Honoris Causa

Investidura com a doctor *Honoris Causa* del senyor

Reinhard Zimmermann

Universitat de Lleida

Recull de les intervencions i lliçons pronunciades en l'acte d'investidura com a doctor *Honoris Causa* de la Universitat de Lleida del senyor Reinhard Zimmermann, que es va fer al Saló Víctor Siurana de l'Edifici del Rectorat el dia 25 d'octubre de 2007.

Disseny i maquetació: cat & cas / Edicions i Publicacions de la UdL

Fotografia de portada: Xavier Goñi. Servei de Reproducció d'Imatge de la UdL

Imprimeix: Gràfiques Bobalà

Dipòsit Legal: L-922-2008

Índex

Salutació

Dr. Joan Viñas Salas

Bon vespre.

Fa tot just una setmana aquesta universitat investia doctor *honoris causa* el professor Veronesi, i ara ens disposem a retre igual reconeixement al professor Reinhard Zimmermann; tots dos, metge i jurista, són referents europeus en les seves especialitats. I en l'entremig a Lisboa s'ha aprovat un nou Tractat de la Unió. La construcció europea sempre ha avançat des d'aquest dos nivells: per la iniciativa dels estats i per l'acció dels homes i dones que han cregut —que creiem— en aquest projecte històric.

La trajectòria científica i universitària del professor Zimmermann l'avala com a constructor d'Europa. I avui la Universitat de Lleida vol reconèixer amb aquesta investidura una trajectòria exemplar. Ara bé, la Universitat de Lleida sap que, honorant-lo, es beneficiarà de la seva saviesa i de la seva humanitat, i, per tant, li està profundament agraïda.

D'altra banda, em plau assenyalar que aquesta investidura es fa en el marc del Congrés Internacional de Dret Civil. Així, doncs, vull saludar de manera molt especial els congressistes que s'han volgut sumar a aquest acte de reconeixement i homenatge al doctor Zimmermann.

Laudatio

Dr. Antoni Vaquer Aloy

Magnífic Rector, dignissimes autoritats, benvolguts col·legues, senyores i senyors,

De vegades, explicar les coses més òbvies esdevé un repte. Aquesta és l'agradable comesa que em pertoca avui. En nom de la Universitat de Lleida i de la seva Facultat de Dret i Economia, tinc l'honor d'explicar per què demanem que es confereixi al professor Reinhard Zimmermann la distinció de doctor *honoris causa*. Seria suficient indicar que, acabats de complir els 55 anys, ja acumula sis doctorats honoraris d'universitats que pertanyen a diversos continents i sistemes jurídics: Chicago, Aberdeen, Maastricht, Lund, Ciutat del Cap, Edimburg, i ara Lleida. Tanmateix, aquests honors no són repetitius. Cada universitat té els seus propis motius per atorgar la distinció, la Universitat de Lleida inclosa. Per això tinc el plaer d'enumerar breument les raons que ens han emmenat a conferir aquesta nova distinció al professor Zimmermann.

La brisa de l'harmonització del dret privat europeu ha sacsejat el panorama jurídic del nostre continent. Després de més de dos segles de nacionalització de la ciència jurídica, des dels anys vuitanta del segle XX s'observa un interès renovat i creixent per un dret comú a tots els països europeus. Amb aquesta finalitat els juristes han suggerit mètodes diversos, i fins i tot les institucions europees han estat sensibles als arguments favorables a l'harmonització, últimament encarregant l'elaboració d'un Marc Comú de Referència. El professor Zimmermann és un dels teòrics més influents de l'harmonització, i ha posat l'èmfasi en la necessitat d'un desenvolupament orgànic de la ciència jurídica a Europa per tal d'atènyer en el futur un codi civil europeu. El lligam d'aquesta concepció amb l'obra de Saginy ha motivat que sovint sigui anomenat el "Savigny modern".

Segurament ésser comparat amb el gran Savigny ha de ser un honor insuperable, que sens dubte ell mereix. No obstant això, de vegades aquesta comparació pot amagar

una simplificació excessiva. La major contribució a la ciència jurídica europea del professor Zimmermann —i m'adono com n'és de difícil, d'esmentar només *una* de les seves contribucions— la constitueix el mètode històrico-comparat, que tants resultats ha produït. El seu interès per la història del dret i pel dret romà no és ni mera arqueologia ni dogmàtica enrevessada. El dret romà és l'origen del nostre dret, i va ser la font d'inspiració de glossadors i comentaristes a l'edat mitjana i després per als autors de l'escola elegant. El dret romà, directament o per mitjà dels conceptes, principis i institucions que generacions de juristes n'han destil·lat, va esdevenir el sòl ubèrrim en el qual van arrelar els drets locals, després nacionals, per anar creixent de forma progressiva. El dret romà proporciona els fonaments dels drets privats europeus. El professor Zimmermann s'ha centrat en el desenvolupament del dret romà, en els fonaments tan profunds dels drets nacionals. Aquest mètode li permet assenyalar les continuïtats i les relacions entre els ordenaments jurídics europeus, sense desdenyar les dissimilituds, i descobrir nous antecedents comuns d'institucions jurídiques només aparentment autòctones. Un nou dret comú europeu —si utilitzem el sentit estricte i històric del terme *ius commune*— es mostra aleshores possible.

El seu interès pel dret romà el va portar de l'Hamburg natal a Sud-àfrica. L'any 1981 va ser cridat a la càtedra de Dret Romà i Dret Comparat de la Universitat de Ciutat del Cap. Hi va anar amb 29 anys i hi va romandre fins a l'any 1988. Allà, a Sud-àfrica va trobar el dret romà vigent, mesclat amb el *common law* anglès i allà hi va concebre la seva obra magna, *The Law of Obligations. Roman Foundations of the Civilian Tradition.* Aquest llibre ha esdevingut de referència obligada per la ciència jurídica, una font d'il·luminació per a generacions de juristes.

L'estada a Sud-àfrica palesa una altra de les seves característiques. Allà on va deixa petjada i no es limita a ser un mer espectador. No em refereixo només a la munió d'amics i deixebles que ha fet —i que segueix fent. Va esdevenir degà de la Facultat de Dret de la Universitat de Ciutat del Cap i president de l'Associació Sud-africana de Professors de Dret, i va participar en moltes activitats acadèmiques i socials. Aquests anys tan fructífers i joiosos van precedir el seu retorn a Alemanya l'any 1988.

Aquell any va acceptar una càtedra a la Universitat de Ratisbona, a Baviera. El seu ambient era molt distint del d'Hamburg o Sud-àfrica. Encara que al començament no va ésser fàcil l'adaptació, també va esdevenir el degà de la Facultat de Dret i va obtenir el prestigiós premi Leibniz que ofereix la Societat Alemanya de Recerca. Va convertir la Facultat en un lloc de pelegrinatge intel·lectual on dotzenes de joves juristes anaven a estudiar al seu costat.

Això em permet subratllar una altra de les seves virtuts: la generositat. Si tants i tants joves i no tan joves juristes acudien a Ratisbona era per la seva generositat intel·lectual. Mai rebutjava ningú que volgués aprendre d'ell, o quan algú volia fer una estada de recerca, o quan algú li demanava un article o un llibre impossibles de trobar que, indefectiblement, ell tenia a mà. Una generositat, val a dir, tant intel·lectual com material. El premi Leibniz va fer possible acabar els treballs de la Comissió de Dret Contractual Europeu, i ha finançat congressos i projectes de recerca en els quals han col·laborat juristes procedents de sistemes jurídics distints. I els resultats científics assolits han estat senzillament impressionants.

El professor Zimmermann ha estat l'ànima de la Comissió de Dret Contractual Europeu, tan decisiva en l'europeïtzació del dret privat. No es pot predir, encara, si els Principis de Dret Contractual Europeu cristal·litzaran en alguna mena de codi civil europeu imperatiu o dispositiu. En canvi, el venerable Codi Civil alemany ja mostra la seva inspiració en el capítol dedicat a la prescripció, una regulació, l'alemanya, que és sabut que ha influït poderosament en la regulació vigent de la prescripció a Catalunya.

Al febrer de 2002 va retornar a la seva Hamburg natal com a director de l'Institut Max Planck de Dret Comparat i Dret Internacional Privat. Malgrat que les seves tasques s'han multiplicat —per exemple, d'ençà de 2006 és el president de la Secció de Ciències Humanístiques de la Societat Max Planck, que engloba dinou instituts de recerca— segueix involucrat permanentment en nombroses publicacions i projectes de recerca.

El professor Zimmermann ha estat i és, d'altra banda, professor visitant i professor honorari de moltes universitats. Només per esmentar-ne algunes, a Oxford, Cambridge, Edimburg, Cornell, Yale, Nova Orleans, Berkeley o Stellenbosch. Ha estat escollit membre d'acadèmies a Alemanya, Nova Zelanda, Gran Bretanya, Itàlia, els Països Baixos o Àustria. Pertany als comitès editorials i científics de deu sèries de monografies i quinze revistes jurídiques a Alemanya, Anglaterra, Escòcia, Sud-àfrica, Itàlia, Espanya, els Estats Units o Austràlia. Finalment, però no menys important, ha donat conferències arreu del món.

No vull acabar sense un toc personal. He d'agrair al professor Zimmermann el seu interès, la seva amistat, el seu suport, a mi en particular i a la Facultat de Dret i Economia. Ha inspirat les anteriors edicions del Congrés Internacional de Dret Privat Europeu que organitza el Departament de Dret Privat i hi ha participat. Tot i ser un pelegrí desconegut procedent d'un país tan ignot com ara Catalunya, vaig ser benvingut dos cops a Ratisbona i ell ha compartit amb mi el seu temps i la seva saviesa. I, especialment, m'ha entusiasmat per la recerca històrica i comparativa.

Confio que els detalls que he ofert de la vida acadèmica hagin estat suficients per demostrar quin home i quin professor i jurista més excepcional és el professor Zimmermann. Permeteu-me afegir cinc cèntims sobre la seva contribució a la literatura. Té un germà bessó en la ficció anomenat Moritz-Maria von Igelfeld, un professor de filologia romànica, especialista en verbs irregulars portuguesos, un home —cito— "afortunat de ser exactament com és". El professor Von Igelfeld viu als llibres que escriu Alexander McCall Smith —alguns dels seus llibres han estat traduïts també al català—, un bon amic seu al qual ha inspirat i animat a desenvolupar el personatge literari.

La Universitat de Lleida va ser fundada l'any 1299. Va ser el primer Estudi General del Regne d'Aragó i Catalunya. D'entre les seves facultats va sobresortir la de Dret. El dret romà i el dret canònic van ser, per descomptat, les matèries que els estudiants d'arreu del reialme aprenien aquí. Alguns anys abans, en 1243, el rei Jaume I va prohibir l'al·legació del dret romà als tribunals. Qualsevol que fos l'objectiu pretès amb aquesta prohibició, a la pràctica va ser ineficaç, ja que el dret romà es

va camuflar sota l'aparença d'"equitat i bona raó" com a dret supletori, estatus que va confirmar-se l'any 1409 i més tard en 1599, quan les fonts del dret civil català van quedar definitivament formulades. Juntament amb el dret canònic, el dret romà ha romàs com a dret supletori del dret civil català fins a 1960. Tinc l'esperança que aquest paper tan prominent del *ius commune* en aquesta universitat al llarg de la seva història, ensems que la nostra amistat perdurable, us faci sentir com a casa a Lleida, professor Zimmermann.

Per això, Magnífic Rector, en nom del Departament de Dret Privat, per l'abast de l'activitat universitària i de recerca, per la seva immensa aportació a la ciència jurídica, pels seus valors d'europeisme i tolerància, tinc el goig de sol·licitar la investidura com a doctor *honoris causa* de la nostra universitat del professor Reinhard Zimmermann.

Acte de doctorat *Honoris Causa*

Sr. Reinhard Zimmermann

Legal History and Comparative Law

I

Let me begin these words on an autobiographical note. When I decided to study law, my interests in history and in Latin naturally led me to take whatever courses were available on Roman law. I enjoyed these courses very much. Yet, for me there was something deeply unsatisfactory in all lectures and textbooks on Roman law leading up to Justinian, and all lectures and textbooks on modern German law starting with the BGB or, at best, its *travaux préparatoires* in the late 19th century. Roman law and modern private law appeared to constitute two different intellectual worlds. At the same time, even for a second —or third— year student is was easy to see that there were connections: Latin legal maxims such as *in pari turpitudine, interpretatio contra proferentem, impossibilium nulla est obligatio*; basic legal concepts such as delict, *negotiorum gestio, diligentia quam in suis*; systematic subdivisions such as the ones between contract and delict, the law of obligations and property law, or loans for use and loans for consumption: on just about every level from terminology to rules, principles, institutions and legal arguments there was much in modern law that was familiar to the student of Roman law, but also in many ways interestingly different.[1] The same was true when I was made to look beyond the geographical borders of modern Germany: French law, Italian law, or English law were presented as self-contained intellectual constructs and certainly appeared to be different in some respects; but, at the same time, there was also much that was familiar.[2]

I was particularly fortunate in receiving my first "call" (as we express it somewhat oddly in Germany) to a chair of Roman and Comparative Law at the University of Cape

Town in 1981. I, therefore, had to teach both subjects that had attracted my attention. Moreover, the application of Roman-Dutch law in South Africa is of particular interest for both the legal historian and the comparative lawyer.[3] For, on the one hand, the tradition of the Roman-Canon *ius commune* is still alive that has prevailed on the European Continent until it was replaced by the great codifications. On the other hand, classical Roman-Dutch law has experienced a reception of concepts, rules and thinking patterns from the English common law. South Africa has thus become a mixed legal system: a synthesis of civil law and common law with its own characteristic identity.[4] At the University of Cape Town in the 1980's Roman law was still an obligatory subject.[5] It was obvious to me that it should not be taught in an antiquarian spirit but as the foundation of a tradition that has decisively moulded our own legal identity. That was the origin of my book on the Roman foundations of the civilian tradition in the law of obligations.[6] It has been said, occasionally, that the approach adopted in that book is biased in favour of establishing continuity.[7] I do not think that this is true. For the emphasis is as much on change as it is on continuity. In the words of Harold Berman that I have often quoted:[8] "The concept of a ... system of law depended for its vitality on the belief in the ongoing character of law, its capacity for growth over generations and centuries —a belief which is uniquely Western. The body of law only survives because it contains a built-in mechanism for organic change."[9] European private law has been subject to constant adaptation; it has been able to react to changed circumstances and new situations, and it has always displayed an extraordinary capacity for integration. Medieval Roman law was no longer the Roman law of classical antiquity, the *usus modernus pandectarum* no longer corresponded to the *usus medii aevi*, and pandectist legal doctrine was a far cry from the *usus modernus*. At the same time, there were considerable regional variations in the application of Roman law. Thus, in the early modern period, we find Roman-Dutch law existing side by side with Roman-Frisian law,[10] Roman-Scots law, *ius Romanum Saxonicum, Hispanicum,* etc. Many individual legal problems were solved differently in different parts of Europe. The texts contained in the *Corpus Juris* were no longer regarded as absolutely binding authority: one could generalize and further develop the ideas contained in them, critically examine them, or even declare them

abrogated by disuse.[11] Still, however, they constituted the "legal grammar" for the discussion of private law problems because, in all Universities throughout Europe, they occupied the central place in the study of secular law. The civilian tradition is thus marked by considerable diversity as much as by a fundamental intellectual unity; by change as much as by continuity.

Today, this fundamental intellectual unity is obscured by the existence of a wide variety of national legal systems and, above all, by the fact that these national legal systems are very widely regarded as comprehensive and autonomous systems of legal rules.[12] Obviously, there are many differences among the modern private law codifications. But, equally obviously, they constitute manifestations of one and the same legal tradition.[13] Contrary to what is sometimes stated, comparative scholarship involves exploring both similarities and differences;[14] and what historical scholarship can contribute is to explain these differences (can they be attributed to differences in cultural environment, social development, or economic basis, to historical accident, misunderstanding, or choice of different sources?) and to recreate an awareness of what the European legal systems have in common.[15] This type of critical inquiry, I think, can pave the way for rational discussions including, if one wants to harmonize the laws prevailing in Europe, a rational discussion as to how the existing differences may be overcome.[16] In what follows I would like to illustrate what can be done by looking at a number of examples. In doing so, I propose, in a way, to turn the tables because my examples are taken from the work of those who have so kindly agreed to take part in the proceedings today.

II

1) Everywhere in Europe, except for Scandinavia, Ireland and Great Britain, set-off operates in one of two ways. Either both obligations are extinguished, automatically, from the day of their co-existence ("de plein droit par la seule force de la loi, même à l'insu des débiteurs", as Art. 1290 Code civil puts it), or the right of set-off has to be exercised by notice to the other party; both obligations are then, however, deemed to

have expired at the moment at which, being suitable for set-off, they first confronted each other (this is stated, perhaps most prominently, in § 389 BGB). The French model of set-off (that has been adopted, for example, in Belgium, Austria, Spain and Italy) is based on two sources from the *Corpus Juris* which indicate that set-off operates "ipso iure".[17] The draftsmen of the German Civil Code, on the other hand, focused their attention on a phrase used by Justinian which appeared to demonstrate that set-off specifically had to be raised, or pleaded, by the defendant in the course of legal proceedings.[18] Above all, however, they based their decision on the case law of the Supreme Courts in Germany during the second half of the 19th century where it had come to be recognized that even an extrajudicial declaration of the intention to set off two claims against each other had the effect of extinguishing these claims.[19] The German model of set-off subsequently gained acceptance in many European countries.[20] Even in France, courts and legal writers have found it impractical literally to implement the regime envisaged by Art. 1290 Code civil. Following the lead provided by pandectist scholarship they have effectively attributed decisive influence to the will of one of the parties to bring about the mutual extinction of the obligation.[21] As a result, there is indeed, as Pascal Pichonnaz has put it, a "convergence avancée" among the European legal systems.[22]

However, even the more modern, i.e. the German, solution suffers from a severe doctrinal flaw: the notion of retrospectivity. Retrospecitvity constituted an attempt, by nineteenth-century German legal doctrine, to reconcile the above-mentioned Roman sources with each other. In the course of time, it has become firmly entrenched, in prevailing legal ideology, as an essential characteristic of a declaration of set-off.[23] Yet, as Pascal Pichonnaz has demonstrated, it is based on a centuries-old misunderstanding.[24] The phrase *ipso iure* was used, in classical Roman law, in the context of the banker's *agere cum compensatione*.[25] But it had merely been intended to indicate that this type of set-off was not effected by the judge. The banker himself was forced, by virtue of the *formula* granted to him by the praetor, to reduce his claim by the amount of the other party's counterclaim. The plaintiff was thus made *ipso iure*, i.e. by the law itself, to effect set-off. It is probable that Justinian also still attributed *ex*

nunc effect to set-off.[26] The decisive turn came with the Glossators who reinterpreted set-off *ipso iure* as a form of set-off which occurred automatically, *sine facto hominis*. This misunderstanding was to cast its shadow on the discussions concerning set-off in all Continental legal systems, no matter whether they belong to the Romanistic or the Germanic legal families. The Principles of European Contract Law are the first important legal instrument that has made a conscious effort to emerge from this shadow when they state in Art. 13:106: "Set-off discharges the obligations, as far as they are coextensive, as from the time of notice".[27]

What does that teach us? If we look at the Continental European landscape, we observe two different solutions to one and the same legal problem. It is only as the result of an historical inquiry that we start to understand that situation. For, (I) we can now explain the reason for this difference. It lies in the reception of Roman law, with different sources having provided the starting point for different strands of tradition. Moreover (II) we can trace the development of the problem in the codifications from 1804 to 1992 and in the legal literature relating to these codifications; and we can see a clear convergence towards the model established in the German Civil Code. And finally (III) we become aware to what extent our thinking is dominated by patterns from the past. The concept of set-off operating retrospectively has been shown to have been based on a misunderstanding of the Roman sources. That misunderstanding was not a productive one,[28] and the modern trend, as evidenced by both the Principles of European Contract Law and the UNIDROIT Principles of International Commercial Contracts is to revert to the solution adopted in Roman law. It appears to be both clearer and more practicable than the *ex-tunc* effect of set-off [29] and conforms to Bernhard Windscheid's observation that retrospectivity is a fiction that should be avoided as far as possible.[30]

2) An historical inquiry is not, of course, bound to reveal that a solution accepted in Roman law may also be suitable today. More often, we find the situation that what worked well in the past has become dysfunctional in modern law. The history of the law of delict provides an example, as Nils Jansen has demonstrated in his great work on the structure of liability law.[31] The law of delict, in the various Continental legal

systems, rests on the same historical foundations —in the era of the *ius commune* it constituted an *usus modernus* of Aquilian liability which was reconceptualised under the influence of Natural law theory[32]—, and the ideas prevailing on the Continent have also influenced the development of English law.[33] At the same time, however, in the eighteenth and nineteenth centuries the modernized version of Roman law was no longer really modern. In its basic structure it was still essentially geared towards the sanctioning of private wrongs rather than the reasonable allocation of losses.[34] That was a problem which European legal systems only started to grapple with in the course of the nineteenth century, by which time the first wave of codifications had contributed to a national isolation of the legal discourse. Particularly, therefore, every legal system had to devise its own way of dealing with the problem of strict liability. As a result, the European legal landscape became considerably more patchy in this field than in that of contract law. The development was similar only in so far as it was attempted to supplement, rather than to challenge, the conceptual structure of a law of delict still revolving around the notions of wrongfulness and fault. This has led to a situation which is characterized, at least in some respects, by a lack of fundamental concepts which are both common to the various legal systems and telelogically satisfactory.[35] Thus, we have here the situation that, as a result of a legal institution changing its function, its conceptual infrastructure has become inadequate. The consequence, obviously, cannot be to perpetuate the concepts inherited from Roman law; but we will have to devise a doctrinal structure that is recognizably European and reflects the function of a modern liability law to achieve a reasonable loss-allocation.[36] That is, as Nils Jansen has also pointed out, a constructive task that cannot be tackled by historical or comparative analysis.[37] But it can only be tackled after historical and comparative analysis has cleared the field.

3) The fruitful and productive tension between change and continuity, and unity and diversity, is equally evident in studies tracing the migration of legal doctrines or concepts from one legal system to another.[38] Antoni Vaquer's work provides a number of examples, among them the reception of the German doctrine of *Verwirkung* in Spanish law.[39] The path was paved by the great esteem in which German legal doc-

trine has traditionally been held in Spain, even if, particularly during the first years of General Franco's dictatorship, influential authors called for the preservation of the Spanishness of Spanish law and for the rejection of extraneous influences.[40] Yet, from 1933 onwards, a Spanish translation of Ludwig Enneccerus, Theodor Kipp, and Martin Wolff, *Lehrbuch des Bürgerlichen Rechts*, was published and thus acquainted Spanish readers in their own language, *inter alia*, with the doctine of *Verwirkung*. In 1959 José Puig Brutau not only translated Gustav Boehmer's book on *Praxis der richterlichen Rechtsschöpfung* (1958) but also specifically drew attention to the desirability of accepting the doctrine of *Verwirkung* in Spanish law. Shortly thereafter one of the most promenent Spanish legal scholars, Luis Díez-Picazo, published a fundamental monograph on the overarching notion of *venire contra factum proprium*.[41] Díez-Picazo clearly drew his inspiration from German law, particularly a work by Erwin Riezler;[42] he analyzed the existing Spanish case law in the light of *venire contra factum proprium* and managed to demonstrate how that notion could beneficially be incorporated into Spanish law. That study marked the break-through of the doctrine of *Verwirkung* on the level of legal scholarship. Judicial acceptance only came in 1992;[43] it followed in the wake of the reform of the *Título preliminar* of the *Código civil*, in the course of which a new Art. 7 was introduced which states that rights have to exercised in conformity with the requirements of good faith;[44] and it also followed the translation into Spanish of Franz Wieacker's seminal work on how to structure the application of a general good faith provision such as § 242 BGB or Art. 7 *Código civil*.[45] Thus, it can be said today that the doctrine of *retraso desleal* is part of Spanish law; that it is based on the German notion of *Verwirkung*; and that it can be intellectually related to a general good faith provision in Spanish law in a very similar way as in German law. At the same time, *retraso desleal* and *Verwirkung* are not identical: "Verwirkung", as Antoni Vaquer puts it, "has travelled along its own paths in Spanish law".[46] It tends to be applied more restrictively than in German law, it requires prejudice to the position of the other party, and it has to be distinguished from the established legal doctrine of tacit renunciation of a right.[47] As a result, what appears to be a typical case of *Verwirkung* in German law may appear in an entirely different light in Spain.[48] That makes us realize that law, as a rule, undergoes a transformation when

it is transplanted; and we can also see that legal transfers can be successful[49] even if they cut across the boundaries of the established legal families.

4) Transplant, reception, the transfer of legal ideas: these are also key terms for the analysis of mixed legal systems.[50] Scots law was turned into Roman-Scots law with the reception of the tradition of the learned laws in the late Middle Ages and early modern period; and in the course of the 19th and early 20th centuries the influence of English law brought about further changes, both in substance and appearance.[51] A similar story can be told about Roman-Dutch law, first in the Netherlands and subsequently in South Africa.[52] Hector MacQueen has emphasized that modern Scots contract law shares a number of characteristic features with other civilian legal systems:[53] it recognizes contracts in favour of third parties, it accepts an order for specific performance ("specific implement") as the primary right of the creditor, and it does not have a doctrine of consideration. But we also find at least an equal number of rules and legal institutions that Scots law has in common with, i.e. usually borrowed from, English law: an essentially unified concept of breach of contract, breach of contract by repudiation, or the doctrine of the undisclosed principal in the law of agency. Hector MacQueen has also drawn attention to the fact that in all these cases Scots law has anticipated the position eventually adopted by the so-called Lando-Commission.[54] He has thus emphasized that there are historical experiences in a legal system at the crossroads of common law and civilian jurisprudence which European lawyers in search of a new *ius commune* may be able to draw upon.[55] The same can be said about the development of Roman-Dutch law in South Africa;[56] and in their contribution to "Double Cross", MacQueen and Cockrell have embarked on a detailed comparison not only of Scots and South African law relating to illegality in contract law, but also of chapter 15 of the Principles of European Contract Law, in order to validate that claim.[57] Last year a book was published —it was co-edited by Hector MacQueen— which, *inter alia*, attempted to investigate what criticisms might be made of the Principles of European Contract Law in the light of the experiences made in Scotland and South Africa (and also: to what extent Scots and South African law might benefit from a reform along the line proposed by the Principles of European

Contract Law).[58] All these projects and studies are predicated upon a close intellectual relationship between the historical and comparative perspectives.[59]

5) So is the work that has recently been done by a scholar who is present tonight and whom I want to mention because I have known him for a longer time than anybody else here in the room and because he had the longest way to travel to Lleida: Marius de Waal. He has embarked on the study of an area of law where both Scots and South African law have found a "third way" between modern civilian systems and the common law: trusts. [60] The development was different in both countries. In Scotland, the *fideicommissum* of Roman law appears to have been an important source. English law gave the Scottish trust its name, but in other respects exercised little influence until the 19th century when the essentials of the Scottish trust had already become well established.[61] In South Africa, on the other hand, it was indeed the English trust that was introduced by British settlers in the course of the 19th century; however, it was soon transformed into a civilian institution.[62] In the end result, therefore, both Scotland and South Africa have produced a civilian form of trust: a proper trust, not just a "so-called" trust, as Marius de Waal has pointed out.[63] It is characterized by four core elements: (I) a trustee who has a fiduciary position; (II) a separation between the trustee's personal estate and the trust estate; (III) the operation of real subrogation; and (IV) the construction of trusteeship as an office.[64] The trust, therefore, does not have to be defined, as it traditionally is, in terms of a division of title between the trustee and the beneficiary. That is merely the specifically English manifestation of the trust concept; neither historically, nor rationally can it be said to constitute one of its defining features. [65] That is, obviously, of considerable interest for those countries that wish to introduce the trust into a legal system that has a law of property based on Roman law and also does not recognize the institutional separation of law and equity;[66] and it is hardly surprising that the draftsmen of the Principles of European Trust Law have been inspired by the Roman-Dutch and, particularly, Scots experiences.[67]

III

It is a great honour and pleasure to be receiving this doctoral degree from the University of Lleida. Under the name of Ilerda, Lleida was a city of considerable importance already in the Roman province of *Hispania Tarraconensis* which played a strategic role in the first year of the civil war between Gaius Julius Caesar and his opponents.[68] It produced the only significant Roman law scholar of the period up to 1250 hailing from the Iberian peninsula (Pontius de Ilerda);[69] and, in around 1300, it became the seat of one of the oldest Universities in that part of Europe.[70] Today, the law faculty of the University of Lleida has established itself as a center of learning at the juncture between regional, national and European law. Scholars from the University of Lleida, and Antoni Vaquer in particular, have been active in studying the impact of the process of Europeanization of private law on Catalonia and in bringing to bear, at the same time, the Catalan and the Spanish voices on the discussions about European private law.[71] But it is a particularly pleasant occasion also on account of the fact that so many friends and colleagues are present with whom I have had the privilege of cooperating over a considerable period of time. I have mentioned Antoni Vaquer, Nils Jansen, Hector MacQueen, Pascal Pichonnaz and Marius de Waal because they have spoken here today, or will be speaking tomorrow. They are five scholars from five different jurisdictions. They are all legal historians and comparative lawyers; and they all also regularly contribute to the development of legal doctrine in their respective jurisdictions. Their work reveals interesting differences in approach and outlook. But they would all agree, I think, that while the legal historian must not be the slave of current concerns, his work is of essential importance for enabling us to take stock, and to comprehend, our present legal condition. That knowledge, in itself, will not determine where we have to go. But an understanding of the past is the first and essential prerequisite for devising appropriate solutions for the present day and for the future. If we were merely looking at the civilian legal systems as they stand today, we would have to devise a European regime of set-off either on the model of art. 1290 Code civil or § 389 BGB. The mere fact that they are both based on a misunderstanding of the Roman sources cannot prompt us to attribute a merely prospective effect

to set-off. But it does make us aware of the fact that there is nothing self-evident about the notion of retrospectivity and that we, therefore, have to re-examine the substantive arguments that can be adduced in its favour. If we now know why the conceptual infrastructure of our modern law of delict has become dysfunctional, we still do not know how a modern conceptual infrastructure might look like; but we know from which angle we will have to construct it. A number of European legal systems (among them the Spanish one) have found the notion of *Verwirkung* attractive. That does not mean that they all apply it in the same way. But it does indicate that some device for relaxing the *rigor iuris*, revolving around an autonomous notion of good faith,[72] may be required in a set of Principles of European Contract Law. The mere fact that it is perfectly possible to have a civilian trust does not mean that a civilian legal system has to move in that direction. And good or bad experiences with the notion of illegality in one legal system may prompt cognate legal systems to reconsider their own law; but such historical experiences can never have any prescriptive force. I am particularly lucky in having Nils Jansen, Hector MacQueen, Pascal Pichonnaz, Marius de Waal, Antoni Vaquer and so many other friends and colleagues with whom I share a keen interest in the development of European private law as well as the conviction that that development can benefit very much from historical and comparative study. Thank you all for having come to Lleida today.

I have been told that "Ilerdam videas" (may you see Lleida) is a proverbial curse. I cannot confirm that. I have seen Lleida and I have found great kindness, generosity and hospitality in this city. Thank you very much for having us all on such an auspicious occasion.

I will now try to express my sincere thanks also in Catalan:

Magnífic rector, digníssimes autoritats, col·legues, senyores i senyors,

És un gran honor i un plaer que se'm nomeni doctor *honoris causa* per la Universitat de Lleida. Actualment, la facultat de dret de Lleida s'ha consolidat com a centre d'estudi en la confluència entre el dret regional, nacional i europeu. Els estudiosos

de la Universitat de Lleida, i en particular Antoni Vaquer, s'han dedicat a l'estudi de l'impacte del procés d'europeïtzació del Dret privat a Catalunya i a donar a conèixer, al mateix temps, les veus catalanes i espanyoles en els fòrums de debat sobre el dret privat europeu. Però aquesta és també una ocasió particularment especial pel fet que estan presents molts amics i col·legues amb qui he tingut el privilegi de col·laborar durant un període de temps considerable. Tinc la sort de comptar especialment amb Nils Jansen, Hector MacQueen, Pascal Pichonnaz, Marius de Waal, Antoni Vaquer i molts altres amics i col·legues amb qui comparteixo un profund interès pel desenvolupament del dret privat europeu així com la convicció que aquest desenvolupament pot beneficiar-se molt de l'estudi històric i comparat. Gràcies per haver vingut avui a Lleida. He sentit que "Ilerdam videas" (que vegis Lleida) és un proverbi que conté una maledicció. No puc confirmar-ho. He vist Lleida i he trobat en aquesta ciutat una gran amabilitat, generositat i hospitalitat. Moltes gràcies per rebrem en tan especial ocasió.

Notes a peu

[1] See *Reinhard Zimmermann,* Europa und das römische Recht, (2002) 202 Archiv für die civilistische Praxis 243 ff.; *idem*, Römisches Recht und europäische Kultur, [2007] Juristenzeitung 1 ff.

[2] For England, see *Reinhard Zimmermann*, Der europäische Charakter des englischen Rechts, (1993) 1 Zeitschrift für Europäisches Privatrecht 4 ff.

[3] For an overview, see *Reinhard Zimmermann*, Das römisch-holländische Recht in Südafrika, 1983.

[4] *Reinhard Zimmermann and Daniel Visser* (eds.), Southern Cross: Civil Law and Common Law in South Africa, 1996.

[5] For background, see *Reinhard Zimmermann*, Roman Law in a Mixed Legal System: The South African Experience, in: Robin Evans-Jones (ed.), The Civil Law Tradition in Scotland, 1995, 41 ff.

[6] *Reinhard Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition, 1990; paperback edition 1996.

[7] See, most recently, the discussion and the references in *Rafal Manko*, Is the Socialist Legal Tradition 'Dead and Buried'? The Continuity of Certain Elements of Socialist Legal Culture in Polish Civil Procedure, in: Thomas Wilhelmsson, Elina Paunio, Annika Pohjolainen (eds.), Private Law and the Many Cultures of Europe, 2007, 85.

[8] See, for example, *Reinhard Zimmermann*, Das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit, [1992] Juristenzeitung 12; *idem*, The Law of Obligations —Character and Influence of the Civilian Tradition, (1992) 3 Stellenbosch Law Review 6.

[9] *Harold J. Berman*, Law and Revolution, vol. I, 1983, 9; cf. also, e.g., *Patrick Glenn*, Legal Traditions of the World, 2nd ed., 2004, 146 ff.

[10] On which see *Jan H.A. Lokin, Frits Brandsma, Corjo Jansen*, Roman-Frisian Law of the 17th and 18th Century, 2003.

[11] Thus, books such as *Philibert Bugnyon*, Tractatur legume abrogatarum et iusitatarum in omnibus curiis, terries, jurisdictionibus, et dominii regni Franciae, 1563, and *Simon van Groenewegen van der Made*, Tractatus de legibus abrogatis et inusitatis in Hollandia vicinisque regionibus, 1649, were written.

[12] For Germany, see *Reinhard Zimmermann*, Das Bürgerliche Gesetzbuch und die Entwicklung des Bürgerlichen Rechts, in: Mathias Schmoeckel, Joachim Rückert, Reinhard Zimmermann (eds.), Historisch-kritischer Kommentar zum BGB, vol. I, 2003, 1 ff.

[13] The theme is further developed in *Reinhard Zimmermann*, The Civil Law in European Codes, in: Hector L. MacQueen, Antoni Vaquer, Santiago Espiau Espiau (eds.), Regional Private Laws and Codification in Europe, 2003, 18 ff.

[14] See the discussion in *Gerhard Dannemann,* Comparative Law: Study of Similarities or Differences?, in: Mathias Reimann, Reinhard Zimmermann (eds.), The Oxford Handbook of Comparative Law, 2006, 383 ff.

[15] Cf. also *James Gordley*, Comparative Law and Legal History, in: Mathias Reimann, Reinhard Zimmermann (eds.), The Oxford Handbook of Comparative Law, 2006, 753 ff.; and see his work Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment, 2006.

[16] *Reinhard Zimmermann*, Savignys Vermächtnis: Rechtsgeschichte, Rechtsvergleichung und die Begründung einer Europäischen Rechtswissenschaft, [1998] Juristische Blätter 273 ff.

[17] Inst. IV, 6, 30; C. 4, 31, 14 pr.

[18] C. 4, 31, 14, 1.

[19] On the development in Germany, see *Reinhard Zimmermann*, in: Mathias Schmoeckel, Joachim Rückert, Reinhard Zimmermann (eds.), Historisch-kritischer Kommentar zum BGB, vol. II, 2007, §§ 387 - 396, nn. 12 ff.

[20] It has even been followed in Austrian law, in spite of the fact that § 1438 ABGB appears to endorse the *ipso-iure* effect of set-off; and, in spite of Art. 1242 Codice civile, it enjoys widespread support in Italian law.

[21] *Pascal Pichonnaz*, La compensation: Analyse historique et comparative des modes de compenser non conventionnels, 2001, 505 ff.

[22] *Pichonnaz* (n. 21) 601 ff.

[23] *Reinhard Zimmermann*, Comparative Foundations of a European Law of Set-Off and Prescription, 2002, 39 ff.

[24] *Pichonnaz* (n. 21) 9 ff. (particularly 127 ff., 295 ff.); cf. also Historisch-kritischer Kommentar/ *Zimmermann* (n. 19) §§ 387 - 396, nn. 5 ff.

[25] Paul. D. 16, 2, 21; C. 4, 31, 4.

[26] *Pichonnaz* (n. 21) 260 ff.

[27] Cf. also Art. 8.5 (3) Unidroit Principles of International Commercial Contracts.

[28] The term "productive misunderstanding" was coined, at least for legal history, by H.R. Hoetink (who, in turn, took it over from theological literature): *H.R. Hoetink*, Rechtsgeleerde opstellen, 1982, 34 f., 266 f.

[29] *Ole Lando, Eric Clive, André Prüm, Reinhard Zimmermann*, Principles of European Contract Law, Part III, 2003, 151 f.

[30] *Bernhard Windscheid*, Lehrbuch des Pandektenrechts, vol. II, 7th ed., 1891, 294 (§ 349, 4), n. 12 *in fine*. It is hardly surprising, in view of this, that Windscheid rejected the notion of

retrospectivity *de lege ferenda*; see Historisch-kritischer Kommentar/*Zimmermann* (n. 19) §§ 387-396, n. 24.

[31] *Nils Jansen,* Die Struktur des Haftungsrechts: Geschichte, Theorie und Dogmatik außervertraglicher Ansprüche auf Schadensersatz, 2003.

[32] Law of Obligations (n. 6) 1017 ff.; *Jansen* (n. 31) 271 ff.

[33] *David Ibbetson*, Harmonisation of the Law of Tort and Delict: A Comparative and Historical Perspective, in: Reinhard Zimmermann (ed.), Grundstrukturen des Europäischen Deliktsrechts, 2003, 133 ff.

[34] *Jansen* (n. 31) 181 ff.

[35] *Nils Jansen*, Binnenmarkt, Privatrecht und europäische Identität, 2004, 33 ff.

[36] See *Jansen* (n. 31) 389 ff.

[37] *Jansen* (n. 35) 64 ff.; *idem*, Dogmatik, Erkenntnis und Theorie im europäischen Privatrecht, (2005) 13 Zeitschrift für Europäisches Privatrecht 750 ff.

[38] Generally, see *Michele Graziadei*, Comparative Law as the Study of Transplants and Receptions, in: Mathias Reimann, Reinhard Zimmermann (eds.), The Oxford Handbook of Comparative Law, 2006, 441 ff.

[39] *Antoni Vaquer*, Importing Foreign Doctrines: Yet Another Approach to the Unification of European Private Law? Incorporation of the Verwirkung Doctrine into Spanish Case Law, (2000) 8 Zeitschrift für Europäisches Privatrecht 301 ff.; cf. also *idem,* Verwirkung versus Laches: A Tale of Two Legal Transplants, (2006) 21 Tulane European and Civil Law Forum (= Companions and Crossroads: Essays in Honor of Shael Herman) 53 ff.

[40] For references for this, and the following statements, see *Vaquer*, (2000) 8 Zeitschrift für Europäisches Privatrecht 302.

[41] *Luis Díez-Picazo Ponce de León,* La doctrina de los proprios actos, 1962; on which see also *Christian Eckl*, Treu und Glauben im spanischen Vertragsrecht, 2007, 121 ff.

[42] *Erwin Riezler*, Venire contra factum proprium, 1912.

[43] For references, see *Vaquer*, (2000) 8 Zeitschrift für Europäisches Privatrecht 303 f.; *Eckl* (n. 41) 278 ff.

[44] For the details, see *Eckl* (n. 41) 139 ff.

[45] *Franz Wieacker*, Zur rechtstheoretischen Präzisierung des § 242 BGB, 1956.

[46] (2006) 21 Tulane European and Civil Law Forum 65.

[47] *Vaquer*, (2000) 8 Zeitschrift für Europäisches Privatrecht 305 ff.; *idem*, (2006) 21 Tulane European and Civil Law Forum 64 ff.

[48] See Case Study 22 (Sitting on one's rights) in: *Reinhard Zimmermann, Simon Whittaker* (eds.), Good Faith in European Contract Law, 2000, 514 ff (515 ff. compared with 522).

[49] *Jan Smits*, On Successful Legal Transplants in a Future Ius Commune Europaeum, in: Andrew Harding, Esin Örücü (eds.), Comparative Law in the 21st Century, 2002, 142.

[50] Generally, see *Vernon Valentine Palmer*, Mixed Jurisdictions Worldwide: The Third Legal Family, 2001; *Jacques du Plessis*, Comparative Law and the Study of Mixed Legal Systems, in: Mathias Reimann, Reinhard Zimmermann (eds.), The Oxford Handbook of Comparative Law, 2006, 477 ff.

[51] *Kenneth Reid, Reinhard Zimmermann* (eds.), A History of Private Law in Scotland, 2 vols., 2000.

[52] For the Netherlands, see *Robert Feenstra, Reinhard Zimmermann* (eds.), Das römisch-holländische Recht: Fortschritte des Zivilrechts im 17. und 18. Jahrhundert, 1992; for South Africa, see *Eduard Fagan*, Roman-Dutch Law in its South African Historical Context, in: Zimmermann/Visser (n. 4) 33 ff.

[53] *Hector L. MacQueen*, Scots Law and the Road to the New Ius Commune, Ius Commune Lectures on European Private Law, no. 1, 2000, 5 ff.

[54] Which has prepared the Principles of European Contract Law; see *Reinhard Zimmermann*, The Principles of European Contract Law: Contemporary Manifestations of the Old, and Possible Foundations for a New, European Scholarship of Private Law, in: Florian Faust, Gregor Thüsing (eds.), Beyond Borders: Perspectives on International and Comparative Law —Symposium in Honour of Hein Kötz, 2006, 111 ff.

[55] *MacQueen* (n. 53) 1 ff.

[56] *Reinhard Zimmermann*, Gemeines Recht heute: Das Kreuz des Südens, in: Jörn Eckert (Hg.), Der praktische Nutzen der Rechtsgeschichte, 2003, 601 ff.; *idem,* Roman Law, Contemporary Law, European Law: The Civilian Tradition Today, 2001, 126 ff.

[57] *Hector MacQueen, Alfred Cockrell*, Illegal Contracts, in: Reinhard Zimmermann, Daniel Visser, Kenneth Reid (eds.), Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa, 2004, 143 ff.

[58] *Hector MacQueen, Reinhard Zimmermann* (eds.), European Contract Law: Scots and South African Perspectives, 2006.

[59] See, concerning Scottish legal history, *Hector L. MacQueen*, Mixture or Muddle? Teaching and Research in Scottish Legal History, (1997) 5 Zeitschrift für Europäisches Privatrecht 369 ff.

[60] *Marius J. de Waal*, Trust Law, in: Jan M. Smits (ed.), Elgar Encyclopedia of Comparative Law,

2006, 755 ff.; *idem*, Comparative Succession Law, in: Mathias Reimann, Reinhard Zimmermann (eds.), The Oxford Handbook of Comparative Law, 2006, 1070 ff. (1087 ff.).

[61] *K.C.G. Reid*, National Report for Scotland, in: D.J. Hayton, S.C.J.J. Kortmann, H.L.E. Verhagen (eds.), Principles of European Trust Law, 1999, 68. For a historical analysis of the development of trust law in Scotland, see *George Gretton*, Trusts, in: Reid/Zimmermann I (n. 51) 480 ff.

[62] *Tony Honoré*, Trust, in: Zimmermann/Visser (n. 4) 847 ff. —For Louisiana, see *A.N. Yiannopoulos*, Trust and the Civil Law: The Louisiana Experience, in: Vernon Valentine Palmer (ed.), Louisiana: Microcosm of a Mixed Jurisdiction, 1999, 213 ff.; for Québec, see *Rainer Becker*, Die fiducie von Québec und der Trust, 2007.

[63] *Marius de Waal*, The Core Elements of the Trust: Aspects of the English, Scottish, and South African Trusts Compared, (2000) 117 South African Law Journal 569.

[64] *De Waal*, (2000) 117 South African Law Journal 548 ff.; cf. also *idem*, In Search of a Model for the Introduction of the Trust into a Civilian Context, (2001) 12 Stellenbosch Law Review 63 ff.

[65] See also *George Gretton*, Trusts without Equity, (2000) 49 International and Comparative Law Quarterly 599 ff.

[66] See for France loi no. 2007-211 du 19 février 2007 instituant la fiducie. That statute introduces the fiducie into art. 2011 ff. Code civil. For comment, see the contributions to a symposium under the title „La fiducie, révolution juridique et pratique des affaires", as printed in 2007 La Semaine Juridique - Entreprise et affaires 2050 ff. (6 September 2007) and the Dossier «La fiducie» in 2007 Recueil Dalloz 1347 ff. (24 May 2007).

[67] *Hayton/Kortmann/Verhagen* (n. 61).

[68] See, e.g., *Gaius Iulius Caesar*, Commentarii Belli Civilis, Liber I, 38, 4; Liber I, 48, 5. Cf. also Liber I, 59, 63, 69, 73 and 78, and Liber II, 17.

[69] *Hermann Lange, Maximiliane Kriechbaum*, Römisches Recht im Mittelalter, vol. II, 2007, 16.

[70] *Lange/Kriechbaum* (n. 69) 102.

[71] See, e.g., the volumes edited by *MacQueen/Vaquer/Espiau Espiau* (n. 13) and *Santiago Espiau Espiau, Antoni Vaquer Aloy* (eds.), Bases de un Derecho Contractual Europeo, 2003, and Antoni Vaquer Aloy (ed.), La tercera Parte de los Principios de Derecho Contractual Europeo, 2005, all of them based on conferences held at the University of Lleida.

[72] See Art. 1:201 PECL; Art. 1.7 Unidroit Principles of International Commercial Contracts; and see the case studies in *Zimmermann/Whittaker* (n. 48).

Discurs de cloenda

Dr. Joan Viñas Sala

Cinquanta anys després del Tractat de Roma el procés de construcció europea continua sent un repte formidable i ple incògnites. Massa sovint el focus d'atenció s'ha situat en la seva dimensió política i governamental, de manera que freqüentment l'opinió pública se sent aliena als seus avatars; el fracàs del mal anomenat procés constitucional així ho va posar de manifest. Tanmateix, la construcció europea és, afortunadament, una empresa més rica i més participativa.

Des d'aquesta perspectiva cal assenyalar que en els darrers anys ha crescut l'atenció envers la dimensió jurídica del procés, especialment des dels àmbits universitaris, i no només en el camp del dret públic, de la presa de decisions, de la política agrària comuna i dels acords aranzelaris, sinó també en l'esfera del dret privat.

La formació i consolidació d'un mercat unificat —el Mercat Comú— recomanava que hi hagués un sol dret de caràcter europeu en comptes d'un dret per a cada un dels estats integrants. Les realitats econòmiques i socials, però, acostumen a anar més de pressa que no pas les plasmacions jurídiques. I així, les primeres resolucions del Parlament Europeu de 1989 i 1994 sobre la necessitat d'elaborar un codi europeu de dret privat van pecar de poc realistes. L'any 1999, però, es va donar un pas endavant quan la Cimera de Tampere va cridar a estudiar la necessitat de l'aproximació de les legislacions dels estats membres en matèria civil. Més decisiva va ser la Comunicació de la Comissió al Consell i al Parlament Europeu de l'11 de juny de 2001 sobre dret contractual europeu i la Resolució del Parlament Europeu del 15 de novembre de 2001. Aquesta resolució plantejava l'elaboració d'algun tipus d'instrument jurídic que afavorís l'harmonització jurídica.

El debat es va anar perfilant i, sobre la base de les respostes a la Resolució enviades per universitaris, advocats i organitzacions de consumidors i d'empresaris, la Comissió

va presentar l'any 2003 el seu pla d'acció i en el 2004 va donar a conèixer una nova resolució, en la qual s'esquematitzava el procediment per elaborar un marc comú de referència. Ara mateix és difícil saber en què acabarà aquest marc comú de referència, si en un codi civil europeu obligatori, en un instrument opcional per a les parts o en un simple model tant per al legislador dels diferents estats membres com per al legislador comunitari. L'anàlisi d'aquest marc comú és el tema de debat del congrés internacional que aquests dies té lloc a la nostra universitat.

Ara bé, sigui quin sigui el seu futur, el Marc Comú de Referència sempre serà tributari de les ensenyances i la recerca duta a terme pel doctor Zimmermann. El doctor Zimmermann —així ho ha posat de manifest el doctor Vaquer en la seva brillant exposició— és un dels principals i més influents juristes que han teoritzat sobre l'aproximació entre les legislacions nacionals i la comuna dels estats membres. En la seva recerca, el doctor Zimmermann ha posat l'èmfasi en els punts de contacte existents entre els diferents ordenaments jurídics, en particular entre els drets continentals europeus i el *common law* anglès. El professor Zimmermann ha estat un decidit defensor de la necessitat dels estudis de dret comparat i de la seva ensenyança a les universitats, precisament per preparar les noves generacions de juristes per a una millor comprensió dels altres drets europeus, de manera que el camí cap a l'harmonització sigui cada cop més fàcil. Les assignatures de dret comparat o de dret privat europeu i l'ensenyança de —i en— llengües estrangeres a les universitats, han de constituir eines que, en el marc dels nous plans d'estudis acomodats al sistema de Bolonya, permetin la construcció d'una identitat europea també en la vessant jurídica.

A més, el professor Zimmermann ha estat durant molts d'anys l'ànima de la Comissió de Dret Contractual Europeu. Aquesta comissió ha publicat uns Principis de dret contractual europeu que formaran part del Marc Comú de Referència a què adés em referia i que tant han influït en les noves generacions de juristes d'arreu d'Europa.

D'altra banda, el doctor Zimmermann ha dedicat part dels seus esforços intel·lectuals al dret escocès, que considera un model a tenir en compte per la combinació d'elements continentals i anglesos. Em plau posar de manifest aquesta atenció —poc habitual— a

la tradició jurídica d'una nació sense estat, ara que Catalunya es troba en el moment de la codificació del seu dret civil, amb l'objectiu històric d'aprovar, en el termini d'uns pocs anys, un codi civil català. En aquesta feina s'hauran de tenir molt presents els desenvolupaments jurídics que s'esdevenen a Europa i, en particular, les aportacions que tants professors i estudiosos han fet al disseny d'un dret civil de caire europeu.

Voldria, encara, posar en relleu —com també ha fet el doctor Vaquer— el seu compromís amb els drets humans, i molt especialment contra el règim de l'*apartheid*, un compromís lligat a les necessitats reals de Sud-àfrica, que ha contribuint de manera efectiva a la restauració del principi de legalitat en aquella afligida nació; actitud que va ser reconeguda amb la concessió d'un doctorat *honoris causa* per part de la Universitat de Ciutat del Cap.

Per tot plegat, senyores i senyors, la Universitat de Lleida, a proposta de la Facultat de Dret i Economia i per acord unànime del Consell de Govern, ha decidit incorporar tan il·lustre professor al seu claustre de doctors. La Universitat de Lleida es beneficiarà del seu saber, i al mateix temps tindrà, en la persona del doctor Reinhard Zimmermann, un nou valedor arreu del món. Per això, en nom de la comunitat universitària, us en dono les gràcies.