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0. This conference was planned to make the ‘European Private Law’ train stop in Trieste, breaking its usual route along the Orient Express railroad. The reason for the halt was to make it clear who the engine-driver is, whether the route was devised — to put it in R.L. Stevenson’s words — to go anywhere or simply to go¹ — and whether the direction was supposed to be the same for all the cars, including those which carry tort law materials and rules.

I will restrict this introduction to the above general issues, those concerning the overall reasons for the journey, the engine-driver and the route of the train, deferring scrutiny of tort law questions to the papers of our learned speakers and contributors.

1. Stepping out of the railway metaphor, one should start by stressing that the precise features of the ‘European Private Law’ catchword often remain uncertain and enshrouded in misleading rhetoric. Sometimes the label is used loosely to convey what private law represents in Western (or Western and Eastern) European legal systems². Sometimes it is simply used in opposition to U.S. law³. Other times the adjective “European” refers to the E.C. legislation that affects private law⁴. Most of the time the label is meant not to describe but to announce the possible and longed for outcome of the current ‘integrative’⁵ initiatives under way in Europe.

¹ R.L. STEVENSON, Travels with a Donkey in the Cevennes (1879), Köhleman, Köln, 1997, 46.
2. The latter notion is the focus of the following remarks, but, even within this limited perspective, we will see that not everything is clear or readily agreed on.

Indeed, for comparativists, it is almost a platitude to say that most questions cannot have a clear right or wrong answer. Is European law going to be moulded by a common law and civil law convergence? The answer depends on the assumptions. Is there an ‘Americanization’ of European law going on? Again the answer depends on our willingness to recognize as “American” certain modes of thought that today we all share as scholars in Europe (such as the crisis of the deductive method in favour of a more casuistic one). Should comparative law be “forward looking” and trying to build European law on new bricks (such as those offered by Law & Economics or by the Social Justice Study Group), or should it be “backward looking”, struggling to find evidence of a common past to be restored? Once again, here we are in a domain of free choices, of opinions that are shaped by different experiences and that it would be pointless to evaluate in terms of right and wrong.

Some of the enterprises I referred to as “integrative” reflect this pluralism of opinions in the European legal community. Others do not. The projects whose main task is to promote common solutions to legal problems not only have to make a hierarchical selection but are also inherently constrained by a limited pluralism, owing to the tension between uniformity and diversity. Such projects seek to ascertain which solution may best regulate certain legal problems in a common way, at the same time ignoring the possibility that divergences may be justified on numerous grounds.

3. The effort toward the unification of European private law is, however, driven by many forces. One of the reasons for which this goal is pursued lies with the argument that ongoing business relationships among member states, as well as the large-scale adoption of a single currency, urgently require approaches tailored to 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 led to the single currency. Allegedly, the achievement of the latter has given a new dimension to the international market, bringing economic actors closer together and increasing and intensifying legal relationships across the Eurozone. One could question, however, whether the parallel between economic and monetary integration, on the one hand, and legal uniformation on the other, withstands comparison with history, its lessons, its promises.

In view of the answer to this question, let me consider some European examples, not so distant in time and all of them drawn from within the age of codifications.

Following the political unification of Germany in 1871, a new national monetary unit based on the gold standard, the Reichsmark, was introduced.
troduced in 1875/6 to replace nine different monetary systems. 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, of the linguistic uniformity and of 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 lengthy period of almost 30 years.

In Switzerland, the Constitution of 1848 provided for a single market, uniform customs and a single currency, but not for (a single language, nor 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: the Civil Code was adopted in 1907 and came into force in 1912.

As to the United Kingdom, it is worth stressing that monetary union among England, Wales and Scotland in the early 18th century did not lead to any systematic harmonization 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’ – and in the domain of private law, many differences still exist between English and Scottish law.

The historical example of Sweden, Denmark and Norway may be added to the above. In 1871 these countries agreed on a Scandinavian monetary union that lasted until 1914, 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, these countries – whose languages are closely cognate – did harmonize their legislation, inclusive of legislation on real property, on commercial and maritime matters and, at present, a common law on contracts is shared by the three countries although they lack a common currency and political unity.

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 in this respect.

To be sure the same facts could be seen the other way around, 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 elitist 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. The latter cannot be underestimated because its role as an enabling factor to gauge and proportion the harmonization measures we have in mind. They could be taken and scaled according to the growth, in the community of legal professionals, 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 for a radical change in university curricula and of the necessity to overcome a foreign (not to mention comparative law-) blindness in domestic scholarship. This may take fewer than one hundred or fifty years. But the span of time that is necessary to attain this ‘cultural revolution’ is by no means a factor that can be

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14 It is worth recalling that prior to German unification the law of negotiable instruments (Wechselordnung) and the General German Commercial Code (ADHGB) had only been gradually adopted by the States of the Deutscher Bund.
19 See also N. Jansen, Binnenmarkt, Privatrecht und Europäische Identität, Tübingen: Mohr, 2004, 72, 91 ff.
overlooked if the implementation of any private law harmonization is to escape a grim doomsday.

The Engine-driver

4. All the above could appear like a cry in the dark if compared with the dazzling path traced out by the bulk of prominent European scholars aiming at unification, if not actual codification, of the private law of Europe.

With regard to this debate, irrespective of the side one takes in addressing the different issues related to it, it seems to me that the very idea of a European Codification and the popularity it enjoys in some quarters are grounded on socio-cultural reasons which are worth a brief mention.

In the Western legal tradition it is well known that Continental legal scholars and common law judges have always seen 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 priest-like quality of the jurist and of the Corpus Jurs whose messenger and artisan he is. A Corpus Jurs, which can, in its turn, go by 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 extant multi-level legal framework – have increasingly assumed the role of a breathless oracle intervening in whatever field in order to satisfy the requests addressed by any politically relevant pressure group. This state of affairs feeds the well-known phenomenon of micro-legislation, often affected by bureaucratic contents and wording. The 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 mainland Europe is concerned. It is the weakening of the role of the scholars and of 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. This situation can certainly lead to (or support the promoters of) the conclusion that legal systems presently diverge too much, that the time, in other terms, is not ripe to enact any private law ‘restatement’ or code whatsoever. A defence of the status quo that, as is easy to understand, perfectly fits the need of national professionals and scholars to keep their leadership over domestic legal affairs. In this way the former leave the transnational slice of the pie in the hands of English-speaking and English-writing common-law-trained professionals working for multinational law firms; the latter (more and more prone to case- and statutory law) surrender their historical mission of being the engine of legal development. 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) scholarship of its own traditional role and of the perils to which this role is exposed.

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 – in a paradoxical alliance with multinational law firms – relinquish their attitude of supporting the status quo 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 – an endeavour that (certainly not the bureaucracies and) only European professors could sensibly carry out – would again provide legal scholarship with social prestige and technical indispensabil-


ity, reinstating scholars in their traditional role of artisans and messengers of the law.

It is in this perspective that, I imagine, one may understand and support the idea of codification and the effort made by a passionate legal scholarship reluctant to give up its role.

The Route

5. Be it as it may, what is certain is that even on the morrow of the adoption of any given code, the law will not be given. What will be given—and it is comparative law which shows it at its best—is the existence and survival of specific interpretive practices worked out by jurists and other legal actors, with the contribution of the law-users (and their needs and demands).

In other terms, the real issue affecting the legal discourse, as well as the implementation of any code, is (what Hegel called Stättlichkeit, 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 a historically situated legal community. To be sure, under every methodological choice there necessarily is a question of values, and of ends, among which the lawyer must choose. But the point is that whenever we deal with "law", we deal with something which cannot be grasped referring only to stated principles and provisions (be they or not engraved in a Constitution).

Consequently, one should plainly recognize that, on the one hand, creating a code does not cancel out the existence and the importance of other legal styles and forms (mainly judges and scholars) while, on the other hand, any academic opposition to a Code is likely to be ineffective if the political conditions do favour codification (and the story is not dissimilar to the one we are told about the European Constitution).

Therefore, the relevant question becomes: "Do the political conditions favour any sort of uniformation"?

In the perspective of these pages, it seems to be pointless to scrutinize the reasons—besides those tied to the 'top' and 'pop' culture of the 'exception'—for which the Constitutional Treaty ratification process was led to a deadlock. It is less controversial to quote a different occurrence.

The Communication on European contract law launched a consultation procedure that yielded numerous contributions from governments and stakeholders, including businesses, legal practitioners, academics and consumer organizations. Thereby, the Commission sought to obtain feedback on a suggested mix of non-regulatory and regulatory measures. The Commission was especially interested in whether different national contract laws discouraged or increased the costs of cross-border transactions and sought views on whether the existing approach of sectoral harmonization of contract law could lead to possible inconsistencies at the European level. But the Commission was also interested in receiving views on what form solutions should take. In order to assist in defining possible solutions, the Communication included a non-exhaustive list of possible options, set out in Options I to IV.

In the words of the Commission itself, this was the response:

"Only a small minority favoured Option I, which suggested leaving the solution of identified problems to the market. There was considerable support for Option II, i.e., to develop—via joint research—common principles of European contract law. An overwhelming majority supported Option III, which proposed the improvement of existing EC law in the area of contract law. A majority was, at least at this stage, against Option IV, which aimed at a new instrument on European contract law. However, an important number of contributors suggested that further thought might

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26 With the consent of the authors, the Commission published their contributions on the Commission’s website (Responses to the Commission’s Communication on European contract law: http://europa.eu.int/comm/consumers/policy/developments/contract_law/index_en.html).
be given to this in the light of future developments in pursuance of Options II and III.”

Are these data meaningful? Are such data to be considered as staccato signals in the so far seamless unification symphony directed by the European professional and bureaucratic élites? I don’t know. Some hints at an answer can be found in the subsequent Commission Communication, which plainly discards the codification idea. Other clues come from the growing awareness of the need to start edifying a common legal culture rather than taking it for granted and obsessively striving for a layout of written rules.


See Communication from the Commission to the European Parliament and the Council – European Contract Law and the revision of the acquis: the way forward, October 11th, 2004, COM (2004) 651 final: “Although it is premature to speculate about the possible outcome of the reflection, it is important to explain that it is neither the Commission’s intention to propose a ‘European civil code’ which would harmonise contract laws of Member States, nor should the reflections be seen as in any way calling into question the current approaches to promoting free circulation on the basis of flexible and efficient solutions”. But see also the concerned remarks made on this point by the European Union Committee of the House of Lords, 12th Report of Session 2004–05: European Contract Law – The Way Forward? – Report With Evidence.


What is certain is that in 2004 Western Europeans embraced ten new members – and others are expected to obtain the same status in the near future. They are ten new treasury boxes filled to repletion with history, traditions, solutions, attitudes. To us, the only and real question is whether future ‘European Private Law’ is going to suppress this diversity or to vivify it through an integration which is respectful of, and grateful to, this richness.

The main focus of this conference, indeed, was setting the state of the art of the European Tort Law against these dynamics.

I am confident that the reader of this book will appreciate ideas and insights offered by the distinguished contributors.