

I Civil society and political union

Napoléon Bonaparte in defeat and exile dreamt of a future ‘association européen’ with ‘one code, one court, one currency’.¹

Was Napoléon’s speculation about the composition of the future European Union one of his dangerous fantasies? Or was he correct to believe that an association between the peoples of Europe would have to be founded on and sustained by unified laws, a single system of justice and a common currency? Are these apparently technical and humdrum matters concerning the law and commerce the crucial cement for binding together the nations and regions of Europe? Surely these devices could not be as important to the future of the European Union as the controversial topics debated in the press about constitutions, institutional reform, a rapid response force, a common foreign policy, the ‘democratic deficit’ and allegations of inefficiency and corruption? Notwithstanding the lack of media interest in the ordinary law of commerce and private relations, my thesis supports Napoléon’s speculation: unified law, especially the laws governing commonplace social and economic interactions between people, could make a vital contribution to the future of the European Union. The general framework of this argument can be expressed in a few general propositions.

- (1) The European Union today is a political structure without a community. It is a system of government for a continent, but this territory is fragmented into many political and cultural communities. Although nation states have pooled some of their

¹ *Compte de la Cases, Mémorial de Sainte-Hélène: Journal de la vie privée et des conversations de l'empereur Napoléon à Sainte-Hélène* (London: Colburn and Bossange, 1823), quoted in T. Judt, *Postwar: A History of Europe Since 1945* (London: Heinemann, 2005) 715.

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. Because the European Union does not rest on a deeply integrated civil society, its political union often proves fragile and dysfunctional, to the detriment of all.

- (2) Any successful community or social order is rooted in the bonds established through commonplace social interactions. In its basic elements, a cohesive civil society evolves through working together in productive activities, through exchanges of goods and services, and by the establishment of private associations, family relations, and all the different kinds of connections formed between ordinary people in their daily lives. In modern societies, private law – principally the laws of property, civil wrongs and contracts governing relations between citizens – helps to channel these relationships, to stabilise expectations and sometimes to correct disappointments and betrayals.
- (3) Once established, these relations of civil society form the bedrock out of which political communities and shared identities arise. Through the long-term repetition of these social interactions of civil society, there emerges a belief on the part of the participants that they are members of the same community and share a common identity. Comprising a single people, an integrated community, they require and accept political union – a single governance structure – as well.
- (4) The European Union, however, lacks such a dense set of connections between peoples. It has failed to establish an integrated transnational civil society out of which a common European identity could be constructed. The protection of fundamental economic freedoms by the European Treaties – the free movement of goods, services, capital and labour – created elements of a European civil society by giving citizens the right to engage in commerce across borders. The additional regulatory interventions of the Single Market initiative reduced further the barriers between national communities. These measures removed some of the most conspicuous obstacles to cross-border trade such as quotas, tariffs and prohibitions. But a more comprehensive and inclusive transnational civil society requires more extensive support.
- (5) It is necessary to adopt common legal principles. By harmonising the basic rules and institutions governing social interaction in civil society, Europe can enable the evolution of a transnational civil society community. In short, as Napoléon foresaw, the European Union needs to work towards uniform laws: an integrated body of legal principles to govern all the different kinds of relations formed by citizens in a civil society.

These propositions comprise the central message of this book. At a time when many have lost faith in the possibilities for greater solidarity among the peoples of Europe, it is a message of hope. My project seeks to sustain the aspiration expressed in the European Treaties for a closer union of peoples in Europe in order to foster peace, prosperity and respect for human rights.

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

The Union's aim is to promote peace, its values and the well-being of its peoples.²

We should not permit conflicts of interest and the posturing of nationalism to impede the search for permanent and more productive unity.

Yet closer political union cannot be imposed on a reluctant populace by the ruling political elites. In the name of democracy and accountability, grand constitutional schemes for a federal union will be interrogated and found sorely lacking. Instead, greater unity or social solidarity among the peoples of Europe must be sustained from below, in the networks and interdependencies of social life. Shared legal principles play an important role in supporting and channelling those many ties that bind individuals to each other and to their communities as a whole. Comprising an agreed statement of rights, obligations and principles, the principles of private or civil law articulate a community between individual citizens built on shared values of fairness and respect for others. By acknowledging 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, rather than a political constitution, these common rules brought together in a Civil Code are the essential legal measure for the further evolution of Europe towards its aspiration of an ever-closer union of its peoples and more effective pursuit of its goals of peace, prosperity and respect for human rights.

² Arts. 1A and 2(1) inserted into the Treaty on European Union by Art. 1 of the Treaty amending the Treaty on European Union and the Treaty Establishing the European Community (the Lisbon Treaty) 13/12/2007, OJ C306, 17.12.2007.

1 The constitution of everyday life

Why is the project for constructing a Civil Code so important to the future of Europe? Are not solutions to other much-publicised problems – from the perceived illegitimacy of the ‘democratic deficit’ in Europe’s institutions to the waste and inefficiencies generated by subsidies and quotas – more pressing and fundamental? Without denying the seriousness of the challenges presented by these and many other familiar sticks used to beat European institutions in the media, the case for regarding a Civil Code as a central project for Europe depends on its intimate connection to a broader aspiration. A Civil Code provides a vital ingredient in constructing an economic and social constitution for Europe. In the long run, in order to build greater solidarity among the peoples of Europe, it is this social and economic constitution that must be constructed.

This other constitution, what we shall call the ‘Economic Constitution’,³ does not itself seek to alter the political arrangements for sharing sovereignty between nation states, let alone impose a federal sovereign state on Europe. Nor does this Economic Constitution impose changes in political allegiances. Rather, an economic and social constitution tries to establish a consensus of values regarding fairness and social justice for a community. It provides a cement of social and economic principles around which a community may build more permanent institutional structures. In Europe, this economic and social constitution is sometimes called the European Social Model. But this European Social Model remains unrealised: an aspiration that still requires both detailed articulation and popular acceptance.

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 and respect for another’s interests, both personal and proprietary. The precise meaning of the concept of private law differs between

³ M. E. Streit and W. Mussler, ‘The Economic Constitution of the European Community – “From Rome to Maastricht”’ in F. Snyder (ed.), *Constitutional Dimensions of European Economic Integration* (London: Kluwer Law International, 1996) 109; W. Sauter, ‘The Economic Constitution of the European Union’ (1998) 4 *Columbia Journal of European Law* 27.

legal systems.⁴ Some national legal systems, but not all, include family and domestic relations within this category, though the central focus of private law always concerns the economic and productive relations between ordinary people. 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 standards that comprise an 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 permanent 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 trust and mutual understanding or, to paraphrase Damian Chalmers, an epistemic context for making plans and getting on.⁵

A Civil Code created at a European transnational level of governance achieves these goals across borders and cultures. It articulates the

⁴ G. Alpa, 'European Community Resolutions and the Codification of "Private Law"' (2000) 8 *European Review of Private Law* 321; for a more sceptical account that doubts any stable meaning at all: D. Kennedy, 'Thoughts on Coherence, Social Values and National tradition in Private Law', in M. W. Hesselink (ed.), *The Politics of a European Code* (The Hague: Kluwer Law International, 2006) 9.

⁵ D. Chalmers, 'The Reconstitution of European Public Spheres' (2003) 9 *European Law Journal* 127.

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 standards would apply to a customer's 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.

Such a constitution for everyday life is normally presupposed by the constitution for the political institutions of the state. Historically, in nation states, civil law provided the bedrock on which political associations and institutions were constructed. The evolving rules of ownership, trade and personal status contained in private law described the structure and scope of a community. Legal discourses weave their own distinctive interpretations of the standards that should govern relations in civil society and how those standards are connected to broader political principles such as the protection of individual rights and the obligations of membership of a community. Reliance on the rules implies a common identity and membership in a community. Without such an implicit common identity and membership, it seems impossible to imagine a single polity, an association of all the peoples of Europe.

The European Union needs this other 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.

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 civil society need to be dense and intricate before greater political integration can be

contemplated. The central 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.

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, while at the same time retaining their national and local cultures and allegiances.

The need for a European Civil Code derives from the need to facilitate the construction of a European civil society, in which national boundaries appear less significant as social and economic ties cross these artificial borders in associations and increasingly dense networks.⁶ That European civil society relies on mutual trust and respect, which requires in turn a shared set of values and principles regarding fair dealing, fair opportunities and effective protections from adversity. A code of principles of private law articulates those values and ideals. It provides the foundations on which greater solidarity between the peoples of Europe can be built.

2 Mutual recognition

Yet is a European Civil Code really needed in order to achieve the aim of a transnational civil society? Surely it is possible to establish economic

⁶ The term 'European civil society' is usually employed in a narrower sense in EU documents to refer to representative non-governmental organisations with European-wide membership, which can give voice to the concerns of citizens and business interests: EC Commission, *European Governance: A White Paper*, COM (2001) 428, 11–18. In this book my use of the concept employs the broader usage of social theory and refers very broadly to any cross-border social and economic activity within Europe. For clarifications, see: K.A. Armstrong, 'Rediscovering Civil Society: The European Union and the White Paper on Governance' (2002) 8(1) *European Law Journal* 102.

and social ties across national boundaries without a uniform set of transnational rules? For centuries, indeed, nation states have found a route towards establishing thin threads of civil society across borders. They have achieved support for international commerce and other kinds of social relations without unifying civil laws. The method has depended in modern societies on a broad idea of mutual recognition of sovereignty.

Each nation state recognises the legal authority of the other states within those other states' borders. Further, each state recognises the legal authority of other states where the other's rules and jurisdiction seem to have the closest connection to the events under consideration. Under these rules of private international law (or conflict of laws), for instance, a traffic accident that occurs between a British driver and a French cyclist in France will be governed by French law, even if a claim for compensation is brought before an English court. Moreover, courts in the United Kingdom will respect the decisions of the French courts and even enforce judgments for damages awarded by the French court through domestic procedures. A special choice of law rule governs contracts involving international trade: as a general principle, though subject to exceptions, the parties to the contract are free to determine both the law that should govern the transaction and the courts which will have jurisdiction to adjudicate over any dispute. In order to promote mutual recognition and to avoid anomalies, the European Union has been working towards the harmonisation of these rules of private international law.⁷

This mutual recognition of the authority of other national legal systems goes a long way to make an international civil society possible. A contract that is binding under its governing law will normally be regarded as binding in whatever forum a dispute may be litigated. If a person is married according to the rules of one legal system, that person remains married while travelling the globe, even though the rules governing the formation and the very concept of marriage diverge considerably. Similarly, a contract may create a special type of proprietary interest under English law, and that interest is likely to be

⁷ Reg. 44/2001 on jurisdiction and the recognition of judgments in civil and commercial matters; Reg. 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40; Reg. 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

respected even in a country that does not permit such a proprietary right under its legal system, provided that the contract is governed by English law.⁸ The combination of choice of law clauses and mutual recognition by national courts enables international commerce to flourish.

Mutual recognition always has limits. National sovereignty is preserved over many issues, so that the effectiveness of foreign legal arrangements may not always be recognised on such grounds as public order and moral standards. If the special type of proprietary interest created by a contract runs contrary to fundamental standards of morality or public order, private international law does not require a national court to respect the applicable law. A contract of slavery, for instance, even though formed lawfully in the state of origin of the parties, would not be respected by the tribunals of any European country.

In pursuit of the goal of establishing a single market without trade barriers, the European Union has employed variations on this technique of mutual recognition to challenge national barriers to the free movement of goods and services. It has expanded the application of the principle of mutual recognition from legal rules to all kinds of regulations, administrative rules and market conventions. In relation to goods, for instance, the strategy has been to require Member States to respect the technical specifications for goods produced in other Member States under a 'country of origin' principle.⁹ For example, a car produced according to the technical requirements in the country of assembly can be marketed throughout Europe without the need to comply with different product specifications in other Member States. Similarly, with regard to suppliers of professional services subject to

⁸ The position is not absolutely clear in relation to certain kinds of security rights: J. W. Rutgers, *International Reservation of Title Clauses* (The Hague: TMC Asser Press, 1999).

⁹ The 'country of origin' principle is not found in modern private international law rules, so there is a debate whether such EU measures conflict with or improve upon the underlying principles: H. Heiss and N. Downes, 'Non-Optional Elements in an Optional European Contract Law: Reflections from a Private International Law Perspective' (2005) 13 *European Review of Private Law* 693; A. M. Lopez-Rodriguez, 'The Rome Convention of 1980 and its Revision at the Crossroads of the European Contract Law Project' (2004) 12 *European Review of Private Law* 167; R. Michaels, 'EU Law as Private International Law?' Discussion Paper 5/2006 (Bremen: ZERP, 2006). But from the perspective adopted here, these distinctions are not as important as the contrast between, on the one hand, harmonised laws and, on the other, mutual recognition and respect for the laws, regulations and standards of other nation states, which is the underlying principle of any private international law system.

regulatory regimes involving formal qualifications, the principle of mutual recognition seeks to enable professionals qualified in their home state to offer their services in a state where they do not satisfy the local regulatory conditions.¹⁰ The country of origin principle applies also to the regulation of the provider of a service through electronic means: the regulations of the home country apply, even where the service is received in another country, though Member States are required to comply with common standards.¹¹ Again, this expansive use of the principle of mutual recognition as a technique for market integration encounters limits when Member States perceive that important issues of public order and safety are at stake.

Mutual recognition has been the traditional route for building international connections between civil societies. It provides the necessary assurance of legal support for international business transactions. Mutual recognition in all its guises appears to provide a tried and tested way of enabling international cooperation between civil societies, without the need for the adoption of uniform transnational laws. A first question that must be confronted here, therefore, is whether the project of developing a European Civil Code is necessary. Assuming that Europe does require projects that will lead towards the construction of transnational civil society, why will mutual recognition not provide an adequate and comprehensive alternative for building a transnational civil society in Europe? Why is greater harmonisation of the law necessary, when mutual recognition can enable transnational arrangements to be made and disputes to be settled?

3 Social dumping

Although mutual recognition facilitates transnational civil society, it also invites the risk of 'social dumping'. It threatens to undercut the standards that uphold public policy concerns. These concerns may include, for instance, labour standards, consumer safety rules, environmental protection measures and prohibitions against unfair competitive practices. With respect to technical standards there is a risk, for example, that products which conform to the health and safety

¹⁰ E.g. Dir. 2005/36, OJ 2005, L255/22 on the recognition of professional qualifications.

¹¹ Dir. 2000/31, OJ L178, 17 July 2000, p. 1 on certain legal aspects of information society services, in particular electronic commerce; M. Hellner, 'The Country of Origin Principle in the E-Commerce Directive – A Conflict with Conflict of Law?' (2004) 12 *European Review of Private Law* 193.