Why Europe Needs a Civil Code: European Identity and the Social Model

Pourquoi l'Europe a besoin d'un code civil: l'identité européenne et le modele sociale

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Does Europe need a civil code? Does the European Union require an extensive system of principles of private law, including the laws governing obligations, property rights, and family obligations? In my view it does need such a common framework of principles of private law. For those like myself who want to achieve a closer union of the peoples of Europe and who feel frustrated at the ineffectiveness and inefficiencies of the current political arrangements in Europe, the vital step to take, it will be argued, is not to revive talk of a political constitution, but rather to build from the ground upwards through common principles of private law expressed in a European civil code.

It will quickly become apparent, however, that in making this argument I disagree with most of the rationalisations proffered by the European Commission for its agenda on European contract law. My reasons for believing in the need for a European civil code have little to do with the completion of the internal market, the removal of barriers to cross-border trade, the reduction of transaction costs, or a solution to the legal perils encountered by frontier workers. The Commission finds itself mired in the logic and the jargon of internal market regulation in order to justify the extension of its competence to harmonise private law. As a result, its justifications for action in this field do not bear close inspection, and the Commission has to progress through devious routes. It denies that it is contemplating a civil code, though it funds and promotes work on a ‘common frame of reference’ that differs from comprehensive private law by only being soft law with indirect effects, thus avoiding questions of competence under the treaties. Once this camouflage is exposed, however, the Commission is forced to retreat into ever diminishing projects, such as resolving inconsistencies in the acquis communautaire.

Being in the fortunate position of not being constrained by formal limits on my competence to say what I like in public, I can put forward a different perspective on why Europe needs a civil code or principles of private law, without the shackles of fitting my remarks into the present Treaties. In summary, my argument is that Europe needs a civil code for two interlinked reasons.

The first reason is that a civil code will help to build a transnational community in which there is a shared identity of being European, which in turn can provide the foundations for effective supranational political institutions. This first argument links private law to the task of building a European polis or sense of common identity among the peoples of Europe.

My second argument is that the realisation of the central objective of Europe, aside from peace, which is social and economic progress and cohesion, also depends crucially on private law in two ways. Building on the previous argument, it is suggested that
European institutions cannot construct and defend a European social model unless they become more effective and have the support of the peoples of the Member States. Their effectiveness and legitimacy depends on the development of a deeper sense of community, which my first argument suggests is linked to the creation of common principles of private law. In addition, however, the second link between a European social model and private law is that the rules of private law express the basic elements of the European social model itself. It follows that in order to construct and defend this social model against the forces of globalisation, it will be necessary to articulate and institutionalise the model through principles of private law, together with other kinds of economic and social regulation.

That introduction to my argument, with its two main parts, which can be subdivided, would conveniently enable me to make my presentation in accordance with the constraints of French doctrinal essays. I shall resist that temptation to go native, however, in order to focus attention in the short time available on the elaboration of a few key points.

1. Transnational Civil Society

The European Union is a political structure without a unified community. It is a system of government for a large territory, but this space is fragmented into many political and cultural communities. Though nation states have pooled some of their sovereign powers in the institutions of the European Union, at the level of everyday social interactions, national borders still present serious obstacles to the formation of a single community - a transnational civil society. Without having that bedrock of a community on which to build an effective political structure, the European Union seems destined always to fall short of achieving its mission. Peace and stability have been secured in Europe, but the European Union has not been noticeably effective in promoting its key objectives of economic and social progress and cohesion. How can Europe become more effective? How can Europe establish a more comprehensive sense of community, an ever closer union among its peoples, in order to provide the necessary foundation for a more effective system of governance?

What are the essential ingredients for a community to exist? Every human community is rooted in the social relations and associations established in everyday social interactions. Its elements are to be discovered in the formation of contracts, private associations, family relations, and all the different kinds of connection between ordinary people in their daily lives. But frequent dealings between people do not provide the necessary cement for a community. Social interaction must be combined together with a belief on the part of the participants that they are members of the same community or share a common identity. Membership of that community can then imply the need to recognise a mutual set of rights and obligations towards other members. Once members of the community share this common identity, it becomes legitimate to establish effective systems of governance to guarantee observance of these mutual rights and obligations.
Private law makes two kinds of contributions to the construction of a community. The laws of property, civil wrongs, family responsibilities, and contracts help to channel these relationships and social interactions, to stabilise expectations arising from them, and sometimes to correct disappointments and betrayals. All these kinds of social relations can occur without the law, but the legal rules serve as a framework by which individuals can measure their conduct and form reasonable expectations about the behaviour of others. A second kind of contribution made by private law not only facilitates the functioning of civil society, but helps to build a sense of community identity. By accepting a common set of rules that guide and control associations in civil society, the participants implicitly recognise that they are members of the same community. Every time a dispute is settled by reference to the rules, the litigants accept by implication that they belong to the same community and that they share an identity. These two contributions of private law are observable in both France and the United Kingdom: the Napoleonic Code and the Common Law both serve to construct a framework for a civil society that functions throughout a territory and provide a sense of identity for the nations.

The European Union still lacks a dense set of connections and associations between peoples across national frontiers. It has failed to establish a transnational civil society out of which a common European identity could be constructed. Such a community and sense of common identity cannot be imposed on a reluctant populace by political elites. Instead, greater unity or solidarity among the peoples of Europe must be sustained from below, in the networks and interdependencies of social life. The founders of the European Community started off in the right direction by focussing on cross-border trade. The regulatory interventions of the single market programme also provide an important starting-point for reducing the barriers between national communities. But a more comprehensive and inclusive transnational civil society requires more extensive support by the adoption of common legal principles of private law. In short, Europe needs a civil code: an integrated body of legal principles to govern all the different kinds of relations formed by citizens in a civil society.

The contemporary need for a European civil code arises precisely because the political elites have proceeded in their construction of a supra-national political constitution without having established in advance sufficiently dense networks of civil society on which such a constitution might rest. Like the constitution of a golf club, those political rules about membership and governance make little sense unless there is already an underlying network of individuals who play much the same game with each other according to their shared conventions. Similarly, for Europe, the interconnections of transnational civil society need to be dense and intricate before greater political integration can be contemplated. The problem in Europe at present is not so much one of reconnecting citizens to its political institutions – a connection that was always thin in any case – but one of connecting citizens to one another across national borders in the ordinary relations of civil society.
One way to help such a process of developing a European identity forward is to facilitate and promote all kinds of private agreements that traverse national boundaries. Perhaps the humble package holiday has done more than anything else to facilitate such cross-border links. No doubt many other consumer transactions with a cross-border element help to establish denser links between separate communities. Shopping, eating in restaurants, riding on public transport in foreign cities begin to establish relations based upon stable expectations shared by consumers and business. Long-term family arrangements between partners of different nationalities also diminish the significance and consciousness of national barriers.

Of greater importance to this process of building a transnational civil society will be more permanent associations between groups who share common interests and concerns. Such associations might link together professionals such as doctors and lawyers in transnational organisations, which share knowledge but also establish normative standards for training, professional conduct, and research. Similarly, businesses in particular economic sectors can establish common standards regarding product quality, safety, and environmental protection. These businesses may also establish common standards for their transactions among themselves along supply chains through standard form contracts. Such business associations might comprise an international clearing system among banks that establishes rules governing transfers of funds or rules governing the creation and transmission of other kinds of intangible financial products. Another example may be an integrated transnational supply chain that by means of computerised inventory control and ordering ensures the steady supply of fresh products to the consumer in a supermarket in another country. As well as business associations, transnational civil society can be construction through networks and associations of professionals, groups with shared scientific concerns, and links between institutions such as universities and research groups. Within such transnational associations, through dialogue, agreement, communication networks, and observance of conventional practice, we can discern the evolution of shared rules of economic and social governance.

These business organisation, social networks, and scientific associations, together with long-term family relations and more transient transactions such as the package holiday, are the building blocks of a transnational civil society in Europe. They open up the possibilities for transnational networks between citizens to become denser and form part of the routines of everyday life. These routines derive ultimately from mutual reliance and trust, but then themselves reinforce social solidarity, a sense of belonging to and owing loyalty towards a European community.

Although the basic principles of mutual recognition facilitate the emergence of such transnational networks of civil society, greater support can be provided by common principles and standards that consolidate and clarify mutual expectations in transnational civil society. For example, although each country may respect and recognise the

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qualifications of lawyers in other countries,2 the differences in training, knowledge, and competences of lawyers between Member States may well discourage the acceptance of foreign professionals in practice and prevent the formation of transnational associations and mutual dealings. Where common standards are adopted, however, even if they merely state minimum requirements for qualifications and practical experience, it is easier to overcome these reservations and concerns.

Similar arguments apply to the most basic kinds of links in transnational civil society, such as a cross-border sale of goods. Where consumers can be reasonably confident that the protections afforded by the rules of every Member State are adequate because they conform to common minimum standards, they will be more willing to take the risk of shopping abroad. Common rules can provide safety standards, a right to repair or replacement, and compensation for losses and disappointment. Although consumers may still act more circumspectly when purchasing goods and services in an unfamiliar foreign context, the assurance of common standards will diminish these psychological barriers to cross-border trade.

The case for enlarging the scope of common principles of private law, leading eventually to a European civil code, depends, in my view, on its contribution to the construction of transnational civil society. A comprehensive code that provides common rules for every kind of social and economic association or transaction is probably not essential. The common rules could focus, at least initially, on supporting what are perceived to be the key building blocks that will sustain and promote networks and associations in transnational civil society. Some of these elementary building blocks are likely to be discovered in the laws governing contracts, compensation for damage and injury, protection of property rights (especially intangible proprietary interests such as copyright and financial instruments), and business associations. These ingredients may represent the priorities in a programme for building transnational social solidarity, but in principle there should be no restriction on the scope for agreeing common rules for any kinds of transactions and arrangements in civil society.

Rather than having unity imposed from above, a civil code empowers citizens to construct their own interpretation of how the ever closer union of peoples in Europe should evolve. By weaving the fabric of a civil society that extends beyond the borders of nation states through routine transactions of everyday life, such as buying goods, travelling, renting accommodation, and studying in schools and universities, citizens will become more receptive to regarding themselves as having in part a shared polity or political society. They will become more willing to accept a political and social identity of being in part European, of sharing an identity in common with other Europeans, of being part of a wider political community or polity, whilst at the same time retaining their national and local cultures and allegiances. Comprising an agreed statement of rights, obligations, and principles, a civil code expresses a community between individual citizens built on shared values of fairness and respect for others. By acknowledging

2 Mutual recognition for migrating lawyers, with many reservations, is based on Dir. 77/249 on lawyers’ services, Dir. 98/5 on lawyers’ establishment, and Dir. 2005/36 on the recognition of professional qualifications.
common rules for a transnational civil society, the peoples of Europe can increase mutual trust and confidence, which is an essential strand in the construction of stronger bonds of solidarity. In the long run, a civil code, rather than a political constitution, is the essential legal measure for the further evolution of Europe towards its aspiration of an ever closer union of its peoples.

2. An Economic Constitution

In the context of discussions about the European Community, the term ‘economic constitution’ has been used frequently to refer to the four fundamental freedoms enshrined in the Treaty of Rome.\(^3\) Free movement of goods, services, capital, and labour, certainly represent important principles for an economic constitution in a market society. But they are surely insufficient. An economic constitution should be understood more broadly to concern basic principles and rights that govern issues of corrective and distributive justice in a community. Within this broader sense of an economic constitution, in every society the fundamental freedoms that provide the architecture for a market economy have to be balanced against regulatory constraints that protect social interests and serve to promote social cohesion. This kind of economic constitution has been described as the European Social Model, though this idea has been neither articulated in detail nor realised in practice.

That balance between economic freedom and the constraints of social solidarity can be forged by a variety of legal instruments and administrative arrangements. Basic principles may be expressed in a constitutional document, leaving the details of the economic constitution to be worked out through social and economic regulation and the welfare measures of the state. But private law always plays a vital role in articulating the economic constitution of a society. It provides the ground rules, the basic principles, which are the general standards applicable to economic life. These general principles can be modified by further measures, of which the most significant in modern societies involve the tax and spend measures of the welfare state. But private law rules always remain as the default standard, the principles that strike the central balance of freedom with social justice.

The European treaties have always expressed the desire to promote economic freedom whilst ensuring economic and social cohesion. Although at times the social dimension of European governance has been eclipsed by the imperatives of the internal market and competition policies, it has always been revived when European institutions have fallen into disfavour with the public. Yet Europe encounters an enormous practical difficulty in securing a more balanced economic constitution.

Its competences are focussed on realising the fundamental freedoms. For that purpose, Europe must often challenge the justification for national measures that are intended to serve the purpose of ensuring a balance between freedom and fair treatment. This deregulatory orientation can sometimes be off-set by measures of positive harmonisation, if the Member States can be persuaded to agree to uniform standards. Yet all this deregulation and re-regulation takes place in a vacuum of the absence of the default rules of a uniform private law. The European Community only examines part of the picture, namely social regulations that present an impediment to cross-border trade, and does not consider the broader principles of private law that provide the foundations for governing the operation and outcomes of markets. As a result, it is hard, if not impossible, for European interventions to obtain a desired balance between the freedoms and social protection. The European intervention may deregulate too much, or positive regulation in the form of unifying directives may not have the expected impact owing to the new rules being interpreted and applied in accordance with and in the context of national private law.

The European Commission perhaps acknowledges this problem in some of its justifications for developing a common frame of reference. Yet the problem that European interventions are incomplete and risk being derailed by the presence of diversity in national private law systems cannot be fixed by a dictionary or a tool box. Europe needs to acknowledge that through its regulations in consumer law, employment law, and so forth, it is gradually constructing elements of an economic constitution that goes far beyond the fundamental freedoms. Yet this evolving work, though worthwhile, is flawed by the absence of a scheme of private law that can provide the framework or default rules for a social market and for social inclusion.

A civil code would supply part of the detailed articulation of an economic and social constitution for Europe. These elementary rules provide the foundation for civil society by guiding, channelling, and regulating social and economic interaction between individuals and business organisations. Private law rules require performance of contracts, respect for another’s interests, both personal and proprietary, and provide a framework for family and domestic relations. Together these legal rules construct a framework that ensures respect for personal dignity. At the same time these rules articulate principles and values regarding fairness and justice in social and economic relations with others. By combining these elements, a civil code describes a web of rules that comprise and economic and social constitution for society. This framework enables individuals to interact, to create reciprocal bonds, to form associations, to mix, and to be inclusive. A civil code provides a constitution on which all the networks of civil society can be constructed, whether they concern economic exchange, social cooperation, or the establishment of long lasting associations.

A civil code also initiates a process that leads to popular acceptance of this economic and social model. Every assertion of rights and obligations arising under the private law rules of the code implies an acceptance of its standards of justice and fairness. A complaint to a fishmonger by a customer that her mackerel tasted stale and bitter involves an acceptance of certain rules regarding sales of goods to consumers; any acknowledgement
or response to the complaint also takes as a reference point those legal rules about contracts and their quality standards. Through such dialogues, multiplied by the near infinite variety of interactions in civil society, the rules of private law are tested, refined, and ultimately accepted as the legitimate ground rules. They become popularly accepted not by a momentary vote in a ballot but rather through the repeated use of the rules to guide behaviour and communications. The rules of civil law provide a shared basis for communications that enable mutual understandings, an 'epistemic context for making plans and getting on'.

A civil code created at a European, transnational level of governance achieves these goals across borders and cultures. It articulates the shared principles of fair dealing, just treatment, and respect for the interests of others that constitute vital ingredients in a European Social Model. By relying on such a code of principles for guidance, citizens of Europe can more easily establish trust and respect despite the differences of languages, cultures, and nationalities. The same rules would apply to a complaint about rotten fish whether made in London, Athens, or Helsinki. A European civil code would provide the necessary epistemic context for communications that help to establish a transnational civil society across borders and between cultures.

The European Union needs this other constitution – this economic constitution, this constitution for everyday life – to further its economic objectives of promoting peace, the well-being of its peoples, and to secure its values of respect for human dignity, freedom, democracy, tolerance, justice and social inclusion. Without a foundation in shared principles of civil law that help to create a transnational civil society, endeavours to promote better cooperation and coordination at a supranational level of governance in Europe will surely remain frustrated.

3. Conclusion

If Europe is to progress further in its aims of securing peace and prosperity for its citizens, for the time being it should concentrate not on building controversial supranational sovereign institutions, but rather on helping to support and sustain transnational networks of civil society. The principle of mutual recognition is often inadequate for this purpose, because it fails to ensure minimum standards of social protection and provide a reliable basis for mutual trust and confidence. Common rules and principles of private law will provide a superior basis for constructing a transnational civil society. In nation states those common rules have been provided by civil codes that provide support for the basic institutions and arrangements of civil society, such as the enforcement of contracts, compensation for damage, and the structure of business associations. Similarly, the European Union needs to develop equivalent rules and institutional arrangements. In short, Europe needs to work towards a civil code.

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This argument for a European civil code is not closely connected to policy of promoting the smooth functioning of the internal market throughout Europe. Uniform laws may reduce certain obstacles to trade presented by diversity in national contract laws. Yet that market integration rationale does not describe the principal reasons given here for Europe’s need for common rules and principles of private law. Instead, the project for working towards a civil code provides an opportunity to address central political needs in Europe. First, it offers the possibility of giving substance to an Economic Constitution, of providing some detail for a European social model that can be promoted as an ideal of justice to which we aspire. Second, the acceptance of common rules and principles through social practice will provide substance to and support for a conception of a transnational civil society, which in turn can provide the foundation for a post-national identity, a European polity, for which supranational institutions of governance are required. In combination, these two strands will contribute to restoring confidence and respect on the part of its citizens to the European supra-national political structure. Matching the origins in European integration in market building rather than political constitution building, the development of a civil code, perhaps commencing with contract law, would serve as the next institutional step in creating a system of governance that reinforces the complex aims enshrined in the treaties of both ever closer unity whilst respecting the sovereignty of nation states.