

International Business, Law Merchant, and Law School Curricula

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One of the questions closely related to the subject of the present Symposium, entitled "Interpretation in the University/Interpretation of the University," is whether the current university curricula reflect the tendencies and needs of today's society.

As far as the law school curricula are concerned, this problem becomes prominent in a time when international business is becoming more and more important, i.e., in an age when business no longer is confined to any particular national boundary, but is open to an international trade.¹ For a long time lawyers and law schools did not feel the need to make concessions to the new trends; they were (and some of them still are) "content to be insular in this sense."² Such resistance to change inevitably leads to what has been called "provincialism of legal training,"³ and hence, provincialism of legal thinking. Fortunately, this tendency of self-confinement seems to characterize solely the field of legal science. Indeed, in other fields such as natural and medical sciences, there is an international exchange of information (i.e., of discoveries and opinions). In fact, "[t]here is no such thing as German physics or Belgian chemistry or American medicine."⁴ All natural and medical scientists, regardless of their nationalities, contribute to a more diversified and fruitful production of knowledge in their respective fields.

But this appears not to be true in the area of legal science. In the past two centuries, all legal orders have been strictly nationally oriented; however, this has not always been the case.⁵ In Roman law, for instance, a body of law called the *ius gentium* (as opposed to the *ius*

1. See, e.g., PETER HELLAUER, SYSTEM DER WELTHANDELSLEHRE (1910).

2. 1 KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 14 (Tony Weir trans., 2d ed. 1987).

3. Andreas Bernhardt, *Vom Provinzialismus deutscher Rechtsausbildung*, JURISTENZEITUNG 581 (1971).

4. ZWEIGERT & KÖTZ, *supra* note 2, at 14.

5. For a similar statement, see R.H. Graveson, *The International Unification of Law*, 16 AM. J. COMP. L. 4 (1968). Graveson writes that "[t]he international process of assimilating the diverse legal systems of various countries goes back into ancient history."

civile)⁶ applied particularly to the relationships between Roman citizens and foreigners,⁷ i.e., *quod naturalis ratio inter omnes homines constituit . . . quasi quo iure omnes gentes utuntur*.⁸ The same holds true insofar as sixteenth-century Europe is concerned. Indeed, "as Europe emerged from the relative economic stagnation of the Middle Ages, . . . there appeared the need for a body of law to govern business transactions"⁹ and to get rid of the obstacles which limited the growth of international trade.¹⁰ This body of law known today as the "law merchant,"¹¹ or as the *lex mercatoria*,¹² satisfied the aforementioned needs and transcended political boundaries. The law merchant was an autonomous,¹³ practical body of law created not by legal scholars but by the merchants' court.

This body of law, which could be regarded as a European *ius commune*,¹⁴ started to disintegrate when legal nationalism and subsequently national codes (such as the Scandinavian Codes, the French

6. The Roman law concept of *ius gentium* has to be clearly distinguished from its other meaning as public international law.

7. This is the common understanding. See, e.g., 1 PIERRE HUVELIN, *COURS ÉLÉMENTAIRE DE DROIT ROMAIN* 226 (1927); 1 MAX KASER, *DAS RÖMISCHE PRIVATRECHT* 179 (1955); GEORG PUCHTA, *INSTITUTIONEN* 206 (Leipzig, 10th ed. 1893). There are, however, some legal authors who argue that the *ius gentium* applied to Roman citizens as well. See, e.g., 1 FRIEDRICH CARL VON SAVIGNY, *TRAITÉ DE DROIT ROMAIN* 405 (Paris, 1840); F.P. WALTON, *HISTORICAL INTRODUCTION TO THE ROMAN LAW* 366 (2d ed. 1912).

8. "Which natural reason has established among all men as if all peoples use this law." J. INST. 1.2.1.

9. MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* 23 (1982).

10. For a similar affirmation, see Francesco Galgano, *Il diritto uniforme: la vendita internazionale*, in *ATLANTE DI DIRITTO PRIVATO COMPARATO* 211 (Francesco Galgano & Franco Ferrari eds., 1992).

11. This expression is linked to the writings of Professor Schmitthoff, who, from 1954 on, developed his influential theory on the "new law merchant" and who "emphasized the specific character of international business law, where international conventions, uniform laws and usages have a prominent place." FILIP DE LY, *INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA* 209 (1992). For Professor Clive Schmitthoff's writings, see *SELECT ESSAYS ON INTERNATIONAL TRADE LAW* (Chia-Jui Cheng ed., 1988).

However, a "new law merchant" has been advocated by other authors as well. See, e.g., Aleksandar Goldstajin, *The New Law Merchant*, 1961 J. BUS. L. 12 (1961).

12. The expression *lex mercatoria* can be traced back to a collection of English trade usages from 1290. For the historical development, see Uwe Blaurock, *Übernationales Recht des internationalen Handels*, *ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT* 247, 251 (1993); Karl Güterbock, *Zur Geschichte des Handelsrechts in England*, *ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT* 13, 15 (1861). The first comprehensive theory of *lex mercatoria*, however, can be found in GERARD MALAYNES, *CONSUETUDO VEL LEX MERCATORIA OR THE ANCIENT LEX MERCATORIA* (n.p., 1622). For the most recent references to Malaynes's book, see DE LY, *supra* note 11, at 17; Reinhard Zimmermann, *Der europäische Charakter des englischen Rechts. Historische Verbindungen zwischen civil law und common law*, *ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT* 4, 29 (1993).

13. The autonomous character of the law merchant distinguishes itself from the *ius gentium*, which is a part of Roman law and therefore finds its binding character in Roman law itself. See, e.g., W. BUCKLAND, *THE MAIN INSTITUTIONS OF ROMAN PRIVATE LAW* 19 (1931); DE LY, *supra* note 11, at 10; LEOPOLD WENGER, *DER HEUTIGE STAND DER RÖMISCHEN RECHTSWISSENSCHAFT* 4 (2d ed. 1970).

14. For a similar statement, see Jürgen Basedow et al., *Editorial*, *ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT* 1 (1993).

Civil Code, etc.) appeared.¹⁵ Indeed, "codes were treated, not as new expositions of the 'common law of Europe,' but as mere generalizations or new editions of 'particular customs' raised to a national level, . . . they were regarded as instruments of a 'nationalization of law.'"¹⁶ In fact, after the enactments of these codes, legal scholars stopped looking beyond the border, thus giving rise to legal narrow-mindedness instead of leading to a new *ius commune*.

Recent tendencies, however, challenge such a confined understanding of law. At the beginning of the twentieth century, "there arose a strong movement favoring . . . the total or at least substantial unification of all civilized legal systems."¹⁷ This unification not only made possible an international unity of law, but also facilitated international business transactions. This movement and the concomitant decline of legal nationalism represent a renaissance of the idea of *ius commune*,¹⁸ calling for a return to the age when "the whole of educated Europe formed a single undifferentiated cultural unit."¹⁹ And though businessmen were the first to feel the need for a more international system (not unlike in the Middle Ages, when, for the same reasons, the merchants created the "law merchant"),²⁰ legal scholars as well have been turning their back on legal nationalism since the beginning of the present century. They now prefer to promote the unification (or harmonization) of laws in order to facilitate international economic and legal business. They take as their mission "to reduce or eliminate, so far as desirable and possible, the discrepancies between the national legal systems."²¹

But how do law school curricula in general reflect these trends and needs? To answer this question, it is necessary to understand the means by which the unification of the law can be achieved.²² One of the viable methods is to draw up a uniform law²³ and to include it in a multipartite treaty which the signatories are obliged to adopt and

15. Similar affirmations can be found in René David, *Il diritto del commercio internazionale: un nuovo compito per i legislatori nazionali o una nuova lex mercatoria?*, RIVISTA DI DIRITTO CIVILE 577 (1976); ALDO FRIGNANI, IL CONTRATTO INTERNAZIONALE 9 (1990).

16. RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 63 (3d ed. 1985).

17. RUDOLF B. SCHLESINGER, COMPARATIVE LAW 31 (5th ed. 1988).

18. See Basedow et al., *supra* note 14, at 1.

19. DAVID KNOWLES, THE EVOLUTION OF CULTURAL THOUGHT 80 (1962).

20. For an examination of the law merchant in the Middle Ages, see Leon E. Trakman, *The Evolution of the Law Merchant: Our Commercial Heritage, Part I—Ancient and Medieval Law Merchant*, 12 J. MAR. L. & COM. 1 (1980).

21. ZWEIGERT & KÖTZ, *supra* note 2, at 23.

22. For an overview of the methods whereby uniformation can be achieved, see René David, *The Methods of Unification*, 16 AM. J. COMP. L. 19 (1968); René David, *The International Unification of Private Law*, in 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (1972).

23. There are several institutions which draft such conventions; the most important are UNIDROIT (International Institute for the Unification of Private Law) and UNCITRAL (United Nations Commission for International Trade Law).

apply as national law. Of course, there are other methods as well, but they all lead to one conclusion: "Harmonization implied by international unification cannot be carried out without the help of comparative law."²⁴ And it is for this reason that the younger generations of lawyers, who will face the internationalization of legal transactions, need to learn the law of foreign countries. This is also why law school curricula must include courses which "help a lawyer or a judge in one jurisdiction who needs to know what the law is in another jurisdiction."²⁵

But only a few universities do so. And the universities which respond to this need are usually American universities. In my opinion, such a phenomenon can be explained by one of the fundamental differences between American and European universities, as pointed out by Professor Eco during his lecture. He observed that American universities, unlike European ones, are run like a business. American universities, not unlike any other kind of business, have to face a market-oriented economy. In order to survive, they must offer the "product" the market demands. Since the market of the nineties needs comparative lawyers and foreign legal experts, American universities offer the courses which incorporate the specific knowledge required by the market.

That is not true for European universities, even though European legal scholars recognized the trend towards internationalization of legal life ninety years ago.²⁶ In Italy, for example, although most universities offer a course in "Comparative Private Law," it is generally not a part of the compulsory examination subjects. The same phenomenon appears also in Germany and in other European countries.

One can, therefore, draw the conclusion that European legal studies fail to reflect the international trend and economic imperative of modern society. European law schools in general are reluctant to acknowledge these social changes, and in so being, they deny students both good career opportunities and the possibility "to compare rules of law in the different legal systems in an effort to discern the general principles of the law of all systems."²⁷ Ultimately, the European legal education tends to maintain an obsolete status quo which is not as international as it should be.

24. DAVID & BRIERLEY, *supra* note 16, at 10.

25. GLENDON ET AL., *supra* note 9, at 3.

26. See, e.g., Paul Esmein, *Le droit comparé et l'enseignement du droit*, BULLETIN DE LA SOCIÉTÉ DE LÉGISLATION COMPARÉE 372 (1900).

27. GLENDON ET AL., *supra* note 9, at 3.