



Review of Leone Niglia, "The Struggle for European Private Law: A Critique of Codification"

HEINZE, E; Marcou, A

For additional information about this publication click this link.

<http://qmro.qmul.ac.uk/xmlui/handle/123456789/11921>

Information about this research object was correct at the time of download; we occasionally make corrections to records, please therefore check the published record when citing. For more information contact scholarlycommunications@qmul.ac.uk

Review Essay, 10(1) *Journal of Comparative Law* (2016)

The Struggle for European Private Law: A Critique of Codification, Leone Niglia, Oxford: Hart Publishing, 2015 (196 + x pages), ISBN-13: 978-1849462600, ISBN-10: 1849462607, £48.00 (hardback)

By **Eric Heinze**, Professor Law, Queen Mary, University of London, and **Andreas Marcou**, PhD candidate, Queen Mary, University of London, © 2016 [Please do not cite, reproduce or circulate without permission]

By the nineteenth century, modern codification movements had marked an apogee in the emergence of the post-Enlightenment, “Napoleonic” State. If Europe had once been a heap of rival, parochial backwaters, codification would issue from a unified, centralized legislature. If law had once languished in the randomness of custom and tradition, codification promised the rigour of system and logic.

Strictly speaking, codification means taking a corpus of existing law in order merely to re-state it in some orderly fashion. But if the aim is to overcome inherited gaps and inconsistencies, then codification entails more. It requires selection of the *best* norms. What counts as “best” then depends on the legislators’ broader aims. Do they seek economic competitiveness? Or distributive justice? Or respect for fundamental rights? Or clarity and ease of implementation?

The gaps and inconsistencies which the legislators seek to remedy do not necessarily result from sheer oversight. They may reflect rival social interests. Construed as the end product of a legislative act, a code might seek to reconcile those opposed factions through processes of interest-group bargaining – “horse trading”. On that model, rival voices would all hash out their differences within the political arena, with experts and legislators then steadily progressing towards an optimal text. One problem, however, is that not all voices will be equally loud in that arena, nor equally welcome. Outright policy choices will be made, even heavy-handedly imposed.

Controversies around the European Commission's attempt to codify European Union (hereinafter: EU) private law now usher the codification saga into the twenty-first century. Much EU scholarship has focused on the adoption of the Draft Common Frame of Reference (hereinafter: DCFR) or its shortened version, the Optional Sales Law Code (CELS). In *The Struggle for European Private Law*, Leone Niglia launches a searching critique that revisits the very notion of codification's distinctly legislative paradigm. That model is, on his view, fundamentally flawed. The true function of a code goes missing. In order to grasp the full effects of codification, and to comprehend the purpose and function of some final text, we must, Niglia argues, shift our attention away from that legislative paradigm, towards what he identifies as a *jurisprudential* model. Codification becomes comprehensible, he suggests, only through an analysis – neglected in the existing literature – of jurisprudential actors within the process, such as judges and scholars.

Codes are hybrids, then, of both legislative and jurisprudential forces. They “have no inherent truth when divorced from the jurisprudential forces that surround them”. (p. 2) Modern codification is instead “nomothetic”. It certainly encompasses *thesis*, legislation as such. But it also presupposes *nomos*, the broader values and principles often integrated within the distinctly juridical framework of scholars and judges (p. 3). Any critique of codification must examine those jurisprudential forces which mobilize either to promote codification, which Niglia correlates to individualism, or to limit codification, which he correlates to “the social”. Continuing his previous theoretical work, Niglia probes beyond the confines of DCFR within EU law. He examines codification within its broader historical context, while including elements of private law, as well as legal, political and social theory.

Niglia begins, in Chapter One, by distancing his approach from the ideal of the “complete and self-standing” text, inherited from a history of private law codification. The DCFR, he fears, would represent a “first step towards implementing a grander codification design for the whole of Europe” (p.8). Such a code would claim to embody rules and principles common throughout Europe – the “argument from commonality”. In fact, it emerges more as a strategic assemblage of such materials, developed through various techniques (p. 10). The DCFR displays two techniques: the first is *systematisation*, whereby the code becomes structured through given notions and categories; the second is *coherence*, whereby the code emerges, ideally, free of gaps, ambiguities, or inconsistencies. A third technique, identifiable in other codification regimes, is *neutrality*, whereby none of the competing interests covered by the code are allowed to dominate. Tellingly, for Niglia, the Commission abandons that third element.

Niglia describes the Commission’s approach as “low intensity formalism”, achieved by the writing of model rules incorporating certain *acquis* and adding selected principles to such model rules. For example, the incorporation of provisions governing “Unfair Terms” into the Code demonstrates how the amalgamation of *acquis* and model rules strays from any ideal of neutrality. The Commission in fact reformulates the model rules included in the Code to promote market liberalization, through deregulation and competitiveness.

That attempt is complemented by the introduction of carefully selected principles. Principles promoting the Commission agenda for market libertarianism such as efficiency and freedom are included, whereas rival principles of social responsibility and human rights are ignored. Insistence on such principles is reminiscent of EU austerity policies, which favor principles of market efficiency, such

as those included in the DCFR, over other social principles that might otherwise have been the focus of private law over the second half of the past century, that is, the period during which, according to Niglia, private law emphasized social principles.

Codes historically aim at universality, imposing discipline over a fragmented yet “living” law. Codification inevitably places a stamp, a clearer – but, some might say, ideologically-driven – direction on law, as opposed to just neutrally distilling it. The Commission likewise uses the language of universality. The Code is supposedly general and neutral, refraining from partisan interests, and placing the argument from commonality at the center of any discussion. Niglia condemns that self-fashioning as hypocrisy. The reader may certainly join Niglia in rejecting that free market shift outright, although the Commission’s defenders might view it more as “reflecting” law and less as “making” law than he suggests. Today’s global markets signal, after all, a world quite different from that in which EU norms and institutions were first born.

Niglia invites even readers acquiescent in the Commission’s liberalizing drift, however, to question the terms of EU codification processes. To what extent does codification solely reflect and synthesize the laws and policies of member States, and to what extent does it actively, ideologically, mould that law?

The Commission’s work, on Niglia’s view, risks shifting legal reasoning from the dual platform of parallel national and European levels to a purely code-orientated, monist approach, which would supersede non-code based interpretations and would prioritise textual approaches. The plural and fragmented nature of current jurisprudence ends up sacrificed at the altar of centralized private law. The DCFR then constitutes “a legislative attempt to chain nomos to thesis by conjuring up a code-text with an overarching ideological plan at its core” (p. 5).

Niglia suggests in Chapter 2 that European jurisprudence has strayed from the nineteenth century aspirations. This has culminated, in the latter half of the twentieth century, in a period of “jurisprudential de-codification” (p. 61). From the nineteenth century onwards, private law has pluralized, performing the overtly political role of accommodating conflicting social interests. In the same way, Niglia maintains, a unique European jurisprudence has developed, which the codification movement now jeopardizes.

Current European jurisprudence traces both to the EU Directive regime and to the re-creation of legal traditions domestically through the impact of the decisions of the Court of Justice of the European Union. Courts and scholars take an active role in balancing “individualist European values and social private law”. With the new century, courts have pursued a more active approach. They “actively engage in making new value choices by employing techniques of constitutional adjudication” (pp. 65-66). A European jurisprudence has arisen within private law based on the balancing and the facilitation of conflicts and of conflicting social interests.

Pragmatists will retort that there is always tension between the domestic and European systems, leaving limited space for a unified European jurisprudence. How much consistency we could ever really find across such divergent national systems remains debatable. Faced with economic competitors like the United States, Japan, China, India, and any number of emerging powers, the question once again arises as to whether we seek to repudiate codification altogether, or whether we simply seek greater candor about which values it promotes and which it neglects.

Having outlined the nature and function of the Code in Chapter One and the state of jurisprudence in Chapter Two, Niglia then examines how the two interact. European jurisprudence, he argues in Chapter Three, rejects the move for codification.

The Commission's desire to impose the Code stands as an assault on the current European reality. The Commission endeavors to "replace the heritage of material rights by a neo-classical, formal set of right channelling the strategy of market libertarianism" (p. 80). The Code would risk altering current jurisprudence to a jurisprudence which only allows for interpretations based on a Code-regime.

Niglia joins other scholars in warning against the substitution of national mandatory rules by the Code's supranational mandatory rules. Mandatory rules are unique features of domestic jurisdictions. Their replacement would lead to a "social dumping", the lowering of standards that had protected the weaker contracting parties. That damage would mirror "constitutional dumping". The imposition of individualistic rules and principles through the Code would taint the more balanced structures of domestic private law.

A similar impact would occur in the case of background "default" rules, which "the law provides as a benchmark that the parties may adhere to or dispose of as they wish, and which would liberate the courts from having to decide which obligations are reasonable and which are not as a whole and not selectively" (p. 95). Privately, contracting parties will bargain in the shadow of default rules, which merely serve to fill in gaps after the contract is concluded. Default rules apply to all contracts, but the parties maintain the prerogative to contract around them if they so wish.

Under the Code, it is the Code's *own* default rules which then prevail. To say it otherwise, as the Code would form the only point of reference, judges, "if ... minded to enforce reasonable obligations as provided for in domestic default rules" (at p. 95), would face the substantial interpretative hurdle of having to bypass the Code's *own* default rules. Codification would run contrary to the living jurisprudence and to the current methods of juridical reasoning. In this context,

current practices of constitutional balancing may find themselves eclipsed by black-letter or “grammatical” interpretation, comprising the Code’s limited “range of artificial, technocratic norms” (p. 105). As a result, the Code, which incorporates an artificial world of partisan values, would replace the plurality of values characteristic of contemporary private law.

On a more-or-less standard model, codification represents a struggle between rival forces. Niglia depicts these as the political institutions of the EU favoring the codification of private law *versus* a jurisprudential model, which seeks to protect and perpetuate the current “living law”. In Chapter 4, he points to a further struggle within the jurisprudential model. Niglia argues that jurisprudential forces may produce the legal material which fuels the codification project, but which remains in tension with forces that can subvert that project.

Jurisprudential forces are not in fact unified and harmoniously interacting. They are dynamic and can conflict. On one hand, strands of jurisprudence conceptualize private law through the models of systematization, coherence, and neutralism, positing codification as an “obvious final step” (p. 149). Other strands of jurisprudence have been developed through the pluralization and fragmentation of private law. They are committed to the synthesis of conflicts as affected through the Directives regime and the subsequent interaction of national and European law. In this context, an individualist vocabulary becomes balanced and merges with the social vocabulary emanating from private law as made nationally.

For Niglia, a decisionist movement alone on the part of political agents generates no adequate code, because the jurisprudential climate needs to accommodate the move. Several scholars revert to the aforementioned three techniques characteristic of the codification era. Systematization promotes an

interpretative climate favoring abstract individualistic rights over social rights (pp. 118-121). These scholars return to past forms of reasoning by proponents of the codification movement. In domestic jurisprudence the trend is to portray private law as “inherently a-political and a-constitutional” (p. 125) and therefore in strong need of systematization. Jurisprudence, Niglia warns, must examine Codes as constitutions promoting a substantive agenda. He urges scholars to look past the claims of the Commission about the Code’s neutrality and universality and to examine the economic and political agenda driving the codification project.

Niglia’s critique of codification of the private law swings to a pole opposite to the desire to codify based on the argument that private law is a-political and a-constitutional. The two poles are not, however, mutually exclusive, as Niglia recognizes (Preface). A code can recognize, respect, and even enforce the constitutionality of private law. The risk that a code would reduce private law to an array of technocratic norms, devoid of any social, political or constitutional effect, is real, though not inevitable. Even if we suspect a partisan position driving the Commission, it does not necessarily mean that the codification project would rob private law of its constitutional character. Bearing in mind that at stake is a supranational code, the question arises as to whether a code could be drafted to respect the plurality of legal systems through the solidification of parts of private law and the allowance for flexibility for other parts. Niglia acknowledges these tensions in Chapter Four (in particular at Part D).

Niglia rejects conventional rationalist interpretations of codification projects, which see codes as instruments employed to reinforce State sovereignty, or to boost a nationalist agenda. He treats the DCFR as a regulatory tool, concentrating on economic regulations via administrative processes. He presents the DCFR as an

attempt to entrench an economic constitution. In implementing an economic plan, the code becomes a law which can “channel, facilitate, steer and reinforce social practices regarding market relations” (p. 137). Still, the analogy between domestic jurisprudence and its effect on domestic codes and European jurisprudence and its effect on a pan-European code raises further questions. Jurisprudence in each member State is uniquely established, in comparison with any European jurisprudence. The impact of national jurisprudence is indeed affected by the jurisprudence of each State. But does European jurisprudence affect a European Code in the same way? Because European jurisprudence is not unified nor always consistent, it may exert less impact on a political decision to codify private law.

The critique of a European Code might certainly be damning if it were supported through historical or social evidence as to the failures of another supranational code of similar character. In the absence of such precedent, Niglia draws from national codes. But does historical experience from domestic codified texts bear the same resemblance to a pan-European code? Would a supranational code behave in an identical manner to national codes? Even though a European code could demonstrate some of the features of national codes and codes in general, it does not necessarily mean that it would operate in an identical manner.

National codes, rooted in an established and determined national jurisprudence, can, moreover, readily assimilate rules, principles, and procedures within the domestic legal system. European Codification seeks, by contrast, to collect rules from European and domestic law. There is no established or precise legal system from which to derive material (for the directives may, on crucial points, prove indeterminate). The analogy between domestic codes and the application of the results to a supranational code may not, then, extend as far as the literature on the project of

European private law codification suggests. Absent another supranational code to supply any comparison, however, Niglia's approach certainly draws our attention to core concerns and contradictions within the ongoing European project. In his Epilogue, Niglia concedes the limits of historical evidence drawn from national systems (p. 156). His discussion of national codes seems more relevant when the EU behaves like a single State, though possibly less so when the two are dissimilar. He nonetheless directs the reader's attention to the interpretation whereby the EU may be considered to resemble a large State entity, making the analogy to national regimes germane.

Niglia expresses cogent concern about the Commission attempts to establish a Code in the field of private law. These would have an impact on a codified text on European jurisprudence; and as such impact has been developing in the era of Directives, this is serious indeed. Codification would have a deep constitutional impact on the structures of private law and on the jurisprudence on the field. The strong critique of codification expressed in the book is certainly a consideration of vital importance. Niglia's critique emanates from a close examination of codification in a manner revealing its complexity and the various constitutional and legal issues that are involved. Engaging with several fields Niglia succeeds in offering a convincing argument for a shift in our outlook on codification projects at the European level. Codification projects are assuredly more complex than they may be perceived to be.

Niglia's proposal to turn to jurisprudential forces to examine the codification project is not merely enlightening but imperative. He raises awareness about the state of European private law and also achieves two aims. First, he sheds light on the role of the European Commission and its motives within the codification project. Second,

he emphasizes the power of jurisprudential forces to condone or condemn the Code. This force of this observation is stressed in Niglia's comment that the mere creation of the Code is insufficient, because the codified text needs to command authority. The role of jurisprudence is vital, as a code may command weak authority if dominant interpretations diminish the Code's value.

The problems Niglia identifies are not transient. They go to the heart of the EU project and of the European future. Niglia's critique throws down a gauntlet that conscientious scholars and policymakers will need to pick up, indeed for some time to come.