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Il «codice civile europeo», le tradizioni giuridiche nazionali e il neo-positivismo

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1. - Solo i decenni a venire ci diranno se la filippica di Pierre Legrand «Against a European Civil Code» (1) rappresenterà alla vigilia del XXI secolo un equivalente culturale de «La vocazione dei nostri tempi per la legislazione e la giurisprudenza» (2) di F. C. von Savigny, che agli inizi del XIX secolo si frappose ai tentativi di codificazione in Germania, rinvio di ottanta anni quella vicenda.

Conviene riportare in sintesi la tesi esposta dall’autore: egli ritiene ne realizzabile praticamente, ne culturalmente desiderabile la predisposizione di un «codice civile europeo», come invece auspicato in diversi atti del parlamento europeo e propugnato da numerosi e autorevoli giuristi.

(*) Il presente lavoro è destinato, in modo non formale ma come espressione di riconoscenza per il suo insegnamento giuridico e civile e per la sua mai attenuata disponibilità nei confronti dei giovani, agli Scritti in onore di Pietro Rescigno, in corso di pubblicazione per i tipi della Cedam.

(1) In 60 MLR 44 (1997).

(2) Stampato originariamente a Heidelberg nel 1814. Per una tradizione italiana quasi coeva, v. La vocazione del nostro secolo per la legislazione e la giurisprudenza, Verona, 1857 (ristampata da Forni, Bologna, 1968).
Secondo Legrand lo spazio giuridico europeo è tuttora netta-mente diviso fra sistemi di common law e sistemi di civil law. In questi ultimi la codificazione costituisce lo sbocco di una determinata storia, concezione e logica giuridica e rappresenta il tratto caratterizzante della mentalità dei giuristi continentali: ragionare per principi procedendo poi ad applicarli alla realtà. La common law si caratterizza invece per una strenna resistenza alla codificazione in quanto è l’idea che vi è alla base — l’esigenza di regole generali ed astratte — che viene contestata.

Legrand insiste in particolare sulla diversità della logica giuridica dei due sistemi, ricorrendo ad ampi raffronti con scienze che non sono certo più sconosciute ai giuristi, come la sociologia, l’epistemologia, la psicologia dei gruppi. Tale diversità rende impraticabile l’adozione di strumenti — e il codice è fra questi — che non sono accettati — in quanto culturalmente estranei — in un contesto differente.

Da una diversa prospettiva la proposta di un «codice civile europeo» presenta numerose controindicazioni: esso è la mani- festazione della differenza della burocrazia comunitaria verso le differenze giuridiche portandola a voler uniformare o uniformare le normative nazionali. Il pluralismo giuridico europeo costituisce, invece, per Legrand, un valore da tutelare.

Non è accettabile che si voglia imporre ai common law le mentalità dei civil lawyers in assenza di ragioni obiettive che possano sanzionare la superiorità del sistema continentale su quello insulare. Per comprendere l’imposizione che verrebbe fatta agli inglesi, basta riflettere su come accetteremmo noi l’abrogazione dei nostri codici, sostituiti dalla mera evoluzione giurisprudenziale.

Il progetto di codificazione europea sarebbe infine il frutto retrogrado di un autoritarismo di stampo napoleónico. Quel che invece è necessario è l’accettazione e la comprensione delle differenze in quanto valore in sé. Tanto più se il problema viene affrontato dallo studioso di diritto comparato il quale vive di (e per) quelle differenze.

2. - Il discorso di Legrand — qui ridotto in pillole, ma di ben maggiore complessità e fondato su un approccio multidisciplinare — merita di essere analizzato non soltanto in sé, quanto per il fatto che esprime opinioni diffuse tra i giuristi anche se mai manifestate con tanta veemenza (3). Oltretutto, impedisce all’interlocutore di poter utilizzare l’obiezione dello sciovinismo giuridico, qualora tali argomenti fossero venuti da un inglese: Legrand, franco-canadese, insegnava in una università olandese.

Come in tutti i discorsi vi sono alcune parti che suscitano consenso, altre che non appaiono condivisibili, altre ancora che non paiono convincenti.

A) La burocratica armonizzazione: da sottoscrivere pienamente sono — a mio parere — le (fin troppo edulcorate) perplessità manifestate nei confronti delle capacità tecnico-giuridiche delle autorità comunitarie. Varrà la pena di ribadire che la normativa comunitaria è espressione di un ceto burocratico (e non di un ceto politico, come avviene quando la legislazione è affidata ad un organo elettivo); tale ceto giustifica la propria funzione e si assicura potere (nel senso sociologico — e non necessaria-mente deteriore — del termine) producendo regole: tale ceto peraltro non dispone di grandi mezzi tecnico-normativi, anche per via della sua etrogenesi culturale, e per la mancanza di una solida conoscenza dei diritti dei vari Stati membri.

Il risultato è che le prerogative ad esso affidate sono essènte avendo riguardo essenzialmente — e non potrebbe essere di-versamente — alla propria esigenza: affermare la propria visio-ne regolatrice ed assicurare l’adesione dei destinatari (4).

Pare dunque più che legittimo esprimere graduali fortemente critici verso l’attività normativa comunitaria, sia per il suo contenuto che per la mentalità di cui è espressione.

Tuttavia, sotto questo aspetto, il bersaglio di Legrand appare sbagliato in quanto i progetti di codice civile europeo non sono portati avanti da strutture burocratiche della Comunità, bensì da gruppi ad esseri esterni e composti da giuristi «professionisti». Vi è un sostegno — espresso dal parlamento europeo e dalla commissione — ma da quest’ultima in modo assai blando


all'iniziativa, ma esso non si è tradotto, a quanto consta, in un attivo intervento sia di impostazione che di redazione; non vi sono stati tutti quelli interventi procedurali tipici del modo di formazione della normativa comunitaria: commissioni, libri verdi, richiesta di pareri, gare fra i diversi centri di ricerca giuridica europea.

Anzi, si può ragionevolmente sostenere che l'idea di un codice civile europeo sia una delle risposte alla diffusa insoddisfazione nei confronti della frammentarietà e della inconsistenza teorico-sistematica dell'ordinario intervento delle burocrazie comunitarie.

Non si tratta di una mera ipotesi, giacché tale conclusione appare evidente dal più significativo risultato del lavoro di codificazione europea rappresentato dai «Principles of European Contract Law» (5), redatti con l'incoraggiamento comunitario ma da soggetti del tutto estranei alla sua organizzazione burocratica.

Con il che non si intende anticipare un giudizio su tale lavoro, ma solo mettere in luce un problema che il pur approfondito contributo di Legrand pare trascurare: senza rimanere sul piano delle petizioni di principio o nel mondo di Utopia, quali rimedi si possono realistamente prefigurare e mettere in opera rispetto alla pochezza e ai guasti della normativa comunitaria? Occorre, in altri termini, prendere atto del processo comunitario di «armonizzazione» (6) in corso, e del fatto che esso tocca l'intero sistema delle fonti normative (e non soltanto il settore del diritto privato (7) dove si evidenzia meggiormente l'alterità common law-civil law (8)), e chiedersi:


7. La prospettiva è stata delineata oltre quindici anni fa da H. Kortz, Gemeineuropäisches Zivilrecht, in Festschrift Zweigert, Mohr, Tübinga, 1981, 481.


a) è auspicabile il processo di armonizzazione europeo?
b) si possono escludere dall'intervento comunitario alcune aree che presentano connotati di forte identità culturale?
c) come e chi decide quali aree vanno eventualmente escluse?
Solo dando una risposta negativa alla prima domanda, legittimando il sempre forte isolazionismo britannico, si può risolvere in radice il problema posto da Legrand. Ma una volta che si accetti l'idea della Comunità — anzi dell'Unione — europea e l'attribuzione di potestà normative ai suoi organi, la risposta può risiedere solo nel correggere e migliorare il processo formativo ed il prodotto dell'attività comunitaria, e non certo innalzare un cordone sanitario intorno alla common law.
Il che, ovviamente, lascia spazio al dibattito sulle misure correttive da adottare e sulla possibilità che un codice civile europeo rientri fra tali misure.

B) La difesa del pluralismo giuridico: non si può peraltro non condividere dal punto di vista sia di principio che di metodo il discorso di Legrand, quando sostiene l'esigenza di tutelare l'esistenza di diverse culture giuridiche in Europa, perché ciò costituisce una ricchezza, e non un ostacolo. Un sistema giuridico costituisce espressione della cultura e della storia di un pease. Il tentativo di ridurre le differenze attraverso la riproduzione degli enunciati normativi costituisce una semplificazione positivistamente dannosa e infondata. Da mille anni l'Europa è l'incontro fra l'antichissima cultura mediterranea e quella, più recente, dei popoli nordici. Esse hanno, alla loro base, una diversa concezione della comunità e dei rapporti con l'autorità. Ma questa alterità è servita costantemente da modello, stimolo, metro di verifica. Il riconoscimento del valore del pluralismo giuridico implica consapevolezza del postulato gius-realista che guarda alla law in action: nella quale gli attori non sono le carte, bensì persone in carne e ossa, non solo «operatori del diritto», ma persone comuni, negli affari, nella famiglia, nelle relazioni sociali.
Tutto questo è messo in pericolo dal progetto di codice
civile europeo? La domanda richiede in primo luogo una ri-
sposta a livello degli ordinamenti continentali, nei quali le
diversità, seppure non eccessivamente marcate, esprimono e
al tempo stesso disegnano l'identità culturale dei singoli paesi.
La storia di questi due secoli sembrerebbe offrire conforto al
codificatori europei: nell'area di influenza francese, anche
molti decenni di immobilistica scuola dell'esegesi non hanno
soppresso le differenze. All'apparente ineluttabilità del BGB
si è subito contrapposto l'arioso codice svizzero (9). In altre
parole la codificazione, come processo, non si è fossilizzato,
ma è stata in costante evoluzione, perfezionandosi seguendo
modelli competitivi (10). Si pensi ai problemi di metodo e
di sistema posti dal codice civile olandese (11) e della riconfica-
cazione del diritto privato nei paesi dell'est (12). Ragionare
su un codice civile europeo è dunque — anche indipendentemente
alle ragioni che si diranno oltre — utile da perse
per la scienza giuridica, precisando dalla sua ricaduta prati-
cia. Serve ad accrescere la conoscenza delle variazioni nazionali
e a comprendere fondamenti e antinomie (13).

Ovviamente, diverso è il discorso per gli ordinamenti di com-
mom law per i quali - come Legrand sottolinea - il rifiuto del
codice non è dovuto (solo) a sciovinismo, bensì ad una radica-
mente diversa logica giuridica: induttiva anziché deduttiva,
con il conseguente rigetto di regole generali e sistemi. Importa
un codice non significa dunque soltanto coartare il contenuto
della regola, bensì soprattutto sovvertire la forma mentis del
giurista inglese.

Tuttavia, sorge il dubbio che la contrapposizione antitetica fra
sistemi codicistici e sistemi non codificati rischi di essere
simplistica. Che la cultura del common law rifiuti oggi il codice
— inteso nel senso continentale — è indubbio. Ma ciò vale
anche per la formulazione di regole generali organizzate in si-
stema? La risposta, in questo caso, credo, deve essere più duttili-
ne e debba tenere conto di alcuni indici.

In primo luogo la manualistica di common law, sulla quale
si preparano gli studenti universitari e che viene comunemente
utilizzata dai pratici, è generalmente organizzata secondo sche-
mi logici di stampo continentale, dai principi generali ai corol-
laria, dalle regole alle eccezioni. E evidente che l'enunciato è me-
nos assertivo, anche perché è privo del sostegno di una dogmata-
ica, e copre aree meno vaste e meno ben determinate, per via
della variabilità della casistica. Tuttavia, l'accumulazione e il
consolidamento di quest'ultima portano a risultati non dissimili
dai quelli che riscontriamo nella manualistica continentale. Ov-
viamente, ciò non legittima una equiparazione fra i sistemi nè
tantomeno una comparazione fra l'attuale situazione inglese e
quella, pre-codificistica, francese all'epoca dei grandi trattatisti,
non fosse' altro per via del fatto che Domat e Pothier avevano
alle spalle il diritto romano e il razionalismo cartesiano. Rimane
nuttavia inequivocabile che il giurista inglese, al momento della
sua formazione, viene introdotto in una logica sistematica, in
cui un ruolo assai importante è svolto dai numerosi confini fra
istituto e istituto, fra rimedio e rimedio.

Se ci si fermasse qui l'osservazione rimarrebbe nel campo della
pur importante, ma non esclusiva, educazione del giurista. Es-
saat, tuttavia, va integrata dalla considerazione che la manualisti-
ca non serve solo agli studenti, ma costituisce strumento di uso
quotidiano dell'avvocato e del giudice. Ed è sufficiente scorrere
e la giurisprudenza inglese per avvedersi che essa viene utilizzata
per un duplice scopo: sottanziare una regola recepita e ferma;
sostenere ex authoritate una certa scelta poggiando sul nome
dell'autore del manuale. Da questo punto di vista, amm. il giu-
dice inglese è avvantaggiato rispetto a quei suoi omologhi conti-
nentali (come quello italiano) cui è vietato citare la doctrina.
L'uso della giurisprudenza, poi, inevitabilmente tende all'e-
molelazone di principi che col tempo si ipostatizzano con la
sola differenza che mentre il giurista continentale richiamerà
un articolo del codice o un broccardo latino, quello di common
law farà riferimento al nome della landmark decision.
Dunque, il giudice inglese «fa cose con regole» (14) e queste regole non valgono solo per il caso concreto da lui esaminato.

In terzo luogo il giurista inglese impegnato ad affrontare questioni transazionali — il che avviene sempre più spesso — si è già adattato, e bene, ad ambienti sistematici basterebbe citare il settore — che in Inghilterra ha una incidenza pratica estremamente diffusa e di gran lunga superiore a quella che si riscontra da noi — dei diritti umani ed in particolare della convenzione europea del 1950.

La questione non si presenta dunque in termini di inconciliabilità fra civil law e common law. Piuttosto occorre prendere atto che l’assetto non è omogeneo in tutti i settori del diritto privato. Ma anche che nel suo cuore — il diritto dei contratti — non siamo più di fronte alla sola prospettiva del rigetto di ogni trapianto giuridico (15).

C) La codificazione come rellito del passato. La contestazione di Legrand va anche al merito delle proposte: la codificazione è un processo del secolo XIX, espressione del mito dell’omnipotenza del legislatore, pilastro del positivismo giuridico. Essa è una tecnica inadeguata e dannosa. Non vi è dunque motivo per perpetuarla, estendendola a tutta l’Europa, alle soglie del XXI secolo.

Quel la critica dell’autore appare fortemente imbottita di valutazioni ideologiche che si sovrappongono — ossuccandolo — al ragionamento che tenta di sviluppare. Se infatti — come Legrand sostiene, offrendo a prova una impressionante mole di dati interdisciplinari — gli istituti giuridici e le strutture formali e concettuali attraverso i quali essi vengono espressi sono frutto della più generale cultura di un paese in un determinato momento storico, l’attacco al processo di codificazione — dal secolo dei lumi in poi — è anacronistico, oltre che, ovviamente,


contraddittorio con le premesse. In altre parole non sembra metodologicamente corretto applicare le moderne categorie politico-civili e sociologiche al lavori di Portalis, Tronchet, Bigot de Préameneau e Maleville.

Non sono i codici, in quanto tali, ad essere « autoritario »: essi sono compilati in un’epoca autoritaria — come sicuramente fu quella di Napoleone o di Bismarck — essi si riempiono di contenuti formalistici e diventano strumenti di una politica omogenea. La contropartita si ha alla lettura del codice svizzero ed in particolare del suo magistrale art. 1. Il codice è dunque una struttura in primo luogo logica — ce lo insega Leibniz — volta a dare ordine alle regole giuridiche. E l’esigenza dell’ordine — e dunque della certezza — è comune a tutti i giuristi, anche quelli di common law.

Non ha dunque senso una critica al codice in quanto tale, a meno di non ritenere deterministicamente che quello strumento non possa che produrre risultati autoritari o comunque dirigi-

ti. Tesi che Legrand sembra suggerire apoggiandosi sull’autorità di Pierre Bourdieu. Ma si sommesso e senza risvolto che tutto quanto è stato detto di omologazioni che l’illustre sociologo — non a caso francesi — attribuisce al Code Napoléon si può in Inghilterra ricondurre senza eccessiva difficoltà al circuito chiuso barriers-giudici su cui si fonda la secolare evoluzione (o non evoluzione) (16) della common law. La omologazione, dunque, trova ovunque le strutture su cui appoggiarsi, come pure l’istinto di diversificazione sa utilizzarle con altrettanto profitto: si pensi solo alla ben diversa apertura della cultura giuridica americana, rispetto a quella inglese.

Il discorso deve — a mio parere — spostarsi sul piano delle fonti di produzione normativa: è ovvio che se si attribuisce un valore unico o comunque prevalente al codice, torneremo all’epoca della scuola dell’esegesi (17). Ma siamo ancora fermi — la cultura giuridica europea è ancora ferma! Non mi pare proprio. Costituzioni, giurisprudenza, principi generali, prassi, lex mercatoria hanno da tempo eroso la visione totemica del codice civile. Senza considerare poi — e si tratta di un aspetto fondamentale nel dialogo civil law-common law — gli aspetti


processuali, che in concreto attribuiscono effettività (o desuetu-
dine) agli istituti di diritto sostanziale (18).

E se guardiamo oltre la Manica, non possiamo ignorare il
progressivo aumento delle fonti di produzione normativa, che
sarebbe folkloristico ridurre a qualche dozzina di signori in to-
ga e parrucca, come in un quadro di Hogarth.

Anche qui dunque la critica di Legrand non pare colpire il
bersaglio, che non è certo la ricerca indipendente, da parte di
un'ampia comunità di studiosi, di convergenze fra civil law e
common law. Piuttosto, la vena «autoritaria» che egli teme ri-
siede nel crescente controllo pubblico dell'attività economica dei
privati, il più delle volte prima ancora che questi intrattengano
rapporti giuridici con altri privati (e dunque in una fase che
non è disciplinata dal codice). Questo ci porta a discussioni sul
contrasto fra politiche liberiste e politiche dirigiste: ma — a
parte rinviare alle pagine di Gilmore su «The Death of con-
tract» (19) e di Atiyah su «The Rise and fall of freedom of con-
tract» (20) — questo è un terreno ben distante dal confronto
di idee sulle nuove codificazioni.

In sintesi, le critiche che Legrand muove all'«arretratezza»
dell'idea di codificazione sono da un lato indirizzate verso una
concezione che in larga misura fa parte del nostro passato (e
non ha molto costretto criticarla la storia). Dall'altro lato sono
da tempo volte in positivo dagli studiosi più attenti (21) — assai
presenti nelle varie iniziative europee — i quali sperimentano
nuove strutture per la sistematica del diritto privato (22).

Vi è tuttavia il pericolo di un equivoco: non è chiaro dal

(18) Non è dunque un caso che R. B. SCHLEINGER, Comparative Law, Foundation Press, Mineola, 1981, dedichi un lungo numero di pagine
al diritto sostanziale e a quello processuale. V., pure, M. STORME, Pro-
cedural Consequences of a Common Private Law for Europe, in A. S. HAR
KAMP et al. (eds.), Towards a European Civil Code, Nijhoff, Dordrecht,
1994, 63.

(19) G. GILMORE, The Death of Contract, Ohio State Univ. Press, Columbus, 1974 (nella traduzione italiana di A. FUSARO, La morte del
contratto, Giuffrè, Milano, 1988).

(20) P. S. ATIYAH, The Rise and Fall of Freedom of Contract, Claren-

(21) V., ed es., E. H. HONDIUS, The Judiciary: An Obstacle to the Har-
monisation of Civil and Common Law, in K. BOYLE-WOELKE et al.

(22) Si v. i vari contributi in A. S. HARTKAMP et al. (eds.), Towards

pur lungo articolo di Legrand se la sua radicale avversione è
nei confronti di un codice civile europeo, inteso come atto norma-
tivo dell'Unione europea che si imposterebbe ai singoli Stati
membri (23), oppure anche ai vari tentativi di redigere un te-
sto comune che sia in grado — senza interventi normativi —
di penetrare direttamente nei sistemi giuridici nazionali grazie
alle sue qualità e alla sua uniformità (24). Semberebbe che l'a-
tore si opponga ad entrambe le ipotesi, il che non è privo di
conseguenze, come si dirà subito.

3. - La prospettiva. Quanto si è finora detto rientra in un
naturale confronto di opinioni, dotate di maggiore o minore
forza persuasiva. Laddove però il discorso di Legrand è oggettiv-
amente debole è nelle sue conclusioni, o meglio, nella loro
mancanza.

In concreto, anche accettando la tesi di Legrand sulla non
condizionalità delle differenze fra il giurista continentale e quello
d'oltre Manica, si deve ritenere che si tratta di una situazione
immutabile ed auspicare che così rimanga? Oppure c'è comu-
que un compito per i giuristi del nostro tempo?

In primo luogo va osservato che si si guarda al cuore del
diritto privato, e cioè al diritto dei contratti (sul quale si incen-
trano i tentativi di codificazione europea) le differenze sono
per un verso assai più modeste di quanto taluni enfatizzano (25),
per altro verso trasversali, e cioè indifferenti ad una netta sepa-
rarizzazione civil law-common law (26).

(23) Tra i fautori di un approccio tradizionale, v. P. C. MULLER,
GRAFF, Private Law Unification by Means other than Codification, in
A. S. HARTKAMP et al. (eds.), Towards a European Civil Code, Nij-

(24) Questo è l'obiettivo della c.d. commissione Lando. I suoi primi
risultati sono citati alla nota 5. Sul tema, v., pure, C. KESSERDIN che
parla di La codification privée, in A. BORRAS et al. (eds.), E pluribus

Formation of Contracts. A Study on the Common Core of Legal Sys-
tems, Oceanis, Dobbs Ferry, 1968.

(26) V. M. H. WHINCUP, Contract Law and Practice. The English System
and Continental Comparisons, Kluwer, L'Aja, 1996, per una
chiara esposizione di numerosi casi di evidenti analogie fra common
law e civil law; v., inoltre, G. H. TRETIEL, Remedies for Breach of
Contract, Clarendon, Oxford, 1988; o H. Mc GREER, Contract Co-
de, drawn up on behalf of the English Law Commission, Giuffrè, Mila-
no, 1993.
La differenza non sta dunque nelle regole — mai immutabili in nessun ordinamento — bensi nelle fonti della loro produzione (27). E mentre nel continente è ancora radicata l’opinione — pur smenita quotidianamente dalla realtà — che è sufficiente un voto del parlamento per cambiare le regole, nella common law ben altro ci vuole, anche perché nessuno può costruire due parti a litigare sol perché c’è bisogno di una landmark decision, come nessuno può costruire un giudice inglese a scrivere le sentenze come reglano un ipotetico conesso di salòmoni europei.

Ma, a questo punto, il discorso si è spostato su un piano che è procedurale, dove è naturale risarcire punti d’intesa. Non è quindi un caso che le due più recenti esperienze di dialogo civil law-common law, i principi Unidroit (28) e i principi del diritto europeo dei contratti, abbiano scelto una struttura — quella dei Restatements — nota alla common law (seppure americana) riversando in essa concetti (29) e soluzioni variamente composti. Si potrebbe, a tale proposito, muovere l’obiezione che un «restatement» è cosa ben diversa da un codice. Sul che non si può che essere d’accordo non senza però mettere in luce che, proprio perché essi sono consapevoli delle problematiche metodologiche, da parte dei giuristi europei più impegnati si è scelta una struttura ben collaudata dell’integrazione di ordinamenti


statuali (gli Stati che compongono gli Usa) gelosi della propria autonomia e delle proprie prerogative di controllo sulle fonti di produzione normativa (30). Con il che viene neutralizzata la paura dell’imposizione dall’alto di un testo estraneo alla tradizione giuridica inglese.

Nello stesso tempo però si deve mettere in luce che un «restatement» non è diverso da un codice nelle sue linee ispiratrici, che sono quelle dell’organizzazione sistematica di regole fra di loro logicamente coerenti e, il più possibile, autosufficienti (31). Ed è proprio il punto di vista sostanziale notare che nella scelta del «restatement» non vi è minore rigore contenutistico rispetto ad un codice. Basti confrontare — dai nostri pur angusto orizzonte nazionale — i principi europei in tema di risoluzione del contratto per trovare quasi tutte le regole (salvo quella sulla rinegoziazione dei contratti) di cui agli art. 1453-1469 c.c. italiano, le quali affondano le radici nel progetto italo-francese di codice delle obbligazioni del 1927, il quale a sua volta rivisita e rinnova la struttura del Code Napoléon alla luce del BGB (32).

In conclusione, vi sono stazioni nelle quali è fortemente sentita l’esigenza di semplificazione del sistema giuridico. L’Europa l’ha attraversata dal Settecento all’ottocento. Se ormai prevale una tendenza alla frammentazione, c’è da prevedere che ad un certo punto questa non sarà più sostenibile — o, per meglio dire, accettabile — per la società (33). Il compito del giurista dei nostri tempi non è quello di rimpiangere un passato che non c’è più, oppure di attendere fatalisticamente che la forza delle cose rovesci lo status quo.


Riflettere sui modelli di organizzazione delle regole giuridiche non è dunque oziosa speculazione di una isolata cerchia di intellettuali affetta da una sindrome di onnipotenza, ma è sforzo indispensabile per offrire risposte razionali ad una società ed a una economia che cambiano, e a non perdere un patrimonio di metodologia giuridica, accumulatesi negli ultimi tre secoli.

In questo contesto le critiche espresse da Legrand sono un momento inevitabile ed anzi indispensabile per la crescita della consapevolezza sulle difficoltà che ci attendono e stimolano ad un dialogo (anche se l’autore, fra le righe, non sembra attenderselo) sul quale si è sviluppata, step by step, la cultura giuridica europea (34).

The ‘European Civil Code’, European legal traditions and neo-positivism

VINCENTO ZENO-ZENOCHIVICH*

Summary. 1. Professor Legrand’s arguments against a European civil code. 2. Bureaucratic harmonisation. 3. The defence of the plurality of legal systems. 4. Codification as a relic of the past. 5. The prospects.

Résumé: Cette contribution est une réponse à un article publié par M. Legrand en 1997 sous le titre ‘Contre un Code civil européen’ (60 MLR 44). Il reprend les trois arguments qui sont aux yeux de M. Legrand autant d’objections à l’harmonisation du droit privé. La première question est celle de savoir s’il est possible et opportun pour l’harmonisation d’être abandonnée aux bureaucrates chargés de la législation européenne. M. Zeno-Zencovich admet que ces personnes manquent de connaissances et de compétences juridiques pour réaliser une tâche aussi complexe, mais il souligne que les initiatives se rapportant à la rédaction d’un Code civil ont été jusqu’ici l’oeuvre de savants juristes indépendants des institutions de l’Union Européenne. Et il suggère que l’une des raisons de promouvoir un Code civil pourrait justement être de neutraliser la législation ‘peu méthodique et théoriquement incohérente’ que les bureaucrates de l’Union européenne mettent sur pied dans le domaine du droit civil.

Le deuxième argument est qu’une pluralité de système juridique devrait être prévue : les systèmes juridiques sont le produit de cultures juridiques. La transplantation de certaines constructions juridiques d’un système à un autre échoue d’ailleurs souvent en raison d’incompatibilités culturelles. M. Zeno-Zencovich doute cependant que l’élaboration d’un Code civil européen menace vraiment cette diversité. Il souligne que l’existence de codes antérieurs n’a pas empêché les Etats d’innover et de recodifier. La rédaction d’un Code exigerait de ses auteurs qu’ils travaillent étroitement ensemble et développent leur connaissance mutuelle des différents systèmes. Même si l’on tient compte des différences entre les systèmes de common law et de droit civil, elles ne doivent pas être exagérées. Les juristes de common law ont l’habitude de présenter le droit de manière structurée et logique - ce qui est la fonction d’un code.

Le troisième argument est que la codification est un vestige du passé, une expression d’autoritarisme qui n’a rien à voir avec l’époque moderne. La réponse à cela est que les codes passés témoignent sans doute d’un certain autoritarisme parce qu’ils reflètent l’esprit de leur temps, mais ce n’est pas forcément vrai d’un code moderne. M. Zeno-Zencovich note que M. Legrand cherche finalement à s’opposer à l’harmonisation du droit privé par tous moyens et que c’est là une faiblesse de sa position. Il faut au contraire rechercher les moyens de résoudre les problèmes posés par les relations juridiques transnationales. Les Restatements

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ont à cet égard montré leur utilité aux États-Unis en permettant de modérer des concepts et des lois qui pourraient servir dans un contexte européen. La tâche des juristes modernes est en effet de réfléchir à un modèle d'organisation des règles juridiques afin de proposer des solutions rationnelles pour une économie et une société en mutation plutôt que de dilapider un patrimoine culturel de méthodologie juridique accumulé sur trois siècles.

Le Privacy Council était saisi des faits suivants : les armateurs d'un navire avaient affrété celui-ci. Le navire fut sous affrété à des expéditeurs pour le transport d'une cargaison d'Indonésie en Chine. Les affréteurs ont soumis un devis comportant une clause, dite clause Himalaya, dont l'objet était de conférer aux sous-contrats le bénéfice de "toutes les exceptions, limitations, stipulations, conditions et facultés" profitant au transporteur. Il contenait également une clause attribuant compétence aux juridictions indonesiennes. Après le déchargement de la cargaison, les propriétaires de celle-ci ont diligenté une procédure à Hong Kong en soumettant que la cargaison avait été endommagée. Les armateurs du navire invoquèrent la clause attributive de compétence comme écart du sens de la clause Himalaya. Mais la cour d'appel de Hong Kong estima qu'ils ne pouvaient s'en prévaloir dans la mesure où ils n'étaient pas parties au contrat.

Leur recours, formé devant le Privacy Council, est également rejeté. Celui-ci retranscrit le développement des clauses Himalaya comme un moyen d'atténuer ou de déroger à la stricte doctrine du lien contractuel pour l'adapter aux diverses situations qui peuvent se présenter dans le cadre d'un transport maritime de marchandises lorsque les protagonistes ont pu légiférer l'étendre à bénéficier de certaines dispositions du contrat de transport, même sans y être parties - principalement les débuteurs mais également parfois les armateurs - invoquant les dispositions des conventions des affréteurs pour s'exonérer de leur «eventuelle responsabilité à l'égard des propriétés de la cargaison et de ses destinataires. Le fondement théorique pour donner effet à de telles clauses demeure cependant problématique (bien qu'elles étaient couramment interprétées comme des contrats synallagmatiques obtenus par l'intermédiaire du transporteur).

Il n'était pas évident qu'une clause attributive de compétence puisse être comprise parmi les clauses dont il est permis à un sous-contratant de bénéficier. "Une telle clause doit être distinguée des exceptions et limitations dans la mesure où elle ne profite pas à une partie seulement mais comporte un accord réciproque en vertu duquel chaque partie s'est mise d'accord avec les autres sur la juridiction compétente en cas de litige. Cette clause est une clause qui crée des droits et des obligations réciproques". Au contraire, la stipulation profitant au transporteur, dont la clause Himalaya reconnaît le bénéfice aux sous-contrats, doit être interprétée de la même manière que des exceptions et limitations. La clause Himalaya a en effet pour but "d'éviter que les propriétaires de la cargaison puissent se soustraire aux causes d'exonération opposables par le transporteur en agissant en responsabilité contre des personnes qui ont effectué des prestations pour le compte de celui-ci. On leur bénéficier ces personnes de la clause attributive de compétence figurant dans le contrat de connaissance n'apporterait rien à la solution de ce problème". En outre, l'objet d'une clause attributive de compétence est habituellement de donner compétence à une juridiction dans le ressort de laquelle le transporteur exerce son activité. Ce ne peut donc être que fortuit si la juridiction est également en un lieu qui convient à un sous-contratant dans le cadre d'un procès. Autrement dit, et les termes de la clause Himalaya et son but montrent que l'on a pu vouloir y inclure la clause attributive de compétence.

Le commentaire qui suit confronte cette solution avec le rapprochement retenu en Belgique dans des situations semblables.


1. Professor Legrand's arguments against a European civil code

Only the forthcoming decades will tell if Pierre Legrand's jaccuse 'Against a European Civil code' will be something like a 20th century remake of the celebrated essay by F. von Savigny 'Vom Betufl unserer Zeit fur Gesetzgebung
und Rechtswissenschaft, which blocked early 19th century attempts at codifying private law in Germany and forestalled for nearly seventy years the enactment of the BGB.

In summary, Legrand's view is that the preparation of a European civil code — supported by various acts of the European Parliament and by many respected and well-known legal scholars — is neither practically feasible nor culturally desirable.

According to Legrand, Europe is still clearly divided — from the point of view of its legal traditions — into Common Law and Civil Law systems. In the latter codification of private law is the result of history, intellectual approaches and the evolution of legal thought over previous centuries; this is still the primary approach of the continental lawyer, who reasons through principles which he subsequently applies to different individual cases.

Common lawyers have, on the other hand, strenuously resisted attempts at codification, and have questioned the need for general, abstract rules.

Legrand particularly insists on the differences of legal reasoning between the two systems, basing himself on a vast range of comparisons with sciences such as sociology, epistemology and group psychology — disciplines which are no longer unknown to legal scholars. These differences tend to frustrate attempts at transplanting structures (and a code is, after all, a structure) which are not accepted, because they are culturally incompatible, in another context.

From another perspective, the proposal of a 'European civil code' has many drawbacks: it is an expression of the fear which EU bureaucracies have of legal differences, a fear which leads them to try to suppress these differences through the unification or the 'uniformisation' of national laws. The European plurality of legal systems ('pluralis tralitarian') is rather — according to Legrand — a value in itself which must be preserved.

It is not acceptable that one should impose on Common lawyers a Civil law mentality without evidence of an effective superiority of the continental systems over the insular one. In order to realise the magnitude of the imposition which would be made on Common lawyers, one should imagine what the reactions of civil lawyers would be if the various Civil codes were suppressed and substituted by mere case-law.

Finally, the proposal of a European civil code is the expression of a backward-looking and authoritarian legacy which dates back to the times of Napoleon, and would be impracticable as the text to which the two systems would refer would be interpreted and applied in completely different and incompatible ways. What is necessary, rather, is to accept and understand the value of legal differences.

Such an approach is much more appropriate for comparative lawyers who live off of, and for, those differences.

Legrand's arguments — which I have summarised in a nutshell, but which are expressed in a much richer and more complex language, using a multidisciplinary approach — need to be analysed and discussed, not only for their intrinsic strengths (or weaknesses) but also because they are widely present in the current debate among European legal scholars, although they have never been formulated in such a strong and vehement style. One is also obliged to discuss them because it is not possible, in order to counter them, to resort to the most obvious objection of legal chauvinism, as one could easily have done if they had come from an English scholar: Legrand is French-Canadian and teaches in a Dutch University.

As happens with all provocative arguments, there are parts with which one can agree, others that, on the contrary, cause profound disagreement and others still that appear unconvincing.

2. Bureaucratic harmonisation

Legrand's doubts, expressed in a manner that could be even more forthright, as to the legal skills of the EU bureaucracy should be entirely supported.

It is worth remembering that EU legislation is the product of a group of bureaucrats (I use the term in a sociological and not a disparaging sense) and not of a group of politicians, as is the case when legislation is enacted by an elected body. This group justifies its existence and functions and ensures its power (also here the term is used in a sociological sense) by creating rules. However, with obvious exceptions, this group does not have at its disposal great legal skills. This is because of its background, its methods of recruitment, the cultural differences amongst its members, and the lack of a profound knowledge of the legal traditions of member states.

The result is that the functions that have been assigned to this group are implemented firstly in consideration (and it would be astonishing if it were any different) of its own requirements; the affirmation of its own regulatory power and the ensuring of the compliance of those to whom it is addressed.

It is therefore perfectly justifiable to be severely critical of the EU legislation, both as regards its content and the mentality it expresses.

However, from this point of view, Legrand appears to miss the mark. The projects for a European civil code are not promoted and prepared by the EU bureaucracy, but by legal scholars who are independent from its structures and

2 Originally printed in Heidelberg 1814. For a contemporary translation in Italian see La vocazione del nostro secolo per la legislazione e la giurisprudenza, Verona 1857 (reprinted by Forlì, Bologna 1968). The parallel with the Savigny-Thibaud controversy is laid out also by O. Land, 'Why Codify the European Law of Contract', 3 ERPL (1997) 525.

who are operating on the basis of their own assessments and experience. There has
been support for some initiatives by the European Parliament and the Commission
(albeit in a very lukewarm way), but, as far as anyone knows, it has never been
expressed by means of well-known EU law-making procedures, that is, by means
of active intervention in the phases of preparation and drafting: committees, green
papers, calls for comments, and bids among the many European research centres
and so on.

On the contrary, it may reasonably be argued that the idea of a European civil
code is one reply to growing dissatisfaction at the piecemeal and theoretically-
inconsistent nature of the ordinary legislation promoted by the EU bureaucracies.

The argument becomes less hypothetical when one considers the most
important contribution to codification of European private law, the
‘Principles of European Contract Law’, prepared with the encouragement of the
EU (but not really much more than that) by scholars completely outside its
bureaucracy.

And without anticipating judgement on the merits of such work, the
‘Principles’ raise a question that Legrand’s wide-ranging article does not seem to
counter: if one does not wish to limit oneself to questions of principle or take
refuge in Utopia, which solutions can one offer to the low quality of EU legislation
and the negative effects thereof?

It is necessary therefore to acknowledge that the push towards ‘harmonisation’
is growing all the time, and that it involves not only a vast part of administrative
and public law, but also a considerable and expanding amount of private law, which
up to two decades ago was the monopoly of national law: consumer law, company
law and, par ricochet, contract and tort law, and, incidentally, even property
law (through the Directive on time-sharing) and family law (through the
December 4, 1997 Resolution on ‘fictitious marriages’ or the recent May 28, 1998
convention on mutual recognition of judicial decisions in marriage cases).

With this in the back of one’s mind, one should ask oneself:

(a) Should one favour the process of harmonisation of different parts of the
European legal systems?
(b) Is it possible to exclude from the field of EU intervention some areas of the
law which reflect a very strong cultural identity?
(c) Who decides – and how is the decision made – which, if any, areas should
be excluded?

Only a firmly negative reply to the first question can resolve at its roots the
problem which Legrand is posing. It would therefore be necessary, from a practical
point of view, to encourage and stir up the British desire for isolation, and severely
or noticeably dampen relations with continental Europe.

But if one accepts the idea of a European Community (now a Union) and the
transfer to its bodies of legislative powers, the only practicable reply is to correct
and up-grade the law-making process and its results; the creation of a sort of
Chinese wall to protect the Common law’s diversity does not appear to be realistic.

This conclusion, obviously, leaves ample space for the debate on which
measures should be adopted and on whether the idea of a European civil code
might be part of such measures.

3. The defence of the plurality of legal systems

Another argument of Legrand which deserves full approval – both at the level of
principles and at that of methodology – is the need for the different European legal
cultures to be protected, for they are an asset and not an obstacle.

A legal system is one expression of the culture and the history of a country and
any attempt to reduce differences by the mere generation of legislative rules is a
harmful and unproductive positivist simplification.

For the last thousand years, Europe has been the meeting point between the
millenarian culture of the Mediterranean and that, more recent, of the populations
of Northern Europe. The two cultures have, deep down, a different conception of
community and of the relationship between individuals and authority. But these
differences have provided each culture with an invaluable model and have acted as
a stimulus and provided a means of comparison. A recognition of the value of the
plurality of legal systems is the obvious consequence of legal realism: one must
look at the law in action and not at the law in the books; one should also remember
that the ‘actors’ are not legal formulations but real people, who are not only judges
and lawyers, but common people in the business world with families and social
relationships.

But is the plurality of legal systems endangered by the project of a European
private law? The question should be answered in the first place in terms of the
various continental systems in which the differences, although not excessive, are
the expression and distinctive feature of the cultural identity of each country. The
history of these last two centuries seems to offer arguments in favour of the
present attempts to codify European private law: the numerous decades of
stagnation due to the dominance of the 'École de l'excés sè' have not suppressed the differences. The German BGB, which seemed to have given the final word on the subject of codification, was soon followed by the contrasting openness of the Swiss Civil code. In other words codification, as a process, has not been fossilised, and has constantly evolved through the comparison of the rival models; one should bear in mind the methodological and systematic problems raised by the new Dutch Civil code and by the re-codification of private law in Eastern European countries.

To discuss a European civil code, without considering the reasons that will be put forward in the paragraphs which follow, is therefore useful in itself, even if it does not result in a change in legislation. Work on the project of a European civil code brings out, in an extremely vivid and practical way, national variations and converging trends, and enhances mutual knowledge of the different systems.

The picture alters when one looks at those Common law systems which refuse the idea of codification, not because of chauvinistic reasons, but because of a profoundly different legal logic: inductive rather than deductive. This entails an idiosyncratic attitude towards general rules and systems; the adoption of a European Civil code would impose on the Common lawyer not only different rules but also a different mentality and a different law-making process.

Although this last statement expresses a historic reality, one cannot avoid the impression that such a confrontation between codified and non-codified legal systems is simplistic. Undoubtedly the Common law culture rejects the idea of a Code as this is defined in civil law countries. But can one say the same of the formulation of general rules which are organised logically in a system? In this case, I feel the answer must be much more nuanced and should take account of various factors which have noticeably reduced differences over the last decades.

First of all, one should consider the vast number of textbooks which law students study and use to prepare for their examinations and which are commonly used by practitioners that are organised according to logical schemes typical of continental experiences, starting from general principles to their corollaries, and from rules to their exceptions. It is obvious that the text is less binding, as it cannot avail itself of the support of doctrinal scholarship and because of the amount and weight of case-law covers a smaller and less precise area. However, the stratification and accumulation of case-law brings about results that do not differ substantially from those that one can see in continental handbooks. It is obvious that this mere similarity does not justify the equation between continental and Common law systems, nor a comparison between the present state in England and that existing in France in the 18th century, before the Code Civil, for Domat's and Pothier's works were deeply founded on Roman law and Cartesian rationalism.

One should, however, bear in mind that, nowadays, the English lawyer, from the start, is introduced to a system which is taught to him by the application of a systematic logic.

If one leaves it at that, the argument would apply only to the important field of legal education. One should, however, add that handbooks are not just used by law students, but are the daily tool of lawyers and judges. If one takes a rapid glance at recent English case-law or at the briefs of the litigating parties, one notices that handbooks are used in a two-fold way: to synthesise a rule which is consolidated and to support a certain choice ex autoritate, citing the name of the author of the handbook. And from this point of view an English judge has an advantage over many of his continental colleagues (such as those from Italy) who, for many centuries, have been forbidden in their decisions to quote from legal writers and works.

Therefore, the English judge does 'things with rules' and these rules are not only valid in the particular case he is deciding.

Finally, one cannot ignore the fact that English lawyers have adapted themselves, quite comfortably, to systematic texts formulated in an extremely general and broad way. An example outside the private law field is to be found in the European Charter of Human Rights of 1950, which in England, more than in many continental countries, has an extremely important practical impact, which is enhanced (or caused?) by the absence of a written Constitution.

One may conclude that the discussion cannot be based on the presumption of a sort of incompatibility between the Civil law and the Common law. Rather, it is evident that the situation varies throughout the different, traditional branches of private law. But at the heart of private law, that is the law of contract, a gradual inter-penetration of the concepts of both systems has already taken place without major problems of one system rejecting the transplant from another.

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10 For a summary on the debate among legal scholars in Germany on the Konsolidierung see A. SOMMA, in G. ALPE (ed.), Corso di sistemi giuridici comparati, Giappichelli, Trieste, 1996, 150.


4. Codification as a relic of the past.

Legrand's critique extends to the merits of the proposal of a European civil code; codification is a 19th century procedural expression of the myth of the omnipotence of legislators, the pillar of legal positivism. It is inadequate and harmful. There is no reason to insist on following this path and extending an idea belonging to another era to the rest of Europe on the brink of the 21st century. Here Legrand's argument appears to express ideological prejudices that cover and overwhelm the general thesis that he is presenting.

Let us begin by using Legrand's own yardstick: if it is true -- and Legrand offers a vast amount of interdisciplinary evidence to support his point -- that legal institutions and the formal and conceptual structures through which they are expressed are the result of the general culture of a country at a given historical moment, to launch an attack on the process of codification of private law as it developed throughout the 18th and 19th centuries is anachronistic and contradicts Legrand's own arguments. In other words, it does not seem correct to apply modern political and sociological categories to the work of Portalis, Tronchet, Bignon, de Prémonvieu and Maleville.

Codes are not in themselves 'authoritarian' (nor 'liberal' nor 'democratic'); if they are written in an authoritarian age, such as that of Napoleon or Bismarck, they have an authoritarian spirit and become tools of an homogeneous policy. Proof of the contrary is provided, once again, by the Swiss Civil code and its cornerstone Article 1, which encourages the judge to fill in the inevitable gaps in the Code by reference to general principles and legal writings.

A code is, first of all a logical structure, and as such it has been one of the most lasting ideas of Leibnitz's philosophy. It was -- and still is -- meant to give order and certainty to legal rules, the requirements of which are felt deeply by all jurists, whether from Civil law or Common law background.

To criticise the Code in itself does not therefore appear to be very useful, unless one is convinced from the outset that codes can only give authoritarian and/or formalistic results. Legrand, however, appears to share this pessimistic view, supporting it in particular with several citations from Pierre Bourdieu. But the objection may be made that the 'homologation effect' that the famed sociologist -- not by chance a Frenchman -- considers to be one of the ill effects of the Code Napoléon can easily be found in England, where the closed circuit of barristers and judges that for centuries has governed the evolution of the Common law is analysed.¹⁶

The instinct of homologation will always find structures on which to found and reproduce itself, just as the instinct of non-conformity will be able to use them in the opposite way. One has only to compare, in the Common law world, the openness of American legal culture with the long decades of conservative attitudes of its English equivalent.

What needs to be discussed more adequately is the role played by the different sources of law, the role that has to be played by statute law, and the procedures and techniques used in developing a Code.

Only if one considers the Code as the sole or main source of law would one return to the age of the 'École de l'Éxégèse'.¹⁷ But are we -- is European legal culture -- still at that stage? I do not think so. Constitutions, case law, general principles, usages, les mercatoria have, for a long time, led to the eclipse of the idea of the Civil Code as a sort of totem. And one should add to this the fundamental (especially in the Civil law-Common law dialogue) procedural aspect by means of which the institutes of substantive law become effective or remain ineffective.¹⁸

And if we look beyond the Channel, it would be folkloristic to ignore the increasing number of sources of law and imagine that the Common law is made up of a few dozen elderly gentlemen with wigs and robes like a painting by William Hogarth.

It would therefore seem that Legrand's critique again fails to hit the mark, which surely cannot be independent research on the converging trends between Civil law and Common law by a broad community of scholars.

If there is an 'authoritarian' trend, one can find it rather in the ever-increasing administrative control over private business, most of which takes place before legal relations with others have been undertaken, and therefore at a stage not regulated by a Code.

This would lead us into a discussion of the contrast between liberal economic policies and dirigiste economic policies; but this is a very different subject, and one can easily refer to Gilmore's 'The Death of Contract'¹⁹ and Atiyah's 'The Rise and Fall of Freedom of Contract'²⁰ -- quite far removed from the debate for or against codification.

In summary, Legrand's objections to the 'backwardness' of the idea of a European civil code are directed, on the one hand, against a conception which is part of our past (and to criticise history is not very productive). On the other hand, these objections are a common legacy of more aware legal scholars²¹ who have used them as a stepping stone towards new structures for the systematisation of private law in the various initiatives in which they are involved.²²

¹⁷ For a few echoes to such an approach see P. Stern (ed.), Convegni di Studio per la redazione del progetto di un Codice Europeo dei Contratti, Pavia 1992 - 1994, Giuffrè, Milano 1996.
¹⁸ It is not by chance that R.B. Schelling, Comparative Law, Foundation Press, Mineola, 1980 devotes an equal number of pages to procedural law and substantive law. See also M. Storlbo, 'Procedural Consequences of a Common Private Law for Europe', in A.S. Hartkamp et al. (eds.), Towards a European Civil Code, Nijhoff, Dordrecht 1994, 83.
One should however, avoid a *quid pro quo*; it is not quite clear from Legrand’s lengthy article if his opposition is to the idea of a European civil code (seen as a legislative act of the EU which would be imposed on the legal systems of the member States), or to the various attempts to prepare a common text which would - without legislative enactment - seep into legal systems on the basis of its quality and uniformity. It would seem that he opposes both, which is not without consequences that will be illustrated in the following paragraph.

5. The prospects.

What has been up to this point stated reflects a natural difference of opinions, each of which will be either more or less persuasive, depending on the reader. There is one point, however, where Legrand’s argument appears to be *objectively* weak, and that is in its conclusions or, rather, in the failure to draw any.

Let us, for a moment, accept Legrand’s thesis on the impossibility of conciliating the differences between continental and English jurists: is this a final conclusion that will never change and that we should not wish ever to change? Or is there somehow a task for the jurists of our time?

If we were to accept that conclusion, comparative lawyers might as well pack their bags and devote themselves to less fruitful areas of transnational speculation. But the facts do not appear to point in that direction: if we look at the heart of private law, i.e. the law of contract, the field in which most of the attempts at European codification are concentrated, the differences are on the one hand much less significant than are often stated and, on the other hand, transversal in the sense that they do not follow a clear cut Civil Law–Common law divide and can be found between one Civil law system and another, some adopting a solution analogous to that of English law.

The difference therefore is not so much in the rules, which in no country are, or have been, unchangeable, but rather in the sources of the rules or, to put it in an even more legal-realistic way, in what the legal community perceives as sources of law, how these rules are expressed, interpreted and taught.

And whilst on the continent the, albeit fallacious, idea that a new law is sufficient to change the rules is deeply embedded, in English Common law change is much more difficult; this is because one cannot force two parties to litigate simply because there is need for a landmark decision to override a precedent, just as one cannot force a judge to write his decision, as a Parnassus of European scholars would like him to.

But, at this point, discussion has moved onto procedural aspects, where it is natural that different opinions tend to find practical solutions that can achieve a common goal.

It is therefore not astonishing that the most significant experiences of dialogue between Civil law and Common law systems, the Undroit Principles and the Principles of European Contract Law, have adopted a procedure, the Restatements, created by Common law (albeit American), moulding concepts and rules of different origin.

One might, in relation to such a framework, object that a Restatement is something quite different from a Code, which is perfectly true (but, as I have noted Legrand seems to place them on the same footing), and is the reason why continental legal scholars, who are well aware of the methodological difficulties in bringing together two different cultures, have voluntarily chosen a structure that has been experimented with over many years in integrating different ‘national’ systems (those of the States of the USA), each jealous of their autonomy and power of control over the sources of legal rules.

But, on the other hand, one must stress that a Restatement is not different from a code in its fundamentals, which are the systematic organisation of rules that are logically coherent and, as far as possible, self-sufficient. One must add, from a

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29 R. SACCO, ‘Il sistema del diritto privato europeo: le premesse per un codice europeo’, in L. MOCCIA (ed.), *Il diritto privato europeo: problemi e prospettive*, Giuffè, Milano 1993, insists on the unification of the conceptual categories for it is there were the contrasts exist.

30 The method can well be extended to other areas of the world: M.J. BONELL - S. SCHEDIN (eds) *Principi per i contratti commerciali internazionali e il sistema giuridico latinoamericano*, Cedam, Padua 1996.

31 P. KREEGOM, ‘Per un ‘Restatement’ europeo in materia di contratti’, in L. MOCCIA (ed.), *Il diritto privato europeo: problemi e prospettive*, Giuffè, Milano 1993, 135, points out how the ‘Restatement’ method relies mostly on general principles which are to be implemented by the judiciary. On the general principles of European Private Law see G. ALDA (ed.), *Corso di sistemi giuridici comparati*, Giappichelli,
substantive point of view, that a Restatement is no less rigorous in its content than a code. An example can easily be found in comparing the European Principles on the avoidance of contracts with Articles 1453-1469 of the Italian Civil Code of 1942 and discovering that the rules — except those on the renegotiation of the contract — are practically the same. And as it is rather unlikely that eminent scholars throughout Europe have been subdued by the perniciousness of Italian legal writers; the reason for the striking similarity must be put down to the fact that the relevant provisions of the Italian Civil Code took as their model the Franco-Italian Draft Code of Obligations of 1928, which revisited the Code Napoléon by using the BGB. We are therefore talking of an evolution that has been in progress for the last hundred years and which involves not only continental scholars but the whole legal community, as one can see by the adoption of many of those rules by the Unidroit Principles.

There are seasons in which the need for a simplification of the legal system is deeply felt. Continental Europe lived through it in the 18th and 19th Centuries. Although the prevailing tendency is now towards fragmentation, one can expect that, at a certain point, the pendulum will swing back and that "anarchy" (to use one of Legrand's expressions) will no longer be sustainable or acceptable.

The task of jurists in our age does not appear to be that of laudatores semporis acti, nor should they simply sit on their launchers waiting fanatically for the statu quo to be uprooted by external events.

Reflecting seriously on the organisational model of legal rules is not the idle exercise of an isolated élite of intellectuals struck by a syndrome of omnipotence, but is an indispensable effort, offering rational solutions to a changing society and economy, promoting movement towards globalisation, and avoiding the waste a cultural legacy of legal methodology which has been accumulated over these last three centuries.

Seen from this standpoint, Legrand's critique is an inevitable — and, I dare say, indispensable — stage on the road towards an increased awareness of the difficulties which lie ahead. And it stimulates that dialogue between scholars, although Legrand does not seem to expect one, on the basis of which European legal culture has, step by step, evolved.

Teodosio 1996, 212.


The ‘European Civil Code’, European legal traditions and neo-positivism

VINCENTO ZENO-ZENCOVICH

Summary. 1. Professor Legrand’s arguments against a European civil code. 2. Bureaucratic harmonisation. 3. The defence of the plurality of legal systems. 4. Codification as a relic of the past. 5. The prospects.

Résumé: Cette contribution est une réponse à un article publié par M. Legrand en 1997 sous le titre "Contre un Code civil européen" (60 MLR 44). Il reprend les trois arguments qui sont aux yeux de M. Legrand autant d'objections à l'harmonisation du droit privé. La première question est celle de savoir s'il est possible et opportun pour l'harmonisation d'être abandonnée aux bureaucrates chargés de la législation européenne. M. Zeno-Zencovich admet que ces personnes manquent de connaissances et de compétences juridiques pour réaliser une tâche aussi complexe, mais il souligne que les initiatives se rapportant à la rédaction d'un Code civil ont été jusqu'ici l'oeuvre de savants juristes indépendants des institutions de l'Union Européenne. Et il suggère que l'un des raisons de prononcer un Code civil pourrait justement être de neutraliser la législation 'peu méthodique et théoriquement incohérente' que les bureaucrates de l'Union européenne mettent sur pied dans le domaine du droit civil.

Le deuxième argument est que une pluralité de système juridique devrait être préservée : les systèmes juridiques sont le produit de cultures juridiques. La transplante de certaines constructions juridiques d'un système à un autre échoue d'ailleurs souvent en raison d'incompatibilités culturelles. M. Zeno-Zencovich doute cependant que l'élaboration d'un Code civil européen menace vraiment cette diversité. Il souligne que l'existence de codes antérieurs n'a pas empêché les États d'innover et de recodifier. La rédaction d'un Code exigera de ses auteurs qu'ils travaillent étroitement ensemble et développent leur connaissance mutuelle des différents systèmes. Même si l'on tient compte des différences entre les systèmes de common law et de civil droit, elles ne doivent pas être exagérées. Les juristes de common law ont l'habitude de présenter le droit de manière structurée et logique - ce qui est la fonction d'un code.

Le troisième argument est que la codification est un vestige du passé, une expression d'autoritarisme qui n’a rien à voir avec l’époque moderne. La réponse à cela est que les codes passés témoignent sans doute d’un certain autoritarisme parce qu'ils reflètent l’esprit de leur temps, mais ce n'est pas forcément vrai d'un code moderne. M. Zeno-Zencovich note que M. Legrand cherche finalement à s'opposer à l’harmonisation du droit privé par tous moyens et que c’est là une faiblesse de sa position. Il faut au contraire rechercher les moyens de résoudre les problèmes posés par les relations juridiques transnationales. Les Restaurents

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ont à cet égard montré leur utilité aux États-Unis en permettant de modeler des concepts et l’expérience pourrait servir dans un contexte européen. La tâche des juristes modernes est en effet de réfléchir à un modèle d’organisation des règles juridiques afin de proposer des solutions rationnelles pour une économie et une société en mutation plutôt que de dilapider un patrimoine culturel de méthodologie juridique accumulé sur trois siècles.

Le Privacy Council était saisi des faits suivants : les armateurs d’un navire avaient affrété celui-ci. Le navire fut sous affrét à des expéditeurs pour le transport d’une cargaison d’indonerie de Chine. Les affréteurs ont obtenu un arrangement comportant une clause, dite clause Himalaya, dont l’objet était de conférer aux sous contractants le bénéfice de "toutes les exceptions, limitations, stipulations, conditions et facultés" profitant au transporteur. Il contenant également une clause attribuant compétence aux juridictions indonésiennes. Après le déchargement de la cargaison, les propriétaires de celle-ci ont diligenté une procédure à Hong Kong en soutenant que la cargaison avait été endommagée. Les armateurs du navire invoquaient la clause attributive de compétence dont ils étaient bénéficiaires.

Leur recours, formé devant le Privacy Council, est également rejeté. Celui-ci retraça le développement des clauses Himalaya comme un moyen d’atténuer ou de déroger à la strict doctrine de la loi contractuel pour l’admettre aux diverses situations qui peuvent se présenter dans le cadre d’un transport maritime de marchandises lorsque les protagonistes ont pu légitimement s’attendre à bénéficier de certaines dispositions du contrat de transport, même sans y être parties : principalement les débrouilleurs mais également parfois les armateurs invoquant les dispositions des contrats de transport, des collecteurs de droits et des agents de manutention, qui étaient couramment interprétées comme des contrats synallagmatiques (obtenus par l’intermédiaire du transporteur).

Il n’était pas évident qu’une clause attributive de compétence puisse être comprise parmi les clauses dont il est permis à un sous contrat de bénéficier. "Une telle clause doit être distinguée des exceptions et limitations dans la mesure où elle ne profite pas à une partie sans la conserver en propre accord réciproque et, de ce fait, une partie n’est mise d’accord avec les autres que par la clause attributif en cas de litige. C’est une clause qui crée des droits et des obligations réciproques". Au contraire, la stipulation profitant au transporteur, dont la clause Himalaya reconnaît le bénéfice aux sous contractants, doit être interprétée de la même manière que les exceptions et limitations. La clause Himalaya a eu effet pour but "d’empêcher que les propriétaires de la cargaison puissent se soustraire aux clausules d’exception opposables par le transporteur en agissant en responsabilité comme des personnes qui ont effectué des prestations pour le compte de celui-ci. Or faire bénéficier ces personnes de la clause attributive de compétence figurant dans le contrat de connaissances n’apporterait rien à la solution de ce problème". En outre, l’objet d’une clause attributive de compétence est habituellement de donner compétence à une juridiction dans le ressort de laquelle le transporteur exerce son activité. Ce ne peut donc être que fortuit si la juridiction est également au lieu qui convient à un sous contrat dans le cadre d’un procès. Autrement dit, et les termes de la clause Himalaya et son but montrent que l’on a pu vouloir y inclure la clause attributive de compétence.

Le commentaire qui suit confronte cette solution avec le raisonnement retenu en Belgique dans des situations semblables.


1. Professor Legrand’s arguments against a European civil code

Only the forthcoming decades will tell if Pierre Legrand’s præcise ‘Against a European Civil Code’1 will be something like a 20th century remake of the celebrated essay by F. von Savigny ‘Vom Beruf unserer Zeit für Gesetzgebung

1 60 MLR 44 (1997).
und Rechtswissenschaft, which blocked early 19th century attempts at codifying private law in Germany and forestalled for nearly seventy years the enactment of the BGB.

In summary, Legrand's view is that the preparation of a European civil code — supported by various acts of the European Parliament and by many respected and well-known legal scholars — is neither practically feasible nor culturally desirable.

According to Legrand, Europe is still clearly divided — from the point of view of its legal traditions — into Common Law and Civil Law systems. In the latter codification of private law is the result of history, intellectual approaches and the evolution of legal thought over previous centuries; this is still the primary approach of the continental lawyer, who reasons through principles which he subsequently applies to different individual cases.

Common lawyers have, on the other hand, strenuously resisted attempts at codification, and have questioned the need for general, abstract rules.

Legrand particularly insists on the differences of legal reasoning between the two systems, basing himself on a vast range of comparisons with sciences such as sociology, epistemology and group psychology — disciplines which are no longer unknown to legal scholars. These differences tend to frustrate attempts at transplanting structures (and a code is, after all, a structure) which are not accepted, because they are culturally incompatible, in another context.

From another perspective, the proposal of a 'European civil code' has many drawbacks: it is an expression of the fear which EU bureaucracies have of legal differences, a fear which leads them to try to suppress these differences through the unification or the 'uniformization' of national laws. The European plurality of legal systems ('plurijurality') is rather — according to Legrand — a value in itself which must be preserved.

It is not acceptable that one should impose on Common lawyers a Civil law mentality without evidence of an effective superiority of the continental systems over the inaural one. In order to realise the magnitude of the imposition which would be made on Common lawyers, one should imagine what the reactions of civil lawyers would be if the various Civil codes were suppressed and substituted by mere case-law.

Finally, the proposal of a European civil code is the expression of a backward-looking and authoritarian legacy which dates back to the times of Napoleon, and would be impracticable as the text to which the two systems would refer would be interpreted and applied in completely different and incompatible ways. What is necessary, rather, is to accept and understand the value of legal differences.

Such an approach is much more appropriate for comparative lawyers who live off of, and for, those differences.

2 Originally printed in Heidelberg 1814. For a contemporary translation in Italian see La vocazione del nostro secolo per la legislazione e la giurisprudenza, Verona 1857 (reprinted by Forni, Bologna 1968). The parallel with the Savigny-Thibaudeau controversy is laid out also by O. Lando, 'Why Codify the European Law of Contract', 5 ERPL (1997) 525.

Legrand's arguments — which I have summarised in a nutshell, but which are expressed in a much richer and more complex language, using a multidisciplinary approach — need to be analysed and discussed, not only for their intrinsic strengths (or weaknesses) but also because they are widely present in the current debate among European legal scholars, although they have never been formulated in such a strong and vehement style. One is also obliged to discuss them because it is not possible, in order to counter them, to resort to the most obvious objection of legal chauvinism, as one could easily have done if they had come from an English scholar: Legrand is French-Canadian and teaches in a Dutch University.

As happens with all provocative arguments, there are parts with which one can agree, others that, on the contrary, cause profound disagreement and others still that appear unconvincing.

2. Bureaucratic harmonisation

Legrand's doubts, expressed in a manner that could be even more forthright, as to the legal skills of the EU bureaucracy should be entirely supported.

It is worth remembering that EU legislation is the product of a group of bureaucrats (I use the term in a sociological and not a disparaging sense) and not of a group of politicians, as is the case when legislation is enacted by an elected body. This group justifies its existence and functions and ensures its power (also here the term is used in a sociological sense) by creating rules. However, with obvious exceptions, this group does not have at its disposal great legal skills. This is because of its background, its methods of recruitment, the cultural differences amongst its members, and the lack of a profound knowledge of the legal traditions of member states.

The result is that the functions that have been assigned to this group are implemented firstly in consideration (and it would be astonishing if it were any different) of its own requirements; the affirmation of its own regulatory power and the ensuring of the compliance of those to whom it is addressed.4

It is therefore perfectly justifiable to be severely critical of the EU legislation, both as regards its content and the mentality it expresses.

However, from this point of view, Legrand appears to miss the mark. The projects for a European civil code are not promoted and prepared by the EU bureaucracy, but by legal scholars who are independent from its structures and


who are operating on the basis of their own assessments and experience. There has been support for some initiatives by the European Parliament and the Commission (albeit in a very lukewarm way), but, as far as anyone knows, it has never been expressed by means of well-known EU law-making procedures, that is, by means of active intervention in the phases of preparation and drafting: committees, green papers, calls for comments, and bids among the many European research centres and so on.

On the contrary, it may reasonably be argued that the idea of a European civil code is one reply to growing dissatisfaction at the piecemeal and theoretically-inconsistent nature of the ordinary legislation promoted by the EU bureaucracies.

The argument becomes less hypothetical when one considers the most important contribution towards codification of European private law, the 'Principles of European Contract Law', prepared with the encouragement of the EU (but not really much more than that) by scholars completely outside its bureaucracy.

And without anticipating judgement on the merits of such work, the 'Principles' raise a question that Legrand's wide-ranging article does not seem to consider: if one does not wish to limit oneself to questions of principle or take refuge in Utopia, which solutions can one offer to the low quality of EU legislation and the negative effects thereof?

It is necessary therefore to acknowledge that the push towards 'harmonisation' is growing all the time, and that it involves not only a vast part of administrative and public law, but also a considerable and expanding amount of private law, which up to two decades ago was the monopoly of national law: consumer law, company law and, perhaps, contract and tort law, and, incidentally, even property law (through the Directive on time-sharing) and family law (through the December 4, 1997 Resolution on 'fictional marriages' or the recent May 28, 1998 convention on mutual recognition of judicial decisions in marriage cases).

With this in the back of one's mind, one should ask oneself:

(a) Should one favour the process of harmonisation of different parts of the European legal systems?
(b) Is it possible to exclude from the field of EU intervention some areas of the law which reflect a very strong cultural identity?
(c) Who decides – and how is the decision made – which, if any, areas should be excluded?

Only a firmly negative reply to the first question can resolve at its roots the problem which Legrand is posing. It would therefore be necessary, from a practical point of view, to encourage and stir up the British desire for isolation, and severely or noticeably dampen relations with continental Europe.

But if one accepts the idea of a European Community (now a Union) and the transfer to its bodies of legislative powers, the only practicable reply is to correct and up-grade the law-making process and its results; the creation of a sort of Chinese wall to protect the Common law's diversity does not appear to be realistic.

This conclusion, obviously, leaves ample space for the debate on which measures should be adopted and on whether the idea of a European civil code might be part of such measures.

3. The defence of the plurality of legal systems

Another argument of Legrand which deserves full approval – both at the level of principles and at that of methodology – is the need for the different European legal cultures to be protected, for they are an asset and not an obstacle.

A legal system is one expression of the culture and the history of a country and any attempt to reduce differences by the mere generation of legislative rules is a harmful and unproductive positivist simplification.

For the last thousand years, Europe has been the meeting point between the millenarian culture of the Mediterranean and that, more recent, of the populations of Northern Europe. The two cultures have, deep down, a different conception of community and of the relationship between individual and authority. But these differences have provided each culture with an invaluable model and have acted as a stimulus and provided a means of comparison. A recognition of the value of the plurality of legal systems is the obvious consequence of legal realism: one must look at the law in action and not at the law in the books; one should also remember that the 'actors' are not legal formulae but real people, who are not only judges and lawyers, but common people in the business world with families and social relationships.

But is the plurality of legal systems endangered by the project of a European civil code? The question should be answered in the first place in terms of the various continental systems in which the differences, although not excessive, are the expression and distinctive feature of the cultural identity of each country. The history of these last two centuries seems to offer arguments in favour of the present attempts to codify European private law: the numerous decades of
stagnation due to the dominance of the ‘École de l’exégèse’ have not suppressed the differences. The German GBO, which seemed to have given the final word on the subject of codification, was soon followed by the contrasting openness of the Swiss Civil code. In other words codification, as a process, has not been fossilised, and has constantly evolved through the comparison of the rival models; one should bear in mind the methodological and systematic problems raised by the new Dutch Civil code and by the re-codification of private law in Eastern European countries.

To discuss a European civil code, without considering the reasons that will be put forward in the paragraphs which follow, is therefore useful in itself, even if it does not result in a change in legislation. Work on the project of a European civil code brings out, in an extremely vivid and practical way, national variations and converging trends, and enhances mutual knowledge of the different systems.

The picture alters when one looks at those Common law systems which refuse the idea of codification, not because of chauvinistic reasons, but because of a profoundly different legal logic: inductive rather than deductive. This entails an idiosyncratic attitude towards general rules and systems; the adoption of a European Civil code would impose on the Common lawyer not only different rules but also a different mentality and a different law-making process.

Although this last statement expresses a historic reality, one cannot avoid the impression that such a confrontation between codified and non-codified legal systems is simplistic. Undoubtedly the Common law culture rejects the idea of a Code as this is defined in civil law countries. But can one say the same of the formulation of general rules which are organised logically in a system? In this case, I feel the answer must be much more nuanced and should take account of various factors which have noticeably reduced differences over the last decades.

First of all, one should consider the vast number of handbooks which law students study and use to prepare for their examinations and which are commonly used by practitioners that are organised according to logical schemes typical of continental experiences, starting from general principles to their corollaries, and from rules to their exceptions. It is obvious that the text is less binding, as it cannot avail itself of the support of doctrinal scholarship and because of the amount and weight of case-law covers a smaller and less precise area. However, the stratification and accumulation of case-law brings about results that do not differ substantially from those that one can see in continental handbooks. It is obvious that this mere similarity does not justify the equation between continental and Common law systems, nor a comparison between the present state in England and that existing in France in the 18th century, before the Code Civil, for Domar’s and Pothier’s works were deeply founded on Roman law and Cartesian rationalism. One should, however, bear in mind that, nowadays, the English lawyer, from the start, is introduced to a system which is taught to him by the application of a systematic logic.

If one leaves it at that, the argument would apply only to the important field of legal education. One should, however, add that handbooks are not just used by law students, but are the daily tool of lawyers and judges. If one takes a rapid glance at recent English case-law (or at the briefs of the litigating parties), one notices that handbooks are used in a two-fold way: to synthesise a rule which is consolidated and to support a certain choice ex autoritate, citing the name of the author of the handbook. And from this point of view an English judge has an advantage over many of his continental colleagues (such as those from Italy) who, for many centuries, have been forbidden in their decisions to quote from legal writers and works.

Therefore, the English judge does ‘things with rules’ and these rules are not only valid in the particular case he is deciding.

Finally, one cannot ignore the fact that English lawyers have adapted themselves, quite comfortably, to systematic texts formulated in an extremely general and broad way. An example outside the private law field is to be found in the European Charter of Human Rights of 1950, which in England, more than in many continental countries, has an extremely important practical impact, which is enhanced (or caused?) by the absence of a written Constitution.

One may conclude that the discussion cannot be based on the presumption of a sort of incompatibility between the Civil law and the Common law. Rather, it is evident that the situation varies throughout the different, traditional branches of private law. But at the heart of private law, that is the law of contract, a gradual inter-penetration of the concepts of both systems has already taken place without major problems of one system rejecting the transplant from another.
4. Codification as a relic of the past.

Legrand’s critique extends to the merits of the proposal of a European civil code: codification is a 19th century procedural expression of the myth of the omnipotence of legislators, the pillar of legal positivism. It is inadequate and harmful. There is no reason to insist on following this path and extending an idea belonging to another era to the rest of Europe on the brink of the 21st century.

Here Legrand’s argument appears to express ideological prejudices that cover and overwhelm the general thesis that he is presenting.

Let us begin by using Legrand’s own yardstick: if it is true – and Legrand offers a vast amount of interdisciplinary evidence to support his point – that legal institutions and the formal and conceptual structures through which they are expressed are the result of the general culture of a country at a given historical moment, to launch an attack on the process of codification of private law as it developed throughout the 18th and 19th centuries is anachronistic and contradicts Legrand’s own arguments. In other words, it does not seem correct to apply modern political and sociological categories to the work of Portalis, Tranchet, Bigot de Préamena and Maleville.

Codes are not in themselves ‘authoritarian’ (nor ‘liberal’ nor ‘democratic’); if they are written in an authoritarian age, such as that of Napoleon or Bismarck, they have an authoritarian spirit and become tools of an homogeneous policy. Proof of the contrary is provided, once again, by the Swiss Civil code and its cornerstone Article 1, which encourages the judge to fill in the inevitable gaps in the Code by reference to general principles and legal writings.

A code is, first of all a logical structure, and as such it has been one of the most lasting ideas of Lehmitz’s philosophy. It was – and still is – meant to give order and certainty to legal rules, the requirements of which are felt deeply by all jurists, whether from Civil law or Common law background.

To criticise the Code in itself does not therefore appear to be very useful, unless one is convinced from the outset that codes can only give authoritarian and/or formalistic results. Legrand, however, appears to share this pessimistic view, supporting it in particular with several citations from Pierre Bodois. But the objection may be made that the ‘homologation effect’ that the famed sociologist – not by chance a Frenchman – considers to be one of the ill effects of the Code Napoléon can easily be found in England, when the closed circuit of barristers and judges that for centuries has governed the evolution of the Common law is analysed.16

The instinct of homologation will always find structures on which to found and reproduce itself, just as the instinct of non-conformity will be able to use them in the opposite way. One has only to compare, in the Common law world, the openness of American legal culture with the long decades of conservative attitudes of its English equivalent.

What needs to be discussed more adequately is the role played by the different sources of law, the role that has to be played by statute law, and the procedures and techniques used in developing a Code.

Only if one considers the Code as the role or main source of law would one return to the age of the ‘Ecole de l’Étage’. But are we – is European legal culture – still at that stage? I do not think so. Constitutions, case-law, general principles, usages, lex mercatoria have, for a long time, led to the eclipse of the idea of the Civil Code as a sort of totem. And one should add to this the fundamental (especially in the Civil law–Common law dialogue) procedural aspect by means of which the institutes of substantive law become effective or remain ineffective.

And if we look beyond the Channel, it would be folkloristic to ignore the increasing number of sources of law and imagine that the Common law is made up of a few dozen elderly gentlemen with wigs and robes like a painting by William Hogarth.

It would therefore seem that Legrand’s critique again fails to hit the mark, which surely cannot be independent research on the converging trends between Civil law and Common law by a broad community of scholars.

If there is an ‘authoritarian’ trend, one can find it rather in the ever-increasing administrative control over private business, most of which takes place before legal relations with others have been undertaken, and therefore at a stage not regulated by a Code.

This would lead us into a discussion of the contrast between liberal economic policies and dirigiste economic policies; but this is a very different subject, and one can easily refer to Gilmore’s The Death of Contract20 and Atiyah’s The Rise and Fall of Freedom of Contract20 – quite far removed from the debate for or against codification.

In summary, Legrand’s objections to the ‘backwardness’ of the idea of a European civil code are directed, on one hand, against a conception which is part of our past (and to criticise history is not very productive). On the other, these objections are a common legacy of more aware legal scholars23 who have used them as a stepping stone towards new structures for the systematisation of private law in the various initiatives in which they are involved.24

One should however, avoid a *quid pro quo*: it is not quite clear from Legrand's lengthy article if his opposition is to the idea of a European civil code (seen as a legislative act of the EU which would be imposed on the legal systems of the member States) or to the various attempts to prepare a common text which would — without legislative enactment — seep into legal systems on the basis of its quality and uniformity. It would seem that he opposes both, which is not without consequences that will be illustrated in the following paragraph.

5. The prospects.

What has been up to this point stated reflects a natural difference of opinions, each of which will be either more or less persuasive, depending on the reader. There is one point, however, where Legrand's argument appears to be objectively weak, and that is in its conclusions or, rather, in the failure to draw any.

Let us, for a moment, accept Legrand's thesis on the impossibility of conciliating the differences between continental and English jurists: is this a final conclusion that will never change and that we should not wish ever to change? Or is there somehow a task for the jurists of our time?

If we were to accept that conclusion, comparative lawyers might as well pack their bags and devote themselves to less fruitful areas of transnational speculation. But the facts do not appear to point in that direction: if we look at the heart of private law, i.e. the law of contract, the field in which most of the attempts at European codification are concentrated, the differences are on the one hand much less significant than are often stated and, on the other hand, transversal in the sense that they do not follow a clear cut Civil Law—Common law divide and can be found between one Civil law system and another, some adopting a solution analogous to that of English law.

The difference therefore is not so much in the rules, which in no country are, or have been, unchangeable, but rather in the sources of the rules or, to put it in an even more legal-realistic way, in what the legal community perceives as sources of law, how these rules are expressed, interpreted and taught.

And whilst on the continent, the albeit fallacious, idea that a new law is sufficient to change the rules is deeply embedded, in English Common law change is much more difficult; this is because one cannot force two parties to litigate simply because there is need for a landmark decision to overturn a precedent, just as one cannot force a judge to write his decision, as a Farnavas of European scholars would like him to.

But, at this point, discussion has moved onto procedural aspects, where it is natural that different opinions tend to find practical solutions that can achieve a common goal.

It is therefore not astonishing that the most significant experiences of dialogue between Civil law and Common law systems, the UNIDROIT Principles and the Principles of European Contract Law, have adopted a procedure, the Restatements, created by Common law (albeit American), moulding concepts and rules of different origin.

One might, in relation to such a framework, object that a Restatement is something quite different from a Code, which is perfectly true (but, as I have noted Legrand seems to place them on the same footing), and is the reason why continental legal scholars, who are well aware of the methodological difficulties in bringing together two different cultures, have voluntarily chosen a structure that has been experimented with over many years in integrating different 'national' systems (those of the States of the USA), each jealous of their autonomy and power of control over the sources of legal rules.

But, on the other hand, one must stress that a Restatement is not different from a code in its fundamentals, which are the systematic organisation of rules that are logically coherent and, as far as possible, self-sufficient. One must add, from a


29 R. SACCO, "Il sistema del diritto privato europeo: Le premesse per un codice europeo", in L. MOCCHI (ed.), Il diritto privato europeo: problemi e prospettive, Giuffrè, Milano 1993, insists on the unification of the conceptual categories for it is there the contracts exist.

30 The method can well be extended to other areas of the world: M. J. BONELL - S. SCHIFANI (eds) 'Principi per i contratti commerciali internazionali' e il sistema giuridico itainoamericano, Codum, Padova, 1996.

31 BRIDON, 'Per un 'Restatement' europeo in materia di contratti', in L. MOCCHI (ed.), Il diritto privato europeo: problemi e prospettive, Giuffrè, Milano 1993, 13%, points out how the 'Restatement' method relies on general principles which are to be implemented by the judiciary. On the general principles of European Private Law see G. ALPA (ed.), CORSO DI DIREITCVI COMPARATI, Giappichelli,
substantive point of view, that a Restatement is no less rigorous in its content than a code. An example can easily be found in comparing the European Principles on the avoidance of contracts with Articles 1453-1469 of the Italian Civil Code of 1942 and discovering that the rules – except those on the renegotiation of the contract – are practically the same. And as it is rather unlikely that eminent scholars throughout Europe have been subdued by the persuasiveness of Italian legal writers; the reason for the striking similarity must be put down to the fact that the relevant provisions of the Italian Civil Code took as their model the Franco-Italian Draft Code of Obligations of 1928, which revisited the Code Napoléon by using the BGB.\textsuperscript{32} We are therefore talking of an evolution that has been in progress for the last hundred years and which involves not only continental scholars but the whole legal community, as one can see by the adoption of many of those rules by the Unidroit Principles.

There are seasons in which the need for a simplification of the legal system is deeply felt. Continental Europe lived through it in the 18th and 19th Centuries. Although the prevailing tendency is now towards fragmentation, one can expect that, at a certain point, the pendulum will swing back and that ‘anarchy’ (to use one of Legrand’s expressions) will no longer be sustainable or acceptable.\textsuperscript{33}

The task of jurists in our age does not appear to be that of laudatores temporis acti, nor should they simply sit on their haunches waiting fatalistically for the status quo to be uprooted by external events.

Reflecting seriously on the organisational model of legal rules is not the idle exercise of an isolated élite of intellectuals struck by a syndrome of omnipotence, but is an indispensable effort, offering rational solutions to a changing society and economy, promoting movement towards globalisation, and avoiding the waste a cultural legacy of legal methodology which has been accumulated over these last three centuries.

Seen from this standpoint, Legrand’s critique is an inevitable – and, I dare say, indispensable – stage on the road towards an increased awareness of the difficulties which lie ahead. And it stimulates that dialogue between scholars, although Legrand does not seem to expect one, on the basis of which European legal culture has, step by step, evolved.\textsuperscript{34}

\textsuperscript{32} The text of the Franco-Italian Draft Code can be found in M. ROTONDI (ed.), Progetto franco-italiano di Codice delle obbligazioni, Codam, Padova 1980.


\textsuperscript{34} For an historical approach of the common law – civil law dialogue see the numerous essays in M. REIMANN (ed.), The reception of Continental Ideas in the Common Law World 1820-1920, Duncker & Humblot, Berlin, 1993.