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Why Continental Jurists Should Consult Their Transatlantic Colleagues

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Why continental jurists should consult their transatlantic colleagues

The idea of codification has proved to be amazingly resilient. In its modern form, it was originally the child of the 18th century marriage between the law of reason and enlightened absolutism. It was adopted and refined by 19th century conceptual jurisprudence, liberalism, and republicanism. It survived even the 20th century with its mass democracy and totalitarian regimes, social and regulatory state, and consumer society. Thus, there is every reason to believe that it will be with us in the 21st century as well. This is particularly true in continental Europe. In most countries there, the traditional civil codes have remained in force, often for 100 years or more. In other lands, notably in eastern Europe after the fall of communism, they are being revived. In yet others, such as the Netherlands, they are being replaced by completely new texts.

Recently, the idea of codification has taken on a new dimension — that of a European civil code. Twice in the last decade, the European parliament has urged the European Union member states to undertake the codification of private law on a European level. In response, scholars have held conferences, launched preparatory research projects, and hotly debated the necessity, feasibility, prudence, and timeliness of such a project.

It is not my point here to take sides in this learned and often emotional debate. My agenda is much more modest. I want to urge my European fellow jurists working toward a common civil code to consult and cooperate with scholars from other parts of the world, notably from North America.

Such a suggestion may seem completely wrongheaded to many Europeans and probably even to many Americans. What can continental jurists possibly learn about codification, they will ask, from lawyers across the Atlantic? After all, codification is an eminently continental European tradition. In fact, it is one of the very hallmarks of the civil law, not of the common law. Technically, the civilians have all the expertise in the world, and

politically, the desirability of a common code is Europe's own business. It would seem that North American codifiers might seek European advice, but not vice versa.

Much of this is true, but I remain convinced that the continental jurists will need all the help they can get, even from their transatlantic colleagues. In planning and drafting a common civil code, continental jurists will run into a panoply of difficulties. With regard to many obstacles, such as a linguistic situation of Babylonic dimensions, national pride in indigenous codes, and clashing cultural predilections, North American lawyers will indeed have little to offer. Yet, with regard to at least two other problems, they will have something to contribute.

E Pluribus Unum

The first problematic issue is that codifying European private law requires forging a general set of concepts and rules from a considerable variety of individual subsets. Even if one believes that European private law is ultimately all rooted in the same tradition (for example, that of the *ius commune*) and thus cut from the same cloth, codification is a daunting challenge.

It is also a challenge regarding which American lawyers currently have greater expertise than the Europeans. Most European nation states succeeded in unifying their private law in the 19th century and could therefore rest on their laurels in the 20th century, at least until very recently. As a result, the present generation of European jurists views unification of law in a federal system as a new challenge. In contrast, their American colleagues have never completely unified their private law, but have continued to face its diversity to the present day. But particularly in our century, Americans have also made great efforts to reach greater uniformity. Thus, for American lawyers, unification of private law has been an ongoing process during which they have gathered vast amounts of experience.

Over the last 100 years, the National Conference of Commissioners on Uniform State Laws has performed exactly the task described above: Condensing the various state laws into a uniform set of concepts and rules to be applied in all member states. In some instances, notably the Uniform Commercial Code (U.C.C.), these efforts have been splendidly successful; in others, success has been more limited or entirely wanting. Overall, unification of private law through uniform (model) legislation, often covering entire areas and thus approaching codification, has become a firmly established tradition and a routinely performed practice in 20th century American legal culture.

For about three-quarters of a century, the American Law Institute (ALI) has been creating *Restatements of Law.* Again, the task is similar to what would be required in Europe (creating a uniform text of law). Like the Uniform Laws, some of these *Restatements* have been highly effective in promoting national uniformity, others have been widely followed only as to individual sections, and still others have had relatively little influence. Be that as it may, the fact that a third generation of *Restatements* is currently underway proves that the work of the ALI also has become an integral part of the American legal system.

To be sure, there are significant, and obvious, differences between these American unification efforts and a European civil code. The uniform laws, including the U.C.C., are not true codes in the European sense because they do not aspire to create a comprehensive logical order. The restatements are not legislation to begin with, and thus bind nobody, except by persuasion. Neither uniform laws nor restatements are designed as closed systems, the gaps of which can be filled by extrapolation from the overall framework. Nor are they considered the unquestioned centerpieces of the private law universe. Thus, simply copying such endeavors for Europe is out of the question. Nonetheless, European jurists could learn a lot from these American projects, with regard to both their successes and their failures.

To begin with, they can study how to organize and manage an institution performing such tasks, how to process information, how to run the drafting process, how to deal with lobbies, and how to persuade legislators to endorse the final product. It is true that the Europeans have some of their own models, such as the Hague Conference on Private International Law, UNIDROIT, and, more recently, the Lando Commission. While these models will be useful when the time comes to draft a European civil code, the American institutions offer great opportunities for additional guidance. This is particularly true because they are superior to the European models in size, complexity, output, and practical success, perhaps with the exception of the Hague Conference.

Perhaps even more importantly, the Europeans can learn much about the advantages and disadvantages of different roads to legal uniformity. Observing the American experience, they can compare the proffering of mere model laws (the adoption of which is then left to the member states) or non-binding restatements with the imposition of uniform (federal or European) law in statutory form by a central government. They can also see that despite a common text, legal developments in the individual jurisdictions will tend to diverge so that an institutional watchdog to curb these tendencies is indispensable. They can observe the perpetual need for revision and updating and thus come to realize that the maintenance of a uniform code is a constant, never-ending process. They

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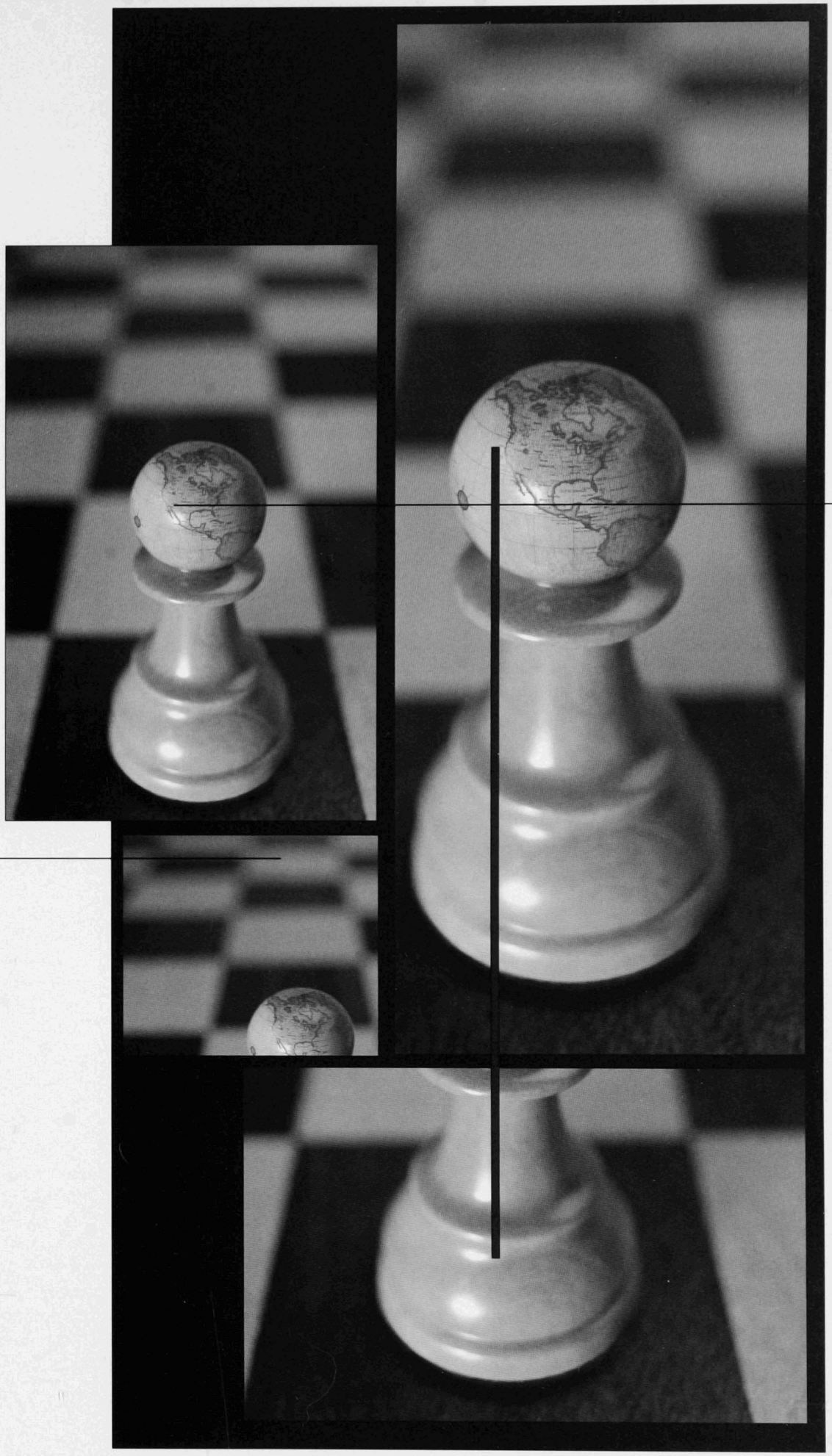

can also learn something about how much private-law uniformity one really needs in a common market, and they can get a sense of how much one can hope to achieve despite the centrifugal forces inherent in any federation. Last, but not least, they can gauge the merits of gradual development and careful experimentation, which are the strengths of American federalism, and weigh them against the resulting inconsistency and incoherence that are its weaknesses.

Codification in Mixed Legal Systems

The second difficulty arises because a truly European civil code would have to include the common law. Of course, the continental jurists could simply limit their endeavor to their own civil law systems, but that would deliver a devastating blow to European legal integration. Leaving out the common law is thus not a viable option. Yet, if forging one system of rules out of more than a dozen continental subsystems is challenging, including the law of England and Ireland is an even more formidable task. It is a banality that the differences among the civilian jurisdictions are less significant than the differences between these civilian systems and the common law. In the world of law, the [English] Channel is still a divide that is not easily overcome.

This is particularly true in several respects pertaining to codification. First, there are important divergences between continental civil law and (English, Irish, and, to some extent, Scottish) common law in the fabric of private law itself. Even if one were to accept that the substantive discrepancies between the civil and the common law have been overrated and that the systems have been converging, there remain indisputable disparities regarding the respective conceptual tools and general structures. The civilian systems share much of the logical framework developed by continental scholars since the late Middle Ages and can easily use it as a foundation when codifying private law. The common law system lawyers have never fully committed themselves to any comprehensive and systematic order — Hale, Blackstone, and the analytical jurists notwithstanding. A second difficulty lies in the divergent conceptions of legal rules. Civilians conceive of rules broadly and are comfortable with a high level of abstraction, which facilitates codification. Common lawyers construe them narrowly and always with a view to the concrete facts that generated them in the first place — an approach almost antithetical to the succinct and general rules of which the traditional civil codes have consisted. Finally, civil lawyers have practiced and cherished codification for centuries; they can thus embrace it on an all-European level as well. Common lawyers, especially in England, have traditionally been skeptical, if not outright hostile, to the whole idea; it is hard to believe that they will suddenly embrace it simply because it now concerns not only their own law, but also that of Europe in general. Significantly, the common lawyers have by and large not participated in the current debate about a European civil code.

With regard to all these differences and the concomitant difficulties, it seems that jurists from the other side of the Atlantic are not exactly a promising source of help. Private law in the United States is even more confused and chaotic than its English counterpart. American lawyers construe rules just as narrowly and consider them just as fact-dependent as do their English colleagues. It is true that jurists in the United States are less hostile to codes, but even they have tended to shy away from, or, as in the case of California, to disregard comprehensive private-law codification in the European style. They have mostly preferred a piecemeal approach, leaving huge gaps. For these reasons, the vast majority of Americans could indeed offer little help to European codifiers in dealing with the frictions between the civilian and the common-law approaches.

Yet there is a small group of North American lawyers who could be extremely useful in exactly this regard. They are the civilian jurists from the mixed jurisdictions, i.e., from Louisiana and Quebec. Just like the advocates and the future draftsmen of a European code, they are civilians by training and at heart who, nonetheless, keep a constant eye on the common law. Operating in civilian enclaves surrounded by a common-law world, they are by necessity experts in working on the fault lines between the two great traditions. They also have a quality that lawyers from most other so-called mixed jurisdictions, such as Scotland, South Africa, and Israel, lack, but that is vital in the present context — they have ample experience with civil codes. Both Louisiana and Quebec have long and proud traditions of codification. These traditions are alive and well. Recently, Louisiana thoroughly revised its civil code, while Quebec enacted a completely new one. Through their traditions, both jurisdictions have produced a group of experts who do essentially what the Europeans are now planning to do: Codifying private law in a mixed jurisdiction in which the civil law predominates. The common law must receive its due, and the rules must be compatible with both traditions.

Illustrations of how civilians in these mixed systems have worked toward the goal of bringing civil and common law together are not hard to find; Louisiana can provide some examples. Codifiers in the Bayou State have always worked comparatively. Leading representatives are Athanassios Yiannopoulos, mainly in property law, Saul Litvinoff in obligations, and, more recently, Symeon Symeonides in conflict of law. In drafting and revising rules, they and others have constantly considered concepts, rules,

and approaches from various civil- and common-law jurisdictions. The Louisiana Law Institute, home of much of their work, has become a veritable powerhouse of comparative legislative drafting.

As a result of these comparative efforts, Louisiana's civil law today shows many signs of imports from common-law jurisdictions. Some of these imports have affected the law of obligations. There we find the common-law concept of detrimental reliance, common-law notions on the determination of price and the transfer of risk in sales law that accords with other states, and, outside the code, common-law ideas about the conditional sale of movables. Other Anglo-American ideas have influenced the law of property. The new concept of "Building Restrictions" is curiously reminiscent of covenants running with the land at common law; the "transfer of rights to a thing" incorporates the Anglo-American quitclaim deed in thin disguise, and, again outside the civil code, the trust — one of the very hallmarks of the common law — was incorporated into Louisiana law. Particularly with regard to trusts, the common-law import was modified and adjusted to fit into the surrounding civil-law environment.

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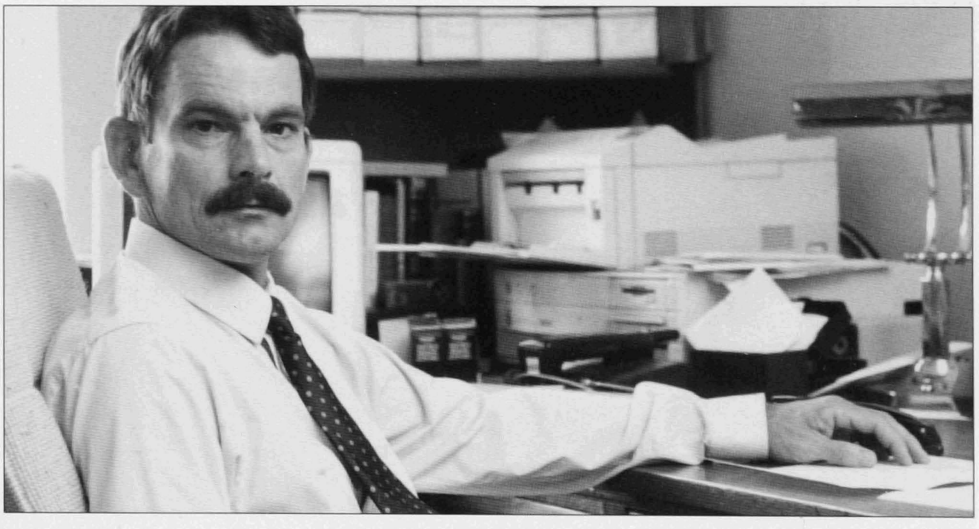
Looking Beyond European Shores

If the European jurists are well advised to draw on the experience of their transatlantic colleagues with codification in federal systems and mixed jurisdictions, how can they do so? Most importantly, the continental civilians should stop talking just among themselves. Europeans like to chastise American lawyers for their parochialism, and often for good reason. In the debate about a common civil code, however, the Europeans have been the parochial ones. It is time they look beyond their shores and consult outsiders as well.

Currently, at the discussion stage, they should actively seek the views and advice of lawyers from the United States, especially from Louisiana, and also from Quebec. They should invite them to their conferences and workshops and ask them how they have handled the difficulties of codification. How did they know whether the time was right to undertake a codification project? How did they prepare for it, and on what sources did they primarily draw? To what extent was the work of legal experts affected by political considerations and alliances? Where did their efforts succeed, and where did they fail? What were the reasons for their successes and failures? If the Europeans proceed to the drafting stage, they should appoint leading members of the National Conference of Commissions on Uniform Laws and of the American Law Institute, and particularly codifiers from Louisiana and Quebec, as members of the respective committees in an advisory function. It is likely that those asked would be glad to serve.

Involving especially the jurists from Louisiana and Quebec means enlisting lawyers with first-rate expertise in comparative law in action. These scholars have gone beyond just thinking about codifying rules in mixed jurisdictions — they have actually done it. Their products are enacted in the legislatures and are being enforced in the courts. An added bonus is that in several cases, these scholars were born, raised, and educated in Europe. They are thoroughly familiar with its languages, traditions, cultural diversity, and with the European legal mind. What better outside help could European codifiers want?



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