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Abstract

This paper advocates the immediate beginning of a genuine, pluralistic political process leading to a binding codification of European Private Law. It is a critique of what I characterize as the post-modernist "soft" discourse of current European private law. This soft ideology stays behind proposals of "restatement" of European law; notions of "model" European codes; assertions of the sufficiency of European legal science as an alternative to codification; theories of competition between national legal systems as an efficient pattern of private law integration; notions of facilitating, optional "default law" as an efficient alternative to mandatory binding legal rules. My claim is that such soft rhetoric is yet another pattern of reception of American legal categories, poorly fitting the present fabric of the European legal scenario, and yielding to a variety of political consequences that should be spelled out rather than kept tacit.

The new European Code should be hard, minimal, not limited to contracts, and process-oriented. It should aim to reflect the social fabric of European capitalism. The European codification process should look beyond the frontiers of fortress Europe and locate itself in the global dynamic of lawmaking.

KEYWORDS: european code, hard code, european integration, private law

HARD CODE NOW!

(A Critique of "Softness" and a Plea for Responsibility in the European Debate over Codification)

By Ugo Mattei.[1]

This paper advocates the immediate beginning of a genuine, pluralistic political process leading to a binding codification of European Private Law. It is a critique of what I characterize as the post-modernist "soft" discourse of current European private law. This soft ideology stays behind proposals of "restatement" of European law; notions of "model" European codes; assertions of the sufficiency of European legal science as an alternative to codification; theories of competition between national legal systems as an efficient pattern of private law integration; notions of facilitating, optional "default law" as an efficient alternative to mandatory binding legal rules. My claim is that such soft rhetoric is yet another pattern of reception of American legal categories, poorly fitting the present fabric of the European legal scenario, and yielding to a variety of political consequences that should be spelled out rather than kept tacit.

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[1] A first draft of this paper was discussed at the Leuven conference on European Codification Nov 30- Dec1, 2001 organized by Secola. It was originated by an invitation to participate to a conference on "Comparative contract remedies" scheduled at Tel Aviv University in June 3-5 2002. The author is Alfred and Hanna Fromm Professor of International and Comparative Law at U.C. Hastings. It is Professore Ordinario di diritto civile nell'

1. Postmodern Condition and the Debate over the Code.

Postmodernism is the logic of late capitalism.[2] It is the domain of the weak, the mild, the soft, the relative, the unprincipled, the random, and the rhizome.[3] Postmodernist legal discourse gives up claims of universality, objectivity and monism.[4] The nation state blurs; sovereignty is decentralized; and legal propositions cannot be legitimised in terms of right or wrong. Justice gets relative, and efficiency becomes expediency, pragmatism and strategy.[5]

In a post-modernist environment, "avant guarde" jurists have discovered pluralism.[6] They have abated hierarchy, and they have claimed that the law is the domain of professionalism, culture, and technique.[7] Jurists have finally got rid of positivism, state-centrism, and dogmatism in legal reasoning. Legal style has become a pastiche of different modes of thought--many times borrowed from experiences of different domains of knowledge or of different legal experiences.[8]

Political legitimacy is the last of concerns. If legal reasoning is a technique of argumentation, a battle of hired weapons, there is no space for the myth of political

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Università di Torino. I wish to thank Nili Cohen, Laura Nader, Mauro Bussani, Luisa Antoniolli Deflorian and Anna di Robilant for helpful contributions in its conception and unfolding.

[2] See F. Jameson, Postmodernism; or the Cultural Logic of Late Capitalism, (1991). D. Harvey, The Condition of Postmodernity. An Inquiry into the Origins of Cultural Change, (1990).

[3] See G. Deleuze & F. Guattari, Mille Plateaux (1980)

[4] See U.Mattei & A. di Robilant, The Art and Science of Critical Scholarship. Postmodernism and International Style in the Legal Architecture of Europe, 75 Tulane L.R (2001)

[5] See N. Mercuro & S. G. Medema, Economics and the Law. From Posner to Postmodernism, (1997); see also R.Posner, Frontiers of Legal Theory (2001).

[6] Pluralism, in the European context is fully accounted for by M. Bussani, (2000) "Integrative" Comparative Law Enterprises and the Inner Stratification of Legal Systems, 8 Eur. Rev. Private Law, 85

[7] See G. Teubner, Law as an Authopoietic System (1993).

[8] See G.Minda, Postmodern Legal Movements (1995)

representation. People no longer believe that the law is the will of the community as expressed by the political process.

Such mode of thought has characterized American legal thought from the last decade of the twentieth century,[9] and it has, in due course, been received in Europe[10].

A strong, dominant position of legal scholarship among the sources of law have been the background in which, at least on the Continent, postmodernist legal discourse has been received.[11] The domain of the law has long been the domain of jurists in Europe, an elite of sophisticated intellectuals traditionally legitimised by knowledge and scholarship.[12] Too high is the degree of complexity of the postmodernist marketplace to be understood, let alone regulated, by politicians. Let politicians be busy with dismantling the welfare state, deciding immigration policies, and negotiating tariffs and quotas. Let them deal with the problems arising from the unification of the currency and the issue of European defence. Let them deal with the enlargement. Let them keep their hands off private law. They can do no good in this area.[13]

2. The Whether and the How in European Private Law.

The issue of the new European Private Law has been unfolding in three phases. The first, beginning in the early eighties, dealt with the *whether*: is there such a thing as European private law? The answer is found in the facts. Legislative, judicial and scholarly development

[9] See Feldman, American Legal Thought from Premodernism to Postmodernism (2000).
[10] See M.W. Hesselink, The New European Legal Culture, (2001).
[11] Mattei & di Robilant, cit supra note 4
[12] See A. Gambaro, Western Legal Tradition, in P.Newman (Ed) The New Palgrave. A Dictionary of Economics and the Law, (1998)
[13] See R. Zimmermann, Civil Code and Civil Law. The "Europeanization" of Private Law within the European Community and the Re-Emergency of a European Legal Science, 1 Col.J. Eur. Law, 63 (1995).

at the European level has characterized even the core areas of private law. Resistance from more conservative, domestic lawyers has been ineffective--at least at the theoretical level. Consent on the *existence* of a subject matter called European private law is now practically unanimous.[14]

European private lawyers have also been remarkably quick in reaching consent on claiming a professional monopoly on the construction of the legal framework of the market. The academic jihad against Brussels bureaucrats, launched early in the nineties, has also been successful. The Europeanisation of private law has to be seen as a professional project.[15]

Naturally, some divisions were bound to happen when it comes to the question of who are the members of the professional groups involved in the project. The question was never really on the table of an open discussion, but we can easily see a couple of opposite trends. We could name such trends as *the elitists* against *the democrats*. Both the elitists and the democrats share English as a sort of *lingua franca*, despite the attempts, particularly on the German side, to maintain some presence of the language.[16] The fact that the debate on European private law is happening mostly in English has dramatically changed the hierarchies of academic prestige.

Those active in the European private law movement tend to be a younger generation of academics who are fluent in English and are neither the mainstream comparativists nor the leading scholars within the national legal systems. Of course, there are exceptions, but this

[14] See, between many, the essays in M.Bussani & U.Mattei (Eds.) Making European Law. Essays on the Common Core Project, (2001)

[15] See, for example, R. Zimmermann, R., Civil Code and Civil Law: The Europeanization of Private Law Within the European Community and the re-Emergence of a European Legal Science, 1 Columbia J. European. Law, 63 (1994). See H. Kotz, A Common Private Law for Europe: Perspectives for the Reform of European Legal Education, in B.De Witte-C.Forder (Eds), The Common Law of Europe and the Future of Legal Education, (1992)

[16] One scholarly periodicals expressly devoted to European Private Law, Zeup is published mostly in German. There are also two Italian periodicals Europa e Diritto Privato and Contratto e Impresa Europa that are expressly

sociological shaking seems to be quite clear. Within this sociological background, nevertheless, there are major differences. "Elitists" tends to refer to self-selected small groups of well-connected and known scholars that, as a consequence, tend to be male members of the leading European jurisdictions, grounding their prestige on a more or less open claim of law as science.[17] More democratic projects tend to involve a younger generation of academics, with more equal gender and jurisdictional based constituency. "Democrats" are usually more open in the political nature of the projects in which they find themselves involved and, in particular, more open to the idea that some dialogue with the European legislator is unavoidable.[18]

The second phase of the ongoing project of Europeanisation has been much more divisive. Let us call it the phase of the *how*: how should the community of European private lawyers (however selected) use its monopoly?

The divisions on the issue of the *how* have been polarized around a few basic questions. Should European private law be codified?[19] Should it be restated? Should it be

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devoted to the subject matter. Neither Zeup nor these Italian journals however significantly overcome local readership or specialized circles.

[17] See, for example, H. Kotz, Comparative Legal Research and its Function in the Development of Harmonized Law. The European Perspective, in De Lege, Towards Universal Law, Uppsala, 1995. An interesting discussion of the roots of such approach with particular attention to the legacy of E. Rabel can be found in D.Gerber, Sculpting the agenda of Comparative Law. Ernst Rabel and the Façade of Language, in A. Riles (Ed.) Rethinking the Masters of Comparative Law, (2001). Leading elitist projects is the so called Lando Commission. See O.Lando-H.Beale (Eds) Principles of European Contract Law, Parts I and II, (2000). For a discussion see M. Hesselink, The Principles of European Contract Law. Some Choices made by the Lando Commission, in 1 Global Jurist Frontiers, 2001 www.bepress.com

[18] See some more details in U.Mattei, The Issue of European Codification and Legal Scholarship. Biases, Strategies and Perspectives 21 Hartings Int & Comp. Law Rev. 883 (1998) ; See also D. Caruso, 'The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration," 3 European Law Journal, (1997) 3, and C.Joerges & O.Gernstenberg, Private Governance, Democratic Constitutionalism and Supranationalism, (1998). A Democratic Project is, in the intention of its Editors, the Common Core of European Private Law. See M.Bussani & U.Mattei, The Common Core Approach to European Private Law, 3 Col.J.Eur. Law 339 (1997).

[19] See M.J. Bonell, The Need and Possibilities of a Codified European Contract Law, 5 ERPL 505 (1997); B.Markesinis, Why a Code is Not the Best Way to Advance the Cause of European Unity, 5 Eur Rev Priv Law, 519 (1997).

left to legal science within a revival known as *usus hodiernus pandectarum*?[20] Should it be developed around some "core" special statutes such as those guaranteeing consumers' protection? Should there be attempts to bridge the distinction between common law and civil law by efforts of harmonisation, or should this "cultural" difference be preserved?[21] Should such legislation be in the nature of directives (letting leeway to state jurisdictions in the domain of implementation), or should it be in the nature of directly binding regulation?[22] Should codification be comprehensive or piecemeal?[23] In this paper, I will not approach directly any of such questions but only will tackle those that are directly connected with my subject matter, i.e. codification[24].

As early as 1989, when the Strasbourg Parliament, the only democratically representative institution of the European Union, has for the first time recommended action in the domain of civil codification, the scholarly reaction has been lukewarm. Such attitude is shared today by a variety of scholars, which have expressed severe critiques to the recent, quite detailed discussion of the subject matter, offered by the Direction General 24.[25] Someone has suspected an attempt of the "Brussels bureaucrats" to claim an even larger role in the making of private law. Some others have dismissed the recommendations as the action

[20] See R.Zimmermann, Roman Law, Contemporary Law, European Law. The Civilian Tradition Today (2001).

[21] See for example, H.Collins, European Private Law and the Cultural Identity f States 3 Eur Rev Priv Law 353 (1995).

[22] See, for recent collection of essays, M.Van Hoecke & F.Ost, The Harmonization of European Private Law (2000) and V. Heiskanen & K.Kulovesi, Function and Future of European Law (1999).

[23] See T. Wilhelmsson, Private Law in the E.U: Harmonised or Fragmented Europeanisation?, Eur. Rev Priv Law. (2002) forth.

[24] A variety of views can be found also in A.S.Hartkamp and others, Towards a European Civil Code, 2d ed. (1998)

[25] Between the more articulated critiques one should remember those expressed by H. Collins at the Recent Leuven Conference (Nov 30, 2001) organized by the Society for European Contract Law. Of this author is worth reading at least H.Collins, Formalism and Efficiency: Designing European Commercial Contract Law, in Eur. Rev.Priv. Law, 211 (2000).

of a weak political actor, not to be taken too seriously. Yet others have denied that the EU would have any jurisdiction on a civil code.[26]

True, some proposals have been advanced by self-appointed groups of scholars, and some of this activity (such as that of the Lando Commission) has been indeed successful in seizing the stage of European private law. Nevertheless, perhaps because of a more rooted positivistic imprint in European legal scholarship, the issue of legitimacy quickly arose and even such self-appointed groups, lacking any political legitimisation whatsoever, have made it clear that their product had little in common with the traditional idea of codification.[27]

The traditional idea of codification, which is the product of nineteenth century modernist *grand style* and is supported by a transcendent idea of sovereignty vested in the State, is a comprehensive, territorial, systematic body of private law rules claming quasi-constitutional status in the edification of the bourgeois legal order.[28] Codes are to be applied and enforced by other, subordinate institutions of the legal order.[29]

Present day codification proposals are much more cautious and less ambitious[30]. They are limited in scope, as today we are reduced to discussing whether contract law should be codified[31]. They are presented -- borrowing from US style even in such a traditionally civilian area of expertise -- as "model codes" or "restatements." Notions such as "soft law,"

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[26] For a discussion thoroughly referring to the literature of many countries, O.Remien, Denationalisierung des Privatsrechts in der Europaishen Union? Legislative Und gerichtliche Wege, 35 Zeitschrift fur Rechtsvergleichung, 119 ff (1995).

[27] See for example O.Lando & Beale, Principles of European Contract Law, cit. See also, for the views of another of such groups, G. Gandolfi, Pur un Code Europeen des contrats, Rev. Trim. Droit. Civ. 707 (1991). The First significant Results of the Pavia Group is in G.Gandolfi (Ed.) Code Europeen des Contrats—Avant Project, (2001).

[28] See J.L. Halperin, Histoire du droit privé francais depuis 1804, (1996).

[29] See A.Gambaro, Codice Civile in Digesto IV Discipline Privatistiche, Civile (1988).

[30] See V. Zeno-Zencovich, The European Civil Code", European Legal Traditions and Neo Positivism, in G.Alpa & N.Bucicco, (Eds.) Il codice civile europeo; Materiali dei seminari, 375 ff (2001).

[31] See W. Van Gerven, L' harmonization du droit des contrats en Europe: Rapport introductif, in C.Jamin-D.Mazeaud (eds.) L' harmonization du droit des contrats en Europe, (2001).

"creeping codification," "open texture," and "bottom up" are used.[32] Such proposals are to be, "interpreted," "discussed," "considered," and "harmonized" by a variety of other *sources of law*.[33]

3. Surrender to the Actors of Market Globalisation?

What is behind such paradigm shift?

In this paper, I claim that what we are witnessing is a real change in the relationship between the law and the market. The soft cultural attitude, typical of postmodernist scepticism, irony and loss of faith, is functional to a new legal and economic order in which the market governs the law rather than the other way around.[34] European private lawyers, in a mood of revolt against the positivistic attitude of state-centric twentieth century positivism, have thrown away the baby with the bathwater. They have failed to seize the tremendous opportunity of renovation and critique stemming from the codification of private law at the European level.[35]

What is going on is the European counterpart of what anthropologist Laura Nader, linguist Noam Chomsky and other critical thinkers have significantly portrayed as an anti-law movement unfolding in present days American Law.[36] It is the final assault of Empire on all such institutions of the nation state that do not fit its profile of economic hegemony and

[32] See C.U. Schmid, "Bottom Up harmonization of European Private Law: Ius Commune and Restatement, in Function and Future of European Law, cit.
[33] See for example K. P. Berger, The Creeping Codification of the Lex Mercatoria (1997); A. Chamboredon, The Debate on A European Civil Code, For an Open Texture in The Harmonization of European Private Law, cit.
[34] See A. Stephanson, Manifest Destiny. American Expansionism and the Empire of Right, (1995); S. Sassen, Losing Control? Sovereignty in the Age of Globalization, (1996).
[35] See for the most blunt critique of codification rooted in such postmodernist mood, P.Legrand, Against a European Civil Code, 60 Mod L.Rev. 44 (1997).
[36] See L.Nader, Law in Motion. Anthropological Projects, (2002 Forth); N. Chomsky, Rough States, (2001)

global corporate governance.[37] Scholars have detected this phenomenon in a variety of areas of U.S. law, such as the so-called tort law reform, by which powerful corporate defendants try to emasculate the plaintiff's bar for fear of class actions and punitive damages. The shift towards compulsory ADR and the tremendous pressure to settle aims at silencing victims of abuse in the workplace or in the family. An episode of oppression by means of "harmony ideology" then offers another important example.[38] More generally a similar trend is visible in the creation of a strong and prestigious conservative scholarly critique of the politically legitimate sources of law within the U.S. legal academy. Such critique, in order to show the efficiency of the common law process, has accused legislatures of being captured by lobby's money.[39] This idea is orthodoxy in those U.S. law and economics circles that have been able to gain major influence in framing the International financial institutions' development plans for the third world. In Europe, the conservative notion that European contract law should serve efficiency because of its value neutral and technical content, and that the Code in this perspective should only be facilitative rather than binding, is now gaining acceptance[40]. Such attitude that considers "legal science" as neutral and insulated from capture is similar to the classic law and economics attitude that considers the "common law process" similarly insulated. But such idea is no more robust (or less arbitrary) in the old continent than it is in the US. The high degree of insulation of U.S. courts of law that should shield them from any

[37] The idea of Globalization as Empire has been advanced by M. Hardt & A.Negri, Empire, (2000). The competing but complementary one, that of globalization as Americanization is interestingly discussed in S. Strange, The Retreat of the State (1996).

[38] See L. Nader, Law in Motion, cit. On the notion of Harmony Ideology as a controlling process see L. Nader, Harmony Ideology (1990).

[39] See for a critical discussion of the politically conservative background of law and economics D.Kennedy, Law and Economics from the Perspective of Critical Legal Studies, in P. Newman (Ed.) The New Palgrave. A Dictionary of Economics and the Law, (1998)

[40] Such position is taken by a variety of scholars. At the Leuven Conference it was taken by C. Kirkhner, R. Van Den Bergh and H.Collins. But such normative use of a biased version of law and economics is even more dangerous in the European legal landscape than in the U.S. See D. Kennedy, The Political Stakes in "Merely Technical" Issues of Contract Law, In Eur. Rev. Priv. Law, 2002 (forth.)

risk of capture is only accepted as an article of faith by mainstream American legal culture (the prestige of art. 3 of the US Constitution is tremendous). There is no empirical testing whatsoever of the effectiveness of the insulation devices provided by article 3 of the US Constitution for the members of the Federal judiciary (tenure of office and guaranteed salary). Moreover some scholars, who certainly can not be considered radicals, are now beginning to question the neutrality and technocracy of private legislatures and independent authorities. The day in which we will realize that outright corruption is not the only danger in the present complex political setting, we will end up questioning the bias in favour of the common law process developed in American scholarship.[41] Similarly, the "neutrality" of the new European private law scholars as a builders of (soft and technical) codification proposals should at least be questioned rather than being taken for granted mirroring in front of the traditionally most prestigious between the civilian "oracles of the law" the same idolatry that in the US is granted to the judiciary [42].

In this cultural context, one might wonder if the strong emphasis of private law default rules being efficient as proxies of what parties would have agreed upon, is not itself, proposed by conservative law and economics scholars, yet another strategy to justify and grant legitimisation to rapacious and self-serving corporate behaviour[43]. Indeed, the idea of default law, *ius dispositivum* as in the civil law tradition we know it, is at the very root of the recent but already well established notion that in Europe, civil codification, in one way or another, should be soft. It is, however, important to stress that parties should be left free to

[41] See for example, Schwartz, Alan and Scott, Robert E., 'The Political Economy of Private Legislatures', 143 University of Pennsylvania Law Review, 595 (1995).

[42] This faith on the value of a "scientific" Code is behind the Von Bar project, which is rumoured to be reflected in the last and very recent European Parliament position on the issue. See V Bar, Paving the Way Foreward with Principles of European Private Law, Paper presented at the Secola conference in Leuven.

[43] I discuss the issue of default rules in U.Mattei, Efficiency and Equal Protection in the New European Contract Law. Mandatory, Default and Enforcement Rules, in 39 Virginia J. Int. Law, 537 (1999).

make their options only once the legal system has been able to establish, by binding and effective law, its control against opportunistic behaviour.[44] Soft law is not at all fit for this purpose. As postmodernism and extreme relativism, it only fits the logic of Empire.

In other words, the legal scholar who resists giving up his or her critical function, in the face of any proposal of soft law, should ask a fundamental, perhaps naïve question. Soft for who? If the law is soft with aggressive and opportunistic market actors, who under the shield of soft legality, succeed in transferring costs to society rather than facing the real social cost of their market activity, it is much better to have it hard.

4. Soft Rhetoric for Hard Practices.

Soft law is often advertised as more efficient because it respects the differences in preferences of market actors. Similar arguments are voiced by many of such scholars that use American inspired ideas of competition between legal systems as arguments against the codification of private law at the European level [45]. Indeed, cultural relativism fosters this ideology because incorrect default law can still be changed by making a deal; whereas incorrect hard law introduces negative and incurable incentives.[46] If it is impossible to make any prediction in terms of right and wrong, then it is better to proceed tentatively, leaving ground for corrections. Similar concerns are behind favouring standards on rules, favouring Directives on Regulation, and favouring restatements over codification because the normative language of even a Model Code makes it harder than the "merely descriptive" suggestions

[44] See R. Cooter & T. Ulen, Law & Economics 3d ed (2000) I discuss the issue in U.Mattei, Efficiency and Equal Protection, cit.

[45] At the Leuven conference, this approach has been defended by long time President of the European Law and Economics Association: R. Van Den Bergh, Forced Harmonization of Contract Law in Europe. Not to be Continued.

contained in a Restatement.[47] Scholars from a variety of perspectives have demonstrated that the Restatement is by no means a merely descriptive exercise (even assuming the possibility of such distinction between fact and value in the law[48]). It is consequently unacceptable that such a claim of neutrality is maintained in Europe in front of a legal scenario in which we simply do not know yet how to answer the fundamental question: "Is there a European private law to restate?"[49].

Similarly, talking about creeping codification is also a soft strategy because it conveys an idea of factual condition of the being (a sort of evolutionary necessity), and not of outright choice, as in the case of a codification project[50]. It is as if the present state of the European legal landscape in the domain of private law, were not the aggregate of a number of political choices determined by a clear hegemony of the German legal community within the Brussels political process. Rather, the relationship of power that determines the unfolding of the law is "neutralized" and the outcome can only, naturally, be today's *status quo* of soft contract law. Such naturalization of the political process has to be denounced as a conservative strategy because it hides the power relationship behind it[51]. Similarly, talking about "harmonization" of law transmits a signal of tolerance for diversity that is absent in the notion of "unification". It is however almost too easy to show that harmony is itself an ideology very soft only as a

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[46] See R. Cooter & T. Ulen, Law and Economics, cit.

[47] See the classic A. Rosett, Unification, Harmonization, Restatement, Codification, and reform in International Commercial Law, 40 Am J.Comp. Law 683 (1992).

[48] I devote to this issue some thoughts in U.Mattei, Fatto e valore. Il paradosso ermeneutico dell'analisi economica del diritto, in J Derida & G.Vattimo (Eds), Diritto, giustizia e interpretazione, (Coord. M.Bussani, 1998)

[49] It is even doubtful if such a question could be posed at all even when long range efforts such as the Trento "Common Core Project" will be completed. For a critical discussion see David Kennedy, The Politics and Methods of Comparative Law, in M. Bussani & U. Mattei,, Making European Law. Essays on the Common Core Project, 2d ed. (2002) Forth.

[50] See Berger, The Creeping Codification, cit.

[51] See L. Nader, Law in Motion, cit.

façade[52]. Indeed it is very hard with the weak side of the power relationship (in this case less prestigious European legal systems) and it does not openly faces the responsibility stemming from choices.

The truth of the matter is, however, that social conflicts such as those happening in the distribution of cooperative surplus, or in deciding the of shares of common resources, are mediated and solved by institutions.[53] Such institutions might take the shape of formal or informal law attempting to create rules for the market (e.g. rules fostering fair market practices), or simply might take the shape of the market buying out the law. What is not covered and determined by law is covered and determined by market forces that, by definition, either are regulated (of course we are talking here of private law regulation) or are left rough. Consequently, strong market actors naturally prefer soft law because in the absence of any regulatory force by the legal system, they are able to make the rules of the very same game in which they are playing.[54]

The critical observer should not be fooled by the appealing and delicate nature of soft arguments: respectful of differences, aware of cultural specificities, concerned with gaining efficiency from flexibility, and refusing the arrogance of decision making in the name of cultural relativism.[55] This is exactly the post-modern logic serving corporate rapacity.[56]

It is easy to observe the change of rhetoric in present day U.S. political discourse, which is the intellectual humus in which cultural models for present days European debates originate. "No smoking!" becomes "Thank you for not smoking;" "please do not disturb!" becomes "privacy please!" "Go away!" becomes "you are kindly invited to leave," and so on.

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[52] See L.Nader, Harmony Ideology, cit.
[53] See D. North, Institutions Institutional Change and Economic Performance (1991)
[54] Such analysis stems from basic public choice theory. See for an accessible and critical discussion, Mercuro & Medema, Economics and the Law, cit.
[55] See for a collection of such attitudes P. Legrand , Fragments of Law as Culture (1999)

Orders become invitations. The clear-cut assumption of leadership and responsibility, with an active and a passive subject, takes the façade of a cooperative game. There is nothing soft in this change of rhetoric except the rhetoric itself. Smokers cannot decline to be kind enough not to smoke in all public buildings. Harsh fines are still enforced. Minimal wage workers in large five star hotel chains are still fired if a client complains about having been disturbed in his privacy. If "asked to leave" a public or private facility because your behaviour does not conform with the rules set by the management and you decline to do so, they will still call the police whose handcuffs are not soft.

Law, as well as language, can present itself in a large variety of semantic clothing. There is not much soft in its nature, nevertheless, because there is not much that is soft in the economic transactions and in the power relationship that connects individuals to each other in the market place. In a sort of zero sum game, at least one institutional setting is to be hard. Either the law is hard keeping economic transactions under control (and potentially making them soft), or the economic relationship is hard and keeps soft law under its thumb, determining its form as well as its substance.[57] Adapting Althusser's intuition, either the law is a coactive apparatus of the state, that arguably might even sometimes serve the interests of the weak, or (dressing soft clothing) it is a coactive apparatus of the global market stronger and harsher even than Leviathan. In this case, however, the only interest it can serve is certainly that of the stronger.[58]

If this is the scenario, any discussion about the "how" of making private law European has to keep it in mind. Soft metaphors hide harsh power relationships. The stakes need to be clear; the cards need to be on the table. Postmodernist irony should not hide the truth. As

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[56] See M. Hardt & A. Negri, Empire, cit; L. Nader, Law in Motion, cit.
[57] See, with emphasis on ideology, D. North, Structure and Change in Economic History, (1982), with emphasis on ideology

social historian Barrington Moore once said, "In any society the dominant groups are the ones with the most to hide about the way society works. Very often, therefore, truthful analyses are bound to have a critical ring, to seem like exposures rather than objective statements…. For all students of human society sympathy for the victims of historical processes and scepticism about the victor's claim provide essential safeguards against being taken in by the dominant mythology. A scholar who tries to be objective needs these feelings as part of his working equipment." [59]

5. In Defence of Hard Law as a European Necessity.

In order to be successful, legal institutions competing with strong economic actors need to be strong and highly effective. The stronger the actors, the stronger the institutions must be if individual selfishness and interest is to be channelled for the welfare of everybody.[60] The rhetoric about the efficiency of soft law has to be exposed in order to achieve informed guesses on what the impact of the Europeanisation of private law carried on by alternative means is going to be.[61] I submit that emphasis on softness in the making of European private law is likely to mean lawlessness and a free battleground for exploitive business interests.

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[58] See L. Althusser, Sur la reproduction, (1995).
[59] B. Moore, Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of the Modern World , (1966) at 523
[60] See C.L. Schultze, The Public Use of Private Interest, (1977)
[61] Such predictive function is crucial to the comparative legal and economic analysis see U.Mattei & A. Monti, Comparative Law and Economics. Borrowing and Resistance, in 1 Global Jurist Frontiers issue 2 (2001) www.bepress.com

Someone has suggested, in one of the few thoroughly insightful papers on European codification, that the United States model should be kept present.[62] To be sure, because soft law is an American metaphor, we need to place it in context. Scholars have trained us to understand that transplants of legal institutions, formal or informal, are not like exports of commodities.[63] Both the context of reception and that of origin are highly relevant in order to make a prediction on what is likely to happen. Present day European context can not be more different that the context of U.S. law, where Restatements and Model Codes were suggested and developed as soft law alternatives to hard law from the thirties of the past century.[64] The United States of the twentieth century was indeed the institutional system with the strongest judiciary that has ever been produced in the history of humankind -- strongest not only in term of power but also of prestige. Restatements were suggesting rules to this kind of judiciary -- a professional group of people given so-called inherent power to pursue public policy in the solution of individual conflicts. The decisions of the U.S. judiciary, reinforced by *stare decisis*, have never been perceived as soft.[65] The American judiciary's role in the process of making the general rules of the game has always proved stronger than the role of legislators. Statutory law, in fact, could never do much more than suggest piecemeal changes.[66] As to the Model Codes, the dialogue was only apparently with State legislatures that were free to maintain or modify them. Indeed, the dialogue was still with these Courts, whether state or federal could not mattering, given the substantial cultural uniformity of U.S. law. Strong

[62] M. Reimann, Towards a European Civil Code: Why Continental Jurists Should Consult their Transatlantic Colleagues, in 73 Tulane L Rev. 1337 (1999).

[63] See for example E. Grande, Imitazione e diritto. Ipotesi sulla circolazione dei modelli (2001); See also, in our context Watson, Alan (2000), 'Legal Transplants and European Private Law', Electronic Journal Of Comparative Law, vol 4.4, http://law.kub.nl/ejcl/44/44-2.html.

[64] See, for the classic discussion, G. Gilmore, Thr Ages of American Law (1977)

[65] See, for a classic discussion H. M. Hart & A.M. Saks, The Legal Process (1994)

[66] See, from the early ages, J.N. Pomeroy, The True Method of Interpreting the Civil Code, 4 West Coast Rep 585 (1884); see also, for more of a recent account, G. Calabresi, A Common Law for the Age of Statutes (1982)

institutional actors and scholars were trying to "persuade" by using a normative semantic level like that of the UCC or the Model Penal Code.[67] It is no surprise that such famous examples of soft legislation are deeply connected with two individual scholars, Professor Llewellyn and Wechsler, respectively. In other words, soft law in the U.S. never undermined, neither rhetorically nor in substance, the really strong actors of the legal system who are the legitimated forces of control of the public sphere on the economic behaviour of market actors.[68] Nor could default law, as free choice of contractual rules, dangerously affect the principle that Courts are still in charge. When they wish to do so, Courts have full inherent equitable power to control, amend, and modify even the most clearly expressed choice of the parties. They have the power to do so both in the interest of one of the parties to the contract or of third parties.[69]

In Europe, such a background scenario of strong self-legitimised institutional actors with inherent powers to channel individual economic self interest in directions compatible with the public welfare is simply absent.[70] National courts of law have never performed that function in the civilian continent. True, Europe is not only the civilian continent, but the sensitivity of British courts with public policy issues has always been much weaker than in the U.S. Moreover, the issue of uniformity makes the European institutional scenario even weaker and potentially carefree for large trans national business interests than does the U.S. one. In Europe, absent a European judiciary both formally (there are no European Courts of general jurisdiction) and culturally (national judiciaries are not uniform neither sociologically

[67] On the first, W. Twining, Karl Llewellyn and the Realist Movement, (1973); on the last, E. Grande, Comparazione dinamica e sistema giuridico statunitense: analisi di una circolazione incrociata di modelli, in 29 Quaderni Fiorentini 2001, 173 ss

[68] See, for a discussion of the use of such power by US courts, D. Kennedy, A Critique of Adjudication, (1997)

[69] See M. Trebilcock, The Limits of Freedom of Contract, (1993).

[70] See materials in H. Jacob-E Blankenburg-H.Kritzer-D.M.Provine-J.Sanders, Courts Law and Politics in Comparative Perspective, (1996)

nor culturally), there are simply not any institutional actors capable of monitoring the everyday bread and butter economic abusive behaviour. A soft Europeanisation of private law lowers responsibility for national legal systems, persuaded, as they are, of the existence of another level of the legal system "better located," according to subsidiary discourse, to monitor global transactions.[71] The softness discourse at the European level undermines the prestige of national civil codes that considered obsolete and out of fashion exactly because they are hard.[72] However, such national civil codes are the only source of principled legitimacy of judicial power in present day Europe. Thus their cultural undermining is a blank check to corporate rapacity.

Put simply, given the available institutional background, a hard European civil Code seems a prerequisite for the development of an effective set of rules of the game capable to keep economic activity under control. A *balcanized* system of private law allows the kind of forum shopping that makes large global market actors irresponsible for the social costs that they produce. To be sure, I am not arguing here that a hard code would be all what is needed for an effective European system of private law. Elsewhere I argued, in papers devoted to contract law and trust law respectively[73], that a system of European courts of general jurisdiction is also a necessity at this point. Nevertheless I believe that given the European legal path such a code would be a necessary if not sufficient condition to make Europe a genuine legal system capable of controlling the behaviour of international corporate capital.

[71] See, in general, L. Antoniolli-Deflorian, La struttura istituzionale del nuovo diritto privato europeo, (1996).
[72] See examples in the papers by Samuel and Chamboredon in , The Harmonisation of European Private Law, cit.
[73] see U.Mattei, Efficiency and Equal Protection in the New European Contract Law, cit. ; U. Mattei, Basic Issues of Private Law codification in Europe: Trust, 1 Global Jurist Frontiers,1 www.bepress.com

Such institutional effectiveness is in turn necessary for Europe to effectively compete with the United States in the international legal arena.[74]

Is this a nostalgic and backwards looking idea? Is it a return to old fashioned positivism? I believe that it is neither, but rather that it is only the realistic taking into account that Europe and the United States have travelled different paths in the law. If there is a desire to merge the path, moving European institutions strait in the American shadow, this shift away from the European structure of legitimacy should be part of a conscious political choice. It should not happen as some creeping phenomenon, presented as a technically more advanced step in the development of private law.

6. The Issue of Contents. *What's in* the Code?

European capitalism has been characterized by a much more social flavour than its U.S. counterpart.[75] Whether the hard European Code will be an old fashioned replica of previous codifications will depend on the content of the Code: the third phase -- that of the *what's in* – of European private law. I submit that the new European Code should be able to capture and reflect in the rules of the game it sets forward, some of the values of the European social model of capitalism. If capable of doing so, it might impose itself as a model capable of competing with U.S. hegemony. By helping to do so, European scholarship might interrupt the trend of Europe being reduced to yet another province of U.S. led corporate Empire.[76]

As to this last point, I will pose here only a few questions for discussion, some of the preliminary issues that the scholarly debate should clarify to make political choices possible.

[74] See P Bordieau, Conterfeux 2, pour un movement social europeen (2001)
[75] See M. Albert, Capitalismo e Controcapitalismo,(1990) ; See also G. Gros Pietro-E. Reviglio-A.Torrisi, Assetti proprietari e mercati finanziari europei, (2001).

Institutions, and consequently codes as institutions, should serve a purpose. Proposed reforms and changes should create advantages and benefits for the community they serve. The first question to pose is, consequently, whose interests does the European private law system have to serve? Is the European civil code only to serve the interests of the Europeans? Alternatively, is Europe a sufficiently strong world power (both in terms of economy and of culture) that its legal system can influence global developments in the present moment of high uncertainty about what path we should walk in the future of world capitalism?[77] I submit that European private lawyers should take full advantage of the cosmopolitan perspective stemming from their comparative law background, (which has proved to be a necessity rather than a choice in present days Europe), to think worldly, i.e. to imagine a legal structure of the European market capable of working as a model and consequently serve the global community and not merely the European interests.

Arguing for a hard code, does not mean taking a legalistic attitude or underestimating the beneficial potentials of the market as an institution of resource allocation and wealth production. Indeed, disregarding such potentials of the market and the incapability of handling tools of interdisciplinary analysis has imposed a dear price to the present state of the debate on European private law.[78] Put simply, European lawyers, if paralleled with their U.S. counterparts, have been good comparativists but very poor economists and social scientists. The lack of knowledge in other social sciences has, for a long period of time, closed European lawyers (common lawyers as well as civilians) into a useless black letter style of legal positivistic analysis that has made them completely disregard the social and economic impact

[76] See G.Arrighi & B.J.Silver, Chaos and Governance in the Modern World System, (1999)
[77] See D. Harvey, The Limits to Capital, New Edition, (1999)
[78] See U. Mattei, Comparative Law and Economics, (1997)

of their legal constructions[79]. Once the costs of legalism has been understood, at least by some avant-garde (mostly of comparatvists) in a relatively recent past, the poor condition of background understanding has not ceased to play a negative role.[80] In the efforts of their *kempf* against positivism and in the late and hasty discovery of the existence and virtues of the market, European lawyers (as well as a large number of policy makers throughout the political spectrum) have trusted the virtues of an unregulated market much more than what it is in order. Rather than limiting and trimming regulation where wasteful, European legal culture has participated in surrendering the political process and its legitimated production of binding rules of behaviour to unrestricted market practices only softly regulated, when regulated at all. This trend is based on bad economics and even worse law and economics[81].

The market is healthy when in open competition with other institutions, most significantly the legal system and the political process.[82] The market should neither be ignored nor made the object of idolatry. It should be regulated to the extent necessary to make all the actors pay for their social costs. Such regulation, short from coming only from the public law and from ex ante government authorization, should be rooted in substantive private law.[83]

I suggest that the European hard code should be minimal, in the sense of containing only those fundamental principles that can readily be used by courts to force market actors to internalise social costs.[84] Nevertheless, a minimal hard civil code should by no means be

[79] See M. Hesselink, The New European Legal Culture, cit.
[80] See, for a classic critique of black letter positivism, R. Sacco, Legal Formants. A Dynamic Approach to Comparative Law, 39 Am J Comp Law, 1 (1991).
[81] A critique of uncritical reception of law and economics in Europe can be found in U. Mattei, Comparative Law and Economics, cit.
[82] See D. North, Institutions, cit.
[83] See R. Cooter & T. Ulen, cit
[84] Attempting to regulate details is just futile. See P. B. Stephan, , 'The Futility of Unification and Harmonization in International Commercial Law',39 Virginia Journal of International Law, 743 (1999). Argues in favour of a very detailed Code, G. De Geest at the Secola conference.

limited to the law of contracts.[85] Seen from the perspective of social sciences, economics in particular, private law is an integrated body of fundamental rules of the game.[86] The laws of contracts, torts, property, restitutions and corporations, in this perspective, play a very similar role. They integrate and complete each other as private law rules introducing correct sets of incentives for a fair and open market. Variations in form might be substantial. They are, however, the resultant of historical accidents (sometimes referred to as legal culture) that do not change the fundamental substance. The truth of the matter is that taxonomy in the law must only serve the purpose of organizing knowledge and should never be seen as something that determines the substantive solution to social problems. For too many years, European lawyers (again in the Continent as well as in the common law) have been victims of the illusion that deducting, or inducing, rules from taxonomy could be seen as a scientific exercise. Such formalistic exercise has only been a waste of time and has many times guided ill considered decisions.[87] For some years now, I have been busy coordinating the painstaking efforts of many colleagues to try understanding as much as possible how things really are in European private law.[88] Our efforts have been conscious of the many difficulties and epistemological objections that we were facing. Nevertheless, our experience has been that taxonomy is bound to become a cage if any attempt is made to use it beyond the its very minimal (but so important at the same time) task of organizing materials.

As long as the hard Code contains a regime comprehensive enough to force internalisation of costs, any taxonomy works. A good suggestion, based on an information

[85] A number of distinguished European scholars are now pointing at contract law as the only target of codification. See recently, J. Basedow, A Common Contract Law for the Common Market, in 33 Common Market Law Rev.1169 (1996). The same author has expressed similar views at the Secola conference.
[86] See R. Cooter, Unity in Tort, Contract and Property: The Model of Precaution, 73 Cal L.Rev. 1 (1985).
[87] See P. Grossi, Historical Models and Present Plans in the Formation of a Future European Law, in A. Gambaro & A.M.Rabello (Eds) Towarsd a New European Ius Commune , (1999)
[88] See M. Bussani & U. Mattei, The Common Core Approach to European Private Law, cit.

costs reduction rationale, would be to use the one that at the moment is more widely understood[89]. Contract law is poorly equipped to take care of externalities imposed on third parties. Tort law is poorly equipped to allow idiosyncratic preferences to unfold. Property law tends to be less flexible than the previous two, and its deep connection with land law places a large part of it arguably outside the European jurisdiction.[90] In corporation law the necessity to make clear what is default law and what is mandatory is perhaps the most crucial problem.[91] The law of restitution might make good some shortcomings of the traditionally poor European tort process. What is mandatory in all these areas should be spelled out in the hard European Code.

This is not the paper to attempt to discuss further details. On top of everything, it would be arrogant. Let me, however, spell out one final point that I consider highly relevant for this preliminary discussion. I believe that the political choice to make a hard code would be courageous because of the many criticisms that it will receive by the more conservative and influential part of the lawyer's profession. I do not believe however that this choice should belong to lawyers, nor that the effort would prove to be futile. True, today in Europe major symbolic choices (and the civil code would certainly qualify as one)[92] are carried on by technocrats and imposed over the people. Possibly the Euro is the most important of those. Nevertheless, the deficit of democracy that is plaguing Europe should not be seized by influential professional guilds to claim privileges and powers that clearly do not belong to

[89] See U. Mattei, A Transaction Costs Approach to the European Civil Code, Eur. Rev. Priv. Law, 537, (1997) and H. Collins, Transaction Costs and Subsidiarity in European Contract Law, paper presented at the Secola conference

[90] See A. Gambaro, Toward a Codification of the European Law of Property, in (A.Gambaro & M. Rabello, Eds) Towards a New European Ius Commune, cit. at 89 ff

[91] Suffice to think about the major debate provoked by F. Easterbrook and D. Fishel, The Economic Structure of Corporate Law, (1991); See C. Marchetti, La nexus of contracts theory, (2000)

[92] On the important of such aesthetic dimension in the competitive success of a source of law, see A.Robilant, The Aesthetics of Law, 1 Global Jurist Advances, 2 www.bepress.com

them. The Euro should not have been the decisions of bankers. The Code should not be the decision of lawyers.

European policy makers, in charge of deciding this issue should not underestimate the potential major impact of such an important piece of legislation in the current lawless global corporate marketplace.[93] Many people in the world (including in the United States the many discontents of the World bank and the IMF as global lawmakers) would welcome a truly responsible piece of economic legislation, something that Europe owes to humankind to make good its less than respectable exploitive past.[94] A European civil code, prestigious because of the strengths still enjoyed by the culture behind it, could become, in the global world, a true piece of model legislation[95]. If a leading jurisdiction such Europe begins to change its attitude towards lawless capital globalisation in favour of a more social model of economic development, this could be a first move of countertrend away from global hegemony and exploitation.[96]

How to do that? In this paper, I only wish to offer some insights on the basic issues that should be thoroughly discussed by scholars and policy makers in deciding the legal framework for an efficient European market. One important lesson that we can learn from social sciences and from the most advanced approaches to legal scholarship is the importance of the dynamic process, in the production of institutions as well as of technology and

[93] See S.Sassen, Globalization and its Discontents (1998).
[94] See A. Loomba, Colonialism/Postcolonialism, (1998); E. Said, Culture and Imperialism,(1994)
[95] See M. Bussani, The Contract Law Codification Project in Europe: Policies, Targets and Time Dimensions, paper delivered at the Secola conference.
[96] S. R. Gill, & D. Law, Global Hegemony and the Structural Power of Capital, 33 Int. Studies Quarterly, 475.(1989).

products. The processes, not only the outcomes, should attract attention of scholars as well as of legislators.[97]

Most of the externalities, most of the social costs dumped in the backyard of our weaker neighbours of the south of the world, *are created during the process of production* of commodities that are vastly consumed by the more than 200 million people that make the European market.[98] Such process of production is traditionally ignored by private law, concerned as it is only with the final outcomes. In economic terms, this simply introduces an alternative. Either European consumers pay too little for their commodities because their prices do not reflect the true social costs of production (environment, labour exploitation, etcetera) and European capitalism is once again subsidized by former colonies,[99] or multinational corporate logo-lords (mostly European, Japanese and North American) make unfair profits pocketing the value of such social costs.[100] In both cases, such economic reality should be a concern for the European policymaker drafting the rules of the game. Today we know that a large number of successful market competitors on the European market offer an inefficiently high number of products at an artificially low price. Such multinational competitors push out of business smaller market actors. Smaller market actors do not externalise costs of production on people in the south of the world. Usually by acting locally, such weaker actors have to comply with European standards of labour conditions and environmental protection and, as a consequence, can not supply as many commodities at such low prices.

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[97] See, in the domain of comparative law, D. Gerber, System Dynamics: Toward a Language of Comparative Law?, 46 Am. J. Comp Law, 719 (1998). Among legal anthropologists, L.Nader, Law in Motion, cit.
[98] See for a fascinating discussion of such process of externalisation, N. Klein, No Logo (2000)
[99] See A Loomba, Colonialism/Postcolonialism, cit
[100] This is the fundamental thesis of N. Klein, No Logo, cit. and of many other critiques of corporate globalisation. See e.g. Arrighi & Silver, cit. Hardt & Negri, cit

Producer's liability, one of the frontier advances in private law, only covers social costs imposed by the outcome of productive process in the consumer's market. Indeed, this is a small fraction of the externality problems, which a system of private law should tackle in approaching problems globally.

This basic change of perspective—from the outcome to the process – is bound to lead to important insights, cutting across significant sections of the substantive rules of the game. This perspective, more than any other, might cure the presently existing gap between substantive rules, remedies and procedures: a plague that the civilian dogmatic attitude should not infect to the European legal process. Focusing on processes rather than on outcomes is likely to allow scholars, policymakers, (and perhaps even the people!) to perceive the importance of the stakes that are on the table. Codifying private law in this sense is the true process of creation of an economic constitution for Europe. Because the economy is not disconnected from culture, ideology and society, this is a constitutional moment that should be perceived and evaluated as such.[101] It is a daunting task and a tremendous opportunity that cannot be wasted.[102] Approaching the issue of European Codification as a technical exercise, involving only a small *nomenklatura* of well-known legal scholars, unduly tables the moment of choices. Suggesting soft solutions only confirms Europe as a periphery of the economic Empire.

[101] See, on the notion of constitutional moment, B.A. Ackerman, We The People, (1991) In the European institutional context see J. Weiler, , 'The Transformation of Europe', 100 Yale Law Journal, , 2043. (1991)

[102] See, for scepticism on the possibilities of legal culture to seize this opportunity, A.Negri, Postmodern Global Governance and the Critical Legal Project, in 1 Global Jurist Advances 3 (2001) www.bepress.com