11\) In any event, contract practice may be changing the substance of contract law far more rapidly than national legislation, international legislation or academic law-making.\(^12\)

Another highly relevant feature in contract practice is now reaching huge proportions across the business law community.\(^13\) This involves American-style long contracts, English as the language of contracts, large American and English law firms as the writers of contracts, the choice of US or English law as the substantive law of the contract, and the choice of the United States or England as the jurisdiction for litigation concerning the contract. It may well be that common lawyers are obtaining more of the business because they are more adept at giving clients what they want and less prone than civil lawyers to tell

\(^{8}\) Shapiro (n. 7), 128–129.

\(^{9}\) Shapiro (n. 7), 129.

\(^{10}\) See e.g. the field research done by H. Beale and T. Dugdale, 'Contracts between Businessmen: Planning and the Use of Contractual Remedies', (1975) 2(1) British J. Law and Society, 45, 51 et seq., 59 et seq.

\(^{11}\) Shapiro (n. 7), 129.

\(^{12}\) Shapiro (n. 7), 129.

\(^{13}\) In view of the possible inclusion of the latter community within the paradigm of the 'artificial societies', see B. Schäfer and Z. Bankowski, 'Mistaken Identities: The Integrative Forces of Private Law', in: M. van Hoecke and F. Ost (eds.), The Harmonization of European Private Law (Hart: Oxford, Portland, Oreg., 2000) 21, 30 et seq.
the clients that what they want the law forbids.\textsuperscript{14} But still the point is that business contract law in practice is becoming more and more the law set out in long contracts written by American and English lawyers in the English language and arbitrated or litigated under American or English law. Thus the real risk is that – without both the technical awareness and the strategic vision that I seek to outline later – any European codification effort in this field may end up as a mere rhetorical exercise.

3. The ‘Ordinary’ Layer

Taking seriously what has been said so far, and in spite of the Lando Commission’s wishes, ‘ordinary’ contracts are bound to represent the main area that can actually be targeted by (or seen within the scope of) the ‘Principles of European Contract Law’. Even within this limited perspective, however, what has to be stressed is that European law-makers, legal professionals and ultimate law-users could expect a much more neat and clear approach than the one so far embraced by the pioneering Commission. Let me set forth two simple, but in my view decisive, remarks.

First and foremost the draft fails to meet a basic requirement that seems an indispensable condition for fostering the adoption, and then the implementation or simply the use, of a European Contract Code. Indeed, what is missing is a precise notion of the ‘contract’ that the Project intends to codify.

It is true that in almost every system we find a category which includes all the agreements acting as sources of obligations between the parties and implying a reward to the promisor: the category that is named contrat, contract, Vertrag, contratto and so forth. It is also true, however, that these various labels are not mutually overlapping.\textsuperscript{15} The working language of the Lando Commission being English, one can wonder whether or not the ‘contract’ codified therein includes gratuitous agreements such as gifts or gratuitous deposits. As is well known, in France and Italy a gift is a contract and a gratuitous deposit is a contract; in England neither of them is included in the notion of contract.

Besides, one may wonder whether the discipline of contract under review would apply only to agreements intended to be a source of obligations or whether it would \textit{per se} be sufficient to create a real security (such as a pledge or a mortgage), whether it would \textit{per se} be sufficient to the transfer of movable property, or whether it would \textit{per se} be sufficient to the transfer of property in land. If the answer to the last three questions is negative, one could ask about the further element to be coupled with the consent of the parties (or of the party concerned). Should we need, according to circumstances, an \textit{Auflassung}, an

\textsuperscript{14} Shapiro (n. 7), 130; H. Kötz, ‘The Trento Project and Its Contribution to the Europeanization of Private Law’, in: M. Bussani and U. Mattei (eds.), (n. 7), 118.

\textsuperscript{15} See Sacco, ‘Formation of Contracts’ (n. 2), 191 \textit{et seq.}
inscription, a trascrizione, a registration – i.e. a series of further formal requirements? Should we need, according to circumstances, the Übergabe, the consegna, the livraison, that is to say the delivery of the object of the transfer?¹⁶

The second remark is less technical but perhaps even more important, because it entails the role of contract law codification within the overall European legal harmonization process. I refer to the awareness which is needed of the possible outcomes stemming from the reference to such notions as, for example, 'good faith' in a transnational context (see, e.g., arts. 1:106(1) and 1:201 of the Lando Principles).

For sure, such a rule can be of much help – for instance, in overcoming the obstacles which are interposed in many systems by local lawyers, judges and scholars to the repression of unfair behaviour which ends up by affecting the contractual relationship.¹⁷ On the other hand, there is always a risk, which must be neutrally assessed, because exposure to it implies the answer to the question about the costs one intends to reduce through the codification. The risk is that through notions such as 'good faith', national courts recycle the (after the codification) repealed national rules – or interpretations of the new rules built upon the old mentality.¹⁸

At the very least, this makes it straightforwardly clear how strictly connected to and necessary by a supranational code is the establishment of a supranational Supreme Court charged with the task of assuring the attainment of an acceptable threshold of uniformity in the interpretation of the legal rules.

¹⁶ See Sacco (n. 2) 191 et seq. On all this, one must add, little if any assistance comes from other texts that have been conceived in a transnational perspective. No assistance comes from the Vienna Sales Convention, which does not deal with gratuitous agreements and even states its disregard (art. 4, b) about the issue of the 'effect which the contract may have on the property in the goods sold'. Not even the Unidroit Principles are of much help in this respect, because they cover only commercial contracts (though in the light of these Principles it is not completely clear what a commercial contract is precisely, apart from the exclusion of consumer contracts), they do not deal with gratuitous agreements nor do they deal with transfer of property.


¹⁸ See Sacco, 'Formation of Contracts' (n. 2), 198 et seq.; H. Kötz and Flessner (n. 3), 117. Consider a German plaintiff who brings an action in France against a French entrepreneur, his contractual counterpart, claiming that the latter breached the duty of good faith (in terms of Schutzpflicht) – say because, while the defendant was performing his contractual obligation of delivering a good he damaged a different interest of the plaintiff. There is no doubt that such a lawsuit could end up being a waste of time and money – under no matter what provision imposing good faith – whenever the French judge argues that the duty upon the defendant has to be seen just as 'une obligation de sécurité de moyens'. On the scope of the latter category see G. Viney, Introduction à la responsabilité (Paris, L.G.D.J., 1995), 284 et seq.
4. Layers and Lessons

Whatever target is pursued as regards European legal integration, if such integration is to be effective and not merely wishful thinking, the above remarks seem worthy of consideration.

In particular, the need to take account of contract law stratification appears enhanced if we are to be fully cognizant of the legal relationships that we want to bring about and which are likely to be created by a code or by any other authoritative regulation. More specifically, such analysis seems necessary in order to understand (i) what kind and what level of integration to pursue, (ii) for what areas of contract law, (iii) what is the correct balance to strike between the widely shared goal of reducing transaction costs on the one hand, and on the other, envisioning options grounded on the maintenance of the status quo, the enactment of a few directives, the adoption of a Code, the drafting of a sort of Restatement, and so forth.

5. The Geo-Political Role of a Contract Law Code

All the foregoing seems to me to lead straight to another problem that any European code drafter should tackle. The question is the geo-political purport of the would-be European Code, i.e., the role we want to make this code play in the world-wide legal arena.

Because this problem lies beyond the scope of this paper, I will restrict myself to two simple questions. Is this contract code meant to be the by-product of a Euro-European debate, focusing on the needs of European law-users and tying the chances of its possible circulation outside the continent to its inner technical features, or to the EU's political prestige? Should this European code, on the contrary, be thought of since its very conception as a possible leading pattern in the ongoing worldwide competition among legal models?

This is a kind of problem that classical nineteenth- and twentieth-century national codes could, and actually did, overlook. Yet it seems to me that the ongoing current situation of political and economic affairs around the globe is

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21 The costs connected with the status quo are easy to specify: they take mainly the form of information costs. In a context where several legal systems may be involved in any particular legal transaction, diversity creates unpredictability and requires a specialized bar. As a consequence, a significant proportion of business resources must be devoted to paying specialized practitioners to give transactional and litigation assistance, rather than being invested in wealth maximizing activities. On these points see U. Mattei (n. 20). See also supra, n. 7.
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urging the ‘European codification’ debate to pay more attention to the issue than the latter has received so far.

To outline what the object of this ‘attention’ should be, let me highlight the following. At stake here is a clear option to be taken. The kind of choice scholars and legislators should make is whether to adopt a single-level or a double-level Contract code.

a) The Double-level Code

Such a code could consist, on the one hand, of a set of provisions dealing with consumer contracts and ordinary contracts (including or excluding from its scope employment contracts, according to the social and economic policies we wish to enforce through the code). Its redactors could take as a starting point EU consumer law and the drafts prepared by the Lando and Gandolfi Commissions and elaborate on those rules: the text should be conceived and written with a view to coordinating what is worthwhile of EU law in force and to gather those notions, techniques and remedies which are as common as possible to the European legal cultures. This is a task that, as far as I know, is not so distant in nature and scope from what is currently being pursued by Professor von Bar’s Study Group and its decentralized contract law units.

The second codification aim could be the production of a sort of Business Contracts Code. This should both restate, whenever useful, EU business law and ‘Europeanize’, whenever and if necessary, the rules actually adopted in international commercial transactions. To be sure, some could see this twofold code as a transnational updating of the domestic dichotomy between commercial and civil codes. The point is, however, that the dissociation outlined here could usefully lend itself to meeting the needs of the transnational perspective that must be adopted by any European code drafter. Furthermore, the planning of the second layer could easily start with hardening the ‘soft-law’ approach of the UNIDROIT Principles of International Commercial Contracts and adapting what is worth keeping from United States UCC and other international instruments such as the Vienna Convention on International Sale of Goods. This second layer could mainly draw its strength from its clarity and its orderly embodiment of what is dispersed across EU law as well as across long contracts practice and commercial customs around the world. Yet all that would possibly allow this ‘part’ of the code (and European contract law professionals) to enter the competition for ‘applicable law’ leadership in the transnational business arena. Lastly, and politically speaking, in view of the preparation of both texts, the drafters should force themselves to decide whether to bear the burden of a time-consuming mediation between continental and English and Irish legal cultures (I stress ‘cultures’ and not ‘rules’)22 or simply to leave the European

22 See also infra n. 27 and corresponding text.
common law countries with the option of following the continental, its own or the former colony's model.

b) The Single-level Code

This, in its turn, would be an all-inclusive classical contract code, akin to the one being drafted by the Lando Commission, merging rules which are conceived as fitting both civil and commercial contracts. This kind of code, in and of itself, may possibly not withstand competition in the business arena as I hinted before, but its drafters could make another choice. The latter should have both a technical and a political meaning. This code should be aware of its non-business vocation and, with all due respect to the legal traditions, represent a sort of counter-power option, the European way to a fair balance of weight between counterparts, to the repression of any form of discrimination,\(^{23}\) to the protection of human rights values\(^{24}\) and to a cost-saving technical clarity.\(^{25}\) All these features could make this

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\(^{24}\) Cf. H.P. Glenn, Legal Traditions of the World: Sustainable Diversity in Law (Oxford, OUP, 2001), 116 et seq. See values and rules embodied in the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, in EC OJ 2000 L 180/22; esp. art. 3, 1st paragraph, litt. h (as to the application of the Directive to 'access to and supply of goods and services which are available to the public, including housing') and art. 14 ('Member States shall take the necessary measures to ensure that: (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished; (b) any provisions contrary to the principle of equal treatment which are included in individual or collective contracts or agreements, internal rules of undertakings, rules governing profit-making or non-profit-making associations, and rules governing the independent professions and workers' and employers' organisations, are or may be declared, null and void or are amended.').

\(^{25}\) This is an option to be also left open to the 'ordinary and consumer contracts' leg of the double-level code. However, as soon as one takes into consideration a) actual European need of entering the competition for the legal pattern leadership, b) time, cultural and technical mediation costs as driving factors of any codification effort, one easily realizes that the competitive 'value added' of such a double-level code has to be found much more and much more consistently in its business contracts part than in its Euro-European not
code what Europeans should expect their code to be, that is, a code which encompasses the most advanced values and rules of Western legal civilization.

The code-drafting task should not, however, be carried out overlooking the possible geo-political role of such a code. Again leaving aside the common law countries with the option of following either western models, the codification process should take into account, and possibly include in the process itself, scholars and practitioners coming not only from eastern Europe, but also from Latin America, Africa and all the other areas of the world where the continental 'patrimonial' law has had and still has a deep sway over the legal tradition, over the civil codes and the other private law rules concerned.  

Both above choices take for granted the need of having a code – a necessity on which this paper will dwell later – and none of them, of course, settle either the problem of the actual implementation and enforcement of such a code, or the related issue concerning the establishment of a (single or double, for 'civil' and 'commercial' matters) uniformity-driven Supreme Court. Both the above choices may do away with the rhetoric of a convergence between common and civil law, leaving this 'coming together' to its own dimension, which is the factual, relentless and competitive dimension of the day-by-day making of the law within and across national boundaries, cultures and market opportunities. But both above choices could allow the continental legal tradition not to miss the opportunity that the European current situation and ongoing codification process offer. The chance is to reinstate itself in the role and within a perspective which have long been its own and which can represent its own future, as soon as its scholars and legislators become aware of what is at stake and how to deal with it.

for business contract rules. A still different issue regards the possible choice for a business contracts code limited in its scope to international transactions. On this point see the contribution of U. Drobnig in this volume: 'A Subsidiary Plea: A European Code for Intra-European Border-Crossing Contracts', Ch. 21 below.

26 For the sake of statistics one could recall that of every 100 Euro of merchandise export of the EU, 10.6 go to North America (US and Canada) and 9.7 to a selected sample of civilian countries including Eastern European and Latin American countries, Egypt, Morocco, Tunisia and Turkey. See the WTO Report, International Trade Statistics 2001, Table III.39, in http://www.wto.org/english/res_e/statis_e/its2001_e/chp_3_e.pdf.


28 See H.P. Glenn, Legal Traditions of the World (n. 24), 116 et seq. The author emphasizes, among other aspects, the profound relation of the civilian codes 'to the value of the human person, and the need for extricating the human person from much of the social fabric which had come to envelop the human person', 130.
III. IN THE NEIGHBORHOOD OF CONTRACT

1. Insights into the Case of Tort Law

The need for a uniformity-driven European Supreme Court mentioned above also comes to the fore when one approaches the legal borderlines which surround contract law. Within this perspective, a straightforward example may be given by tort law. Indeed, a glance at the European law of torts confirms how deeply conscious the code drafters will need to be about the overall implications of remoulding private law.

The kind of awareness that is required in legal debate can be simply illustrated. Suffice to recall, for instance, the problems raised by the catalogue of notions which straddle the tort and contract law fields, such as ‘standard of conduct’, causation, foreseeability, ‘protected interest’ and so forth. Other examples come from the flexible boundaries that comparative analysis enables us to draw as to so-called ‘consequential’ economic loss (i.e. an economic loss connected to even the slightest damage to the person or property of the plaintiff), as well as from the great reliance of certain regimes upon contract rules to handle issues that in other regimes are straightforwardly governed by tort law.

The same point concerning the interdependence between legal domains can be stressed choosing the opposite standpoint, i.e. highlighting how any attempt at codifying tort law would be closely dependent on the solutions which the same Code intends to offer in the other fields of private law, mainly with regard to contract and property.

To give further evidence of what I mean, let me draw on the in-depth study that Vernon V. Palmer and myself have conducted over the last 5 years on the recoverability of pure economic loss in thirteen legal regimes of Europe. What this study makes clear, in the perspective of my contribution to this seminar, can be summarized as follows:

29 Cf. e.g. M. Bussani, La colpa soggettiva. Modelli di valutazione della condotta nella responsabilità extracontrattuale (Padova, Cedam, 1991), 131 et seq.; id., As peculiaridades da noção de culpa: um estudo de direito comparado (Porto Alegre, Livraria do Advogado, 2000), 32 et seq.


(i) If possession is included in the framework of property rights, or if it is at any rate protected by proprietary remedies, any infringement of possession will permit recovery of the economic loss, regardless of whether it is called consequential or pure. If possession is not included in the property framework, however, or if the power of control over the thing is not sufficient in and of itself for the holder to be deemed a possessor, then the recoverability of the economic loss caused to the holder (by interference with the thing itself) becomes an issue to be settled.

(ii) If the right to electricity (but the same could apply to hertzian or other electromagnetic waves)\textsuperscript{33} is deemed a right in rem whose transfer from the supplier to the user is completed as of the date of the agreement, any damage to the system supplying that energy (such as the cutting of power cables) will be considered an infringement of property rights and therefore will raise no problems in any of the legal systems investigated here.

(iii) If the manner in which Germany and Austria apply the notions of ‘culpa in contrahendo’ or the ‘contract with protective effect to third parties’,\textsuperscript{34} is adopted as a model for a European Code, it is beyond doubt that many of the issues raised in ‘pure economic loss’ cases will be settled by contract principles, with little need to resort to tort law rules.

(iv) The Code’s infrastructure regarding transfer of ownership would clearly have manifold effects in any ‘Double Sale’ case. Indeed, the right of the first buyer (\textit{solo consensu}) to obtain compensation depends on a variety of factors, the role of which is actually to define who has the property right in the thing. These factors include the presence of good or bad faith, the completion of delivery (for movables), compliance with formalities like registration and recording (for immovables) and the effects assigned to the registration itself.

\textsuperscript{33} For the debate on the legal nature of these entities, see U. Mattei, \textit{Basic Principles of Property Law. A Comparative Legal and Economic Introduction} (Greenwood Press, Westport, Central London, 2000), 76 et seq., 153 et seq.

\textsuperscript{34} The same could be said for such notions as the French concept of ‘chaîne de contrats’. This refers to a series of contracts which, though distinct in law, form part of an economic complex. An example can be found in the chain which links a site owner to the contractor, the contractor to the sub-contractor and the latter to the supplier of the building materials. See H. Kötz and A. Flessner, \textit{European Contract Law}, I (trans. T. Weir) (Oxford, OUP, 1997), 255 et seq. As to this technical notion and its actual impact on the recovery of pure economic losses, see G. Viney, \textit{Introduction à la responsabilité} (Paris, LGDJ, 1995), 338 et seq.; W. van Gerven, J. Lever and P. Larouche, \textit{Tort Law} (Oxford, Hart, 2000), 32 et seq., 236 et seq.
2. Policies and Interpreters

The above simple remarks only hint at the web of relationships which link the tort and contract law fields. Even when all the above (and possibly other) boundary issues have been clearly settled, the scope and structure of remedies at the disposal of tort and contract law users will still depend on other critical choices – and first among these come the major political choices that need to be made at a more general level about the whole of European patrimonial law.36

Any choices made by the drafters and codifiers are indeed the surrogate political acts of the legislator (whether the latter’s approval of their work is one of default, rubber stamp or close consultation). Thus, any decision by the redactors to decrease, enlarge or simply maintain the existing unequal levels of protection for loss-bearers across Europe, is first and foremost a political question that must be answered. To be sure, the substantive decision necessarily has implications for the draft methodology to be adopted. To cite the simplest example, it may be that if the decision is to protect loss-bearers as broadly as possible, rather than in highly specific ‘privileged loss-type’ situations, then a general clause will be the legal instrument to implement it, rather than a formula grounded on a list of protected interests.

35 For instance, our issue would certainly be affected, both theoretically and operationally, by any decision to allow or forbid the concurrence of tortious and contractual actions. As mentioned, the second alternative is better known as the French ‘règle du non-cumul’. This rule clearly has a particular bearing because, if the European Code embraces it, we would predict that some cases on pure economic loss would disappear from tort law only to reappear as contract law questions. See G. Viney, Introduction à la responsabilité (Paris, L.G.D.J., 1995), 413 et seq.; C. von Bar, The Common European Law of Torts I (Oxford, Clarendon Press, 1998), 449 et seq.; T. Weir, Complex Liabilities, No. 52, Vol. XI, (Oxford, IECL, 1976); P. Schlechtriem, ‘The Borderland of Tort and Contract – Opening a New Frontier?’, (1988) 21 Cornell Int’l Law J, 467 et seq.

36 Undoubtedly political choices have to match technical needs. The latter are substantial and most of them are raised by the fact that the very structure of private law compels any integrative effort to vary the approach according to the needs of the different domains on which it focuses. For example, it is one matter to deal with certain subjects (such as the statute of limitations) in which a combination of legislative data, a glance at the case law and, when necessary, some reference to both recent and distant history promise at the outset to be crucial to solving the problems; it is quite another to have to deal with topics in which any integration-concerned jurist must have an enormous variety of instruments and data at his disposal. This is particularly so, e.g., for topics such as administrative law, with respect to certain areas of property law, particularly as regards immovables. Similarly, the functioning of local Stock Exchanges and financial markets must be considered with reference to the areas of corporation law, financial law, and security interests. Fiscal law and contractual practices must be taken into account when considering new or ‘modern’ contracts, and so forth. On all this, see M. Bussani, ‘Choix et défis de l’herméneutique juridique. Notes minimes’, in (1998) 3 Revue internationale de droit comparé, 735 et seq.
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Yet, one should have no illusions that even the clearest policies, whether stated in general clauses or protected interest formulas, will be translated into the ‘law in action’ without undergoing interpretative modification by judges and scholars. This is especially true, as said, in the absence of a European Supreme Court endowed with the authority to ensure the uniformity of interpretations and applications of legal rules. But it goes without saying that such a Court, like any other Court, will never be able to prevent developments, refinements and qualifications in the interpretation of the same rules whenever, over time, these changes will be felt appropriate by the interpretive community.\(^\text{37}\)

IV. THE DRIVING FORCES BEHIND AND AHEAD OF THE EUROPEAN CODIFICATION PROCESS

1. Market, Currency, Law and the Time Factor

All of these could appear as a cry in the dark if compared to the dazzling path traced by the bulk of prominent European scholars aiming at nothing but the (single-minded) civil code.

One of the reasons that this goal is pursued lies in the argument that ongoing business relationships among the Member States, and monetary union, urgently required approaches tailored to the needs of facilitating the integration of legal and economic markets in (at least) the euro area within a relatively short period of time. To be sure, the motto ‘one market, one currency’ justified the plans that

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\(^{37}\) See e.g. A. Watson, ‘Comparative Law and Legal Change’, (1978) 37 Cambridge L. J., 313; P.G. Monateri, ‘“Everybody’s Talking”: The Future of Comparative Law’, in (1998) 21 Hastings Int’l & Comp. L. Rev., 825; and cf. W. Ewald, ‘Comparative Jurisprudence (I): What Was It Like to Try a Rat?’, in (1995) 143 U. Pa. L. Rev., 1889; id., ‘Comparative Jurisprudence (II): The Logic of Legal Transplants’, in (1995) 43 Am. J. Comp. L., 489. Indeed, even on the morrow of the adoption of whatever code, the law will not be given. What will be given is the existence and survival of specific interpretative practices worked out by the jurists and the other legal actors, with the contribution of the law-users. In other terms, the real issue affecting the legal discourse, as well as the implementation of any code, is (what Hegel called *Sittlichkeit*, and a whole tradition before him, *sensus communis*, i.e., to our purposes) the concrete life of a legal culture, the ‘web’ of beliefs rooted in an historically situated legal community. To be sure, the finite and contextual character of a community’s common heritage opens up the possibility of and the need for continuous control by an ‘uninhibited, robust, and wide-open’ debate – to use (out of context) the celebrated phrase of J. Brennan in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), at 270. But under every methodological choice there necessarily lies a question of values and of ends among which the jurist must choose, though keeping in mind that whenever we deal with ‘law’, we deal with something which cannot be grasped by referring to principles, rulings and provisions stated once and for ever. See M. Bussani, ‘Choix et défis de l’hérméneutique juridique. Notes minimes’, 50 *Reve internationale droit comparé*, 1998, 735 and *supra* n. 10.
led to the single currency. The achievement of the latter has given a new dimension to the internal market, bringing economic actors closer together and increasing and intensifying legal relationships across the euro area. One could question, however, whether the parallelism between economic and monetary integration, on the one hand, and legal codification on the other, withstands comparison with the lessons of history. In view of this question, let us consider some European examples, not so distant in time and all of them drawn from inside the age of codifications.\(^{38}\)

Following the political unification of Germany in 1871,\(^{39}\) a new national monetary unit based on the gold standard, the Reichsmark, was introduced in 1875–6 to replace nine different monetary systems.\(^{40}\) An internal market with free movement of goods already existed because of the customs union (Zollverein) effective from 1834. In spite of this internal market, the linguistic uniformity and the introduction of a common currency, several private law regimes persisted (the Prussian and Bavarian codes, the Napoleonic code, Roman and Canon law, etc.) for the period of almost 30 years.\(^{41}\)

\(^{38}\) Outside Europe, the case of the United States of America could also be of interest. Indeed, one of the aims of the integration of European markets is to create an area that compares itself with the economic might of the United States of America. Whilst in terms of population the European Union exceeds the USA, in macro-economic terms Europe lags well behind. The USA is a federal union of fifty states, each with its own legislative and political powers, but it is, however, a single market. Of course sharing not only a currency, but also a common language and a federal central government and legislature is of the essence for such singleness. Europe has just started with one of the three: a single currency. The Community is no more than an embryo of a federal authority, with limited powers that are moreover subject to the principle of subsidiarity. Furthermore, private and contract law belongs, in the USA, not to the federal level but to the state level. And in this a certain comparison with Europe may be made: the USA has a single market in spite of the fifty state laws on contract. To be sure, a decision, say, of a New York court dealing with a sophisticated financial dispute would have legal authority for local courts throughout the USA, but this is far from the situation in Europe, where private law disputes are still adjudicated at national level with no, or only occasional, cross-border authority. See A. Sáinz de Vicuña (n. 39).


\(^{41}\) It is worth recalling that prior to the German unification, the law of negotiable instruments (Wechselordnung) and General German Commercial Code (ADHGB) had only been gradually adopted by the States of the Deutscher Bund. Cf. K. Zweigert and H. Kötz, Introduction to Comparative Law 3rd edn. (T. Weir trans.) (Oxford, Clarendon Press, 1998), 141.
In Switzerland, the Constitution of 1848 provided for a single market and a single currency, but not for a unified private law system, which was kept within the domain of the cantons. This state of affairs led in 1874 to a revision of the Constitution which allowed for codification. The ‘Code des Obligations’ was only adopted in 1881 and came into force in 1883.

As to the United Kingdom, it is worth stressing that monetary union among England, Wales and Scotland in the early eighteenth century did not lead to any systematic harmonisation of civil and commercial law. Moreover, Article 18 of the Act of Union stated that ‘no alteration may be made in laws which concern private right’. In the domain of the law of contract, many differences still exist between English and Scottish law.\(^{42}\)

The historical example of Sweden, Denmark and Norway may be added to the above. Those countries agreed in 1871 on a Scandinavian monetary union that lasted until 1914, and from which the three countries took a common name for their respective, now separate, currencies, the ‘krone’. Though a proper common codification has always been outside the scope of Nordic ambition and tradition,\(^{43}\) these countries – whose languages are closely cognate – did harmonise their legislation, inclusive of legislation on real property, on commercial and maritime matters. At present, a common law on contracts is shared by the three countries although they lack a common currency and political unity.\(^{44}\)

One is tempted to conclude that the above historical examples support the idea that there is no automatic overlap between economic and legal integration. In particular, one may infer that the combination of an internal market with a single currency in territories with different laws is not necessarily tied to – nor does it inevitably engender, at least in the short run – the unification of the rules applying within that market. Germany, Switzerland, the UK, and to a lesser extent the Nordic countries, are evidence of this.

To be sure the same facts could be seen the other way round, so that ‘most of the time’, in the short or in the long run, legal unification ends up being unavoidable if the same area (enjoys a common – not limited to the elite – linguistic ground, and) has been affected by a deep economic integration.

Either way, the point to be stressed concerns the relevance of the time factor. This cannot be underestimated because its mature use enables us to gauge and proportionate the harmonization measures we have in mind. They could be taken and scaled according to the growth, in the legal professionals’ community,

\(^{42}\) An up-to-date survey in the reports Scotland, by E. Reid and R. Leslie, in V.V. Palmer, Mixed Jurisdictions Worldwide, The Third Legal Family (Cambridge, Cambridge UP, UK, 2001), respectively at 201 et seq., 221 et seq., 227, 231 et seq., 235 and 247 et seq., 252 et seq.


of the necessary awareness of the need for that harmonization or unification, of the most appropriate tools to achieve it, of the size and the impact of the compromises to be made in view of a European legal unity, of the need of a radical change in university curricula and of the overcoming of a foreign – not to mention comparative law – blindness in domestic scholarship. It may be that all this will take less than fifty or a hundred years. But the span of time that is necessary to attain this ‘cultural revolution’ is by no means a factor that can be overlooked if any Code, and its implementation, is to escape a grim doomsday.

2. In Defence of European Scholarship

The codification idea and the widespread success it enjoys seem to me, nonetheless, grounded on some socio-cultural reasons which are worth mentioning and are possibly enhanced by the above mentioned European law fragmentation. In the Western legal tradition it is well known that continental legal scholars and common law judges have always perceived themselves as an organ of a body called Law, a body with both an origin and a destiny that is perennial, not contingent.

As guardian of those origins and executor of that destiny, the jurist has always had some sophisticated technical apparatus at his disposal. This machinery varies according to the historical and geographical conditions in which the jurist happens to find himself. But this apparatus has invariably served to maintain the priestlike quality of the jurist and of the corpus juris whose messenger and artisan he is; a corpus juris which can, in its turn, appear under various names, including Roman Law, Natural Law and/or Rational Law, ius commune, Common Law, Code Civil, usus modernus pandectarum, and so on. The jurist no longer seems to live in this cultural setting.

Nowadays national and European legislators – reinforcing and broadening the existent multi-level legal framework – have increasingly assumed the role of a breathless oracle intervening in whatsoever field in order to satisfy the requests addressed by any politically relevant pressure group. This state of things feeds the well known phenomenon of micro-legislation, often affected by bureaucratic contents and wording. Interpretation and enforcement of this law are usually entrusted to mediation councils, technical committees, agencies, the so-called independent authorities, or other new or old-fashioned administrative bodies.

The final outcome of this phenomenon is easy to understand, at least as far as continental Europe is concerned. It is the weakening of the role of the scholars and their traditional machinery, as both of them are compelled to come to terms with provisions whose nature and contents are increasingly indifferent to the given legal tradition and to the inner consistency of the given legal system.

Transplanted into the ‘European codification debate’, this situation can lead to (or back the promoters of) the conclusion that legal systems presently diverge too much, that the time, in other words, is not ripe to enact a Restatement or
Civil Code; a defence of the *status quo* that, as everybody knows, fits perfectly with the need of the professional élite to keep the leadership over national and transnational legal affairs. Professional élite is a label to be understood in its variety ranging from the European practitioners and judges to the continental (mostly municipal) academics.45

This is why one of the fundamental reasons which supports the idea of, and the debate about, a European Civil code seems to be the self-comprehension of (most) comparative law scholars of their own role and of the dangers to which the latter is exposed; dangers that come from the bureaucratic turn of the national and European legislators as well as from the more and more scattered, fragmentary, out-of-control (both substantive and linguistic) texture of legal rules.

Thus, the relationship between the codification process and European scholarship can be understood in a perspective which goes further than the classical Savigny v. Thibaut quarrel. Indeed, we cannot suppose that the bureaucratic and piecemeal attitude of the law-makers stops or decreases its yield, nor that (culturally) parochial lawyers relinquish their attitude and give up their self-interests. Consequently, one of the real and most important risks that ‘pro-European legal integration’ scholarship has to face appears to be, eventually, not the enactment of the European Code but rather its absence. Indeed, the preparation and interpretation of a Code would again provide legal scholarship with social prestige and technical indispensability, reinstating scholars in their traditional role of artisans and messengers of the law.

It is in this perspective that one may understand and support the idea of the codification and the effort made by a passionate legal scholarship not to give up its role.

3. ‘Pride and Prejudice’

The way that the private law unification process is currently managed, however, shows a critical disadvantage: the idea that the unification has to be attained through a Code, that is, an act of a legislature. It is not a matter of ‘democracy deficit’ I want to address – that issue can be settled through political actions

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45 But see also the position taken by a prominent English scholar: B.S. Markesinis, ‘Why a code is not the best way to advance the cause of European Legal Unity’, (1997) 5 ERPL, 519. According to this author, rather than towards a codification the efforts should aim to train an élite of truly European practitioners. However, since this élite bar would charge high fees to clients – fees which are likely to be a significant cost for each legal transaction – this expensive advice will not be affordable by everybody. This would create (rectius: maintain) both very high transaction costs and an unfair advantage for large business as against the rest of the law-users. See also n. 21.
and agreements whose review lies beyond the scope of this paper.\textsuperscript{46} Herein the focus is different.

As long as the ultimate source of the law is the will of the people affected by it – as it is, for instance, with regard to national or international commercial customs – any new rule is grounded on widespread agreement, with no traumatic rupture of the pre-existent law. A new code, by a new statute, may not have the same \textit{souplesse}. It goes without saying that whenever a code is national it mirrors domestic lawyers' language and views, it makes use of techniques and notions that are rooted in the local practice, it gives solutions for well-known and widely distributed social and economic requests. On the contrary, codes and statutes drafted with a view to setting up a transnational uniformity necessarily have to choose among different models and rules. They erase some rules belonging to a model and substitute for them other rules from other languages and different legal cultures, languages and cultures which can be more or less unknown by the other law-users in the other legal systems concerned by the law reform.\textsuperscript{47}

Doubtless, what forces legal integration can either be an act taken by mutual consent by two or more States, or an act taken by a pre- eminent authority.\textsuperscript{48}


\textsuperscript{47} ‘Sans variations, nous n’aurions pas de progrès, car le progrès est la variation. Si nous voulons le progrès, nous voulons la variation; et si nous acceptons la variation, nous acceptons la diversité’: R. Sacro, ‘La diversité des droits’, in \textit{Mélanges en l’honneur de C.A. Cannata} (Bâle, 1999), 411 \textit{et seq}. On the same tune, A.T. von Mehren, ‘The U.S. Legal System: Between the Common Law and Civil Law Traditions’, in: (2000) 40 \textit{Centro di studi e ricerche di diritto comparato e straniero. Saggi e conferenze}, Roma. The author stresses, at 17, that ‘Until such times as the institutions, values, and circumstances that shape law are homogeneous, diversity will ensure significant differences in legal practices, institutions, and values’.

\textsuperscript{48} R. Sacro, ‘Diversity and Uniformity in the Law’, 49 \textit{A. J. Comp. L.} 171, 177 \textit{et seq.} (2001). Referring again to the US experience, one can note that the market pressures in favour of legal certainty set up the factual conditions under which the American Law Institute, in 1923, created the technique of \textit{Restatements}: a permanent effort after systematization of case law. But it was only in 1940 that the National Conference of Commissioners on Uniform State Laws (which adopted in 1896 the Uniform Negotiable Instruments Law, in 1906 the uniform laws on Sales and on Warehouse Receipts, and half a dozen more uniform laws) decided to embark on the project of a Uniform Commercial Code (UCC) that would update and replace the existing set of uniform laws. It was then in 1952 that a first draft of the UCC saw light; but after a round of discussions with state legislators the first official text was adopted only in 1957 and the text was revised and updated on several occasions. The UCC, however, and as is well known, is not a civilian code. (i) It is a flexible tool: it is not mandatory \textit{per se} and requires endorsement by state legislators, who can select parts of the code and not all its provisions, and who can modify or supplement its content. (ii) It is foreseen as an on-going project, and not a finalized code. (iii) It will add articles as
The latter happened, for example, in Italy, France and Germany when private law was unified. Nevertheless, the same feeling which praises the values of legal unification may sometimes play the opposite role, making a new unification difficult. There is little doubt that current resistance raised by, say, Italian, French and German lawyers to the adoption of a European Civil Code (besides the weight of the dependence on professional routine) is most of the time caused by the pride related to the traditional image and rhetoric of the national codes.

What is worth stressing is that at the very core of this resistance, one can easily find the will to keep timeless a legal solution – the national code(s) – in the name of history. History, though, involves becoming. It can create nothing eternal and nothing invariable. It seems meaningless, then, to side with differences in the name of a self-deceptive invariability. In other words, one can stand up for diversity but upon condition that this is not done in the name of invariability.

Social and economic reality, moreover, constantly ask the law to renew itself to meet new needs, and each innovation always competes with the previous, or a different, solution. It is this competition which usually makes the simplest and the most cost-effective rule to obtain. One of the occurrences which can slow down this self-innovating process is precisely the legal integration dictated by a supranational authority. The law imposed in this way deprives the legal systems of the possibility of remodelling themselves through internal changes. Yet ‘change’ is what is always requested of the law by ever-moving social and economic phenomena, first and foremost the market. What is likely to occur, instead, in the aftermath of such a ‘top down’ forced integration, is that any legal innovation will turn out to be dependent on the working of an array of devices which, in a multilingual and multicultural context like the European one, prove to be belated and consequently ineffective – implying the setting up of international conferences, new preliminary drafting, large majority decisions, and so forth. The easiest outcome to predict all this is a material delay in the law’s development.

In any case – and in conclusion – reducing the amount of legal models in force means limiting the number of possible starting points for further progress and future evolutions. Even worse, such reduction curbs the profits usually deriving from the competition among legal models. To be sure, whenever this competition turns out to be mostly due to academic distinctions about concepts

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or explanations (while operative rules do not lie so far from each other), it could disappear with no regret, replaced by some ‘better’ solution. But what we need to keep in mind is that the choice for or against erasing differences must be adopted with full awareness of how deeply the ideas of change and development are embedded in the relentless mutation of reality and of law – ‘change is the tradition’.50 This is why scholars, and most of all comparativists, cannot leave alone those supranational legislators who are pursuing the knowledge and the governance of complexity.

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50 H.P. Glenn, supra n. 24, at 117 (emphasis in original); M. van Hoecke, ‘The Harmonization of Private Law in Europe: Some Misunderstandings’, in: M. van Hoecke and F. Ost (eds.), The Harmonization of European Private Law (n. 13), at 1, 5 et seq.