

*Do We Need a European Civil Code?*

Mr. David Schmid

LLM in United States Legal Studies Candidate,  
Golden Gate University School of Law;  
PhD Candidate, University of Heidelberg, Germany

**Distinguished President Angel, Dean Ramey, Special Guest of Honor and Keynote Speaker Sir Arnold Amet, Professors, fellow Students of Golden Gate University, Ladies and Gentlemen,**

I am very honored to speak to you today at the 21<sup>st</sup> Annual Fulbright Symposium. Before starting my speech, allow me to thank the President and Staff of GGU, in particular the organizers of the Symposium for this wonderful event.

In line with today's theme, Harmony and Dissonance in International Law, I would like to share my thoughts with you on the question: Do We need a European Civil Code? In order to maintain the time limit of 15 minutes, I will only talk about three major points of my paper but will not be able to go into depth in any of them.

When I talk about a European Civil Code, I mean an all-embracing Civil Codification for all the Member States of the European Union.

Let me begin with the competence.

### 1. Competence

Art. 114 TFEU, together with Art. 26 TFEU offers a competence for actions to establish and administer the internal market. The object of a European Civil Code would therefore have to be the establishment and functioning of the internal market. "The measure has to be designed to remove *genuine obstacles to the completion of the internal market*", the ECJ held.

Such genuine obstacles can be seen in higher transaction costs. They result from the need of legal advice if one is doing business with someone from a different legal order. Furthermore, differences in the law make more detailed contracts necessary, which also leads to higher transaction costs. Moreover, it's an obstacle to the internal market if consumers are held from dealing cross-border because for example product liability law is not unified. Last but not least, a European Civil Code would create the possibility to use a piece of real estate as a lien for a cross border credit.

As a result, there are concrete hindrances to the completion of the internal market, a European Civil Code would remove. Therefore the European Union would have a competence for the measure.

## 2. Advantages and Disadvantages

Due to the limited amount of time, I can only touch on the first five of the major points from my paper today. I hope this will at least give an impression of how closely related the points are and that they have to be regarded as parts of one line of argument.

### a) Signal

First and foremost, a European Civil Code would be an enormous signal of strength, unity and togetherness to the rest of the world and would enlarge Europe's importance in the world market. Together with the Euro, it could be the greatest milestone of European integration as it would affect the people in their everyday life, creating a European identity. So far, every European citizen only sees himself as a member of his own country but not as

a European.

However, the Motto of the EU is “Unified in Diversity”. Europe is not and shall not be one SuperState (United States of Europe). Its core identity does not lie in uniformity and conformity but rather in cherishing the differences of its Members. Therefore, one could argue that the signal a European Civil Code would send out to the world is not the signal the European Union wants to send out.

b) Outcome

A further advantage would be that by mandating the brightest and most recognized legal scholars of the European Union to draft and revise the European Civil Code, the outcome would most likely be a masterpiece of legislation. It would enhance the quality of the law in most of the European Member States regarding fairness and proportionality but also consistency and coverage.

c) Language

Due to this diversity, there are twenty-three different official languages in the EU. Critics always mention that it would not be possible that all the scholars who work on the development of the law work in their language and the results would be translated into the other languages instantly. As a result, no one could keep track of the mass of publications. Therefore the European Civil Code would start to drift apart from the first day on.

To propose that the people of the European Union should agree to only one language is not only foolhardy but also undesirable as the Member States would lose a great party of their cultural identity. But there is another way: the Europeans would not have to

agree to one language of everyday life but only to one language for science and business. The Code would still be published in twenty-three languages, but scholars would work on the development of the law in English only. In this way, the efforts would be combined; all European scholars would work on the development of the law together. And it is not so unthinkable to make English the language of science and business in the EU; it is happening already anyway.

Besides, to agree to one language for business and science would, once again, show strength and unity and would enhance trade between the Member States. Last but not least, the different languages could even be seen as another obstacle to the internal market/trade (and therefore giving the European Union a competence to enact a European Civil Code).

#### d) Common Law Countries

Another major problem is that there are three common law countries in the European Union (England, Ireland and Cyprus). In order not to split the EU, these countries cannot be left out of the European Civil Code endeavors.

But I think that the language argument could be used here once again. All those countries are English speaking. It would be a tremendous advantage for them, if English becomes the language of business and science in the European Union. Therefore, this could be used as a bargaining power. In order to get their mother tongue established as the European language of science and business, they would have to switch their legal system to a civil law system. After all, there are not too many advantages of the common law legal system. It is very hard to always find the right precedents.

Unfortunately, I don't have the time to go into this deeper today.

#### e) Culture

Finally, the differences in the culture of the Member States, which shall be kept alive as the diversity is what makes Europe unique, could be the hindrance. A Civil Codes needs, at least to a certain degree, open clauses and indefinite concepts of law. But interpreting them is always a matter of cultural background. Therefore, even uniform rules would not lead to unified law in Europe due to the differences in the cultural background.

But it has to be borne in mind to what extent a common cultural background is necessary at all. It is not necessary to try to establish a common culture in Europe. Law is not only folklore! The cultural background only has to be common *enough* to come to *similar* interpretations of the open clauses in the civil code. Slight differences in the law of the European Member States have to be accepted; as already mentioned, Europe shall not be one SuperState! Besides, slight differences are better than completely different systems anyway.

Last but not least, one way of eliminating problems in that regard would be to leave out family and inheritance law. Those sections are on the one hand deeply rooted in the national traditions and on the other hand not of great importance for the completion of the internal market anyway. Again, I do not have the time to go into this any deeper.

### 3. Further Proceedings

Let me finish with a word about the further proceedings. The further proceedings

are very important in order to make the European Civil Code a success. A failed try to implement such a code would be an as negative signal as the success would be a positive one. Therefore, I suggest at least four steps to be followed. It should be announced that a European Civil Code will be passed according to the four steps laid out in the following.

**Step 1:** After the announcement, a group of scholars from every Member State should be put in charge of writing down the Code. They could benefit largely from work already done by other groups (a separate section of my paper discusses those efforts).

**Step 2:** In phase two, the European Civil Code should be passed as a non-binding, optional source of law. This period should last for a long enough time (e.g. two decades) to give every Member State the chance to change their education of jurists, to give the population the possibility to get used to the new code and to give the legislature the possibility to change the code easily and bring it into its final shape so it doesn't have to be changed a lot as soon as it becomes binding.

**Step 3:** In phase three, after for example one decade, the commercial part should become binding as well as the basic legal principles and definitions.

**Step 4:** In phase four, the European Civil Code should become the only binding source of Civil Law in Europe.

I hope that despite the time limit, I could at least provide an overview of the complex of problems.

Thank you very much for your attention.