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Pierre Legrand

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Structuring European Community Law: How Tacit Knowledge Matters

By PIERRE LEGRAND*

[Legal traditions] carry . . . in their plurality the meaning of an arrangement which they entrust to a future of speech. A new kind of arrangement which will not be that of harmony, concordance, or conciliation, but which will accept disjunction or divergence as the infinite center from which, through speech, a relation must be created—an arrangement which does not compose but juxtaposes, that is, leaves *outside* one another the terms coming into relation, respecting and preserving this *exteriority* and this distance as the principle—always already undermined—of all meaning. Juxtaposition and interruption here assume an extraordinary force of justice.¹

For many comparativists of my generation, Rudolf Schlesinger's name is chiefly associated with the so-called "Cornell Project" on the common core of legal systems.² Though I remain unconvinced as to

* Professor of Comparative Legal Culture, Tilburg University, The Netherlands. I owe Linda Rae Legault for helping with the argument and its formulation.

1. MAURICE BLANCHOT, *L'ENTRETIEN INFINI* 453 (1969) (emphasis in original) (translation by author). The original French text reads:

elles portent cependant, dans leur pluralité, le sens d'un arrangement qu'elles confient à un avenir de parole. Un arrangement d'une sorte nouvelle, qui ne sera pas celui d'une harmonie, d'une concorde ou d'une conciliation, mais qui acceptera la disjonction ou la divergence comme le centre infini à partir duquel, par la parole, un rapport doit s'établir: un arrangement qui ne compose pas, mais juxtapose, c'est-à-dire laisse *en dehors* les uns des autres les termes qui viennent en relation, respectant et préservant cette *extériorité* et cette distance comme le principe—toujours déjà destitué—de toute signification. La juxtaposition et l'interruption se chargent ici d'une force de justice extraordinaire.

Blanchot had in mind René Char's lines. I paraphrase him.

2. PIERRE BONASSIES ET AL., *FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS* (Rudolf Schlesinger ed., 1968).

the merits of "common core" research for comparative legal studies, I was glad to accept my colleague Ugo Mattei's generous invitation to contribute a brief text to this Schlesinger Festschrift. No one could deny the impact of Schlesinger's work on comparative analysis of law, and no one should fail to bear in mind that Schlesinger lived and worked in a language and in a country that were not his own.

When I agreed to participate in this commemorative issue, Mattei suggested that I look at Schlesinger's last published paper, the written version of the speech he prepared to mark his acceptance of the honorary doctorate bestowed on him by the University of Trento. In this short article, Schlesinger took the opportunity to observe how "it has become fashionable among comparativists on both sides of the Atlantis [sic] to downplay the traditional differences between civil law and common law," and to remark on the fact that this approach is "dangerously apt to derail any serious comparative study."³ While these passages were clearly not meant to suggest a fundamental reconsideration of the virtues of "common core" research, I wish to read them as pointing to the need for comparativists to remind themselves, at all times, that law comes to fulfillment only in the development of its historical, social, cultural—human—significance.

Since the late 1940s, economic considerations relating to the globalization of world markets have led an ever larger group of Western European countries to unite in the quest for a supranational legal order which, in time, generated the European Community. The European Community's early decision to promote economic integration (and later, other types of integration) through harmonization or unification involved, both at Community and national levels, a process of relentless juridification in the guise of legislation and judicial decisions. This development was foreseeable; once the interaction among European legal systems acted as a catalyst for the creation of a supra-system, the need to achieve reciprocal compatibility between the infra-systems and the supra-system naturally fostered the advent of an extended network of inter-connections (such as regulations and directives). As it was realized that the economy could not be neatly detached from other spheres of social action, the question of further legal integration in the form of a "common

3. Rudolf Schlesinger, *The Past and Future of Comparative Law*, 43 AM. J. COMP. L. 477, 480 (1995).

law of Europe" assumed greater significance.⁴

Any proposal in favor of such a "common law of Europe" must wrestle with the presence of two discrete legal traditions in the European Community, that is, two epistemological clusters that have crystallized over the very long term.⁵ As the observer considers the development of law in Europe over the centuries, it appears that two conceptions of law emerged, one based on texts and the other, largely in reaction to the first, grounded in facts. These nomothetic and idiographic perspectives are still with us. Most of the European Community's legal systems claim allegiance to the former historical configuration—what anglophones are fond of labeling the "civil law" tradition. The later is identified as the "common law" tradition to which only two Member States adhere; both of these States joined the Community in the 1970s.

In brief, the notion of "legal tradition" is meant to embrace the idea of tacit knowledge as it defines a finite horizon of meanings and possibilities with respect to the theoretical and practical knowledge that can be acquired within a community. It refers to an idiosyncratic cosmology of beliefs and attitudes. This socially-generated and shared context of meaning renders action intelligible to those involved and delineates the boundaries of relevance and irrelevance within the community. It accounts for cognitive, intuitive and emotional approaches to law, legal knowledge, the role of law in society, the way law is or should be learned, the place assumed by legislation in the community, the function of the judge and so forth.

The civil law (or Romanist) tradition is by far the older of the two European legal traditions. It was, and continues to be, heavily influenced by a way of thinking about the law that developed in Rome largely from the third century onwards. Roman law found its most advanced expression in the massive compilation commissioned in the early part of the sixth century by the Byzantine emperor, Justinian. This multi-volume document was enacted in the early 530s and later came to be called the "*Corpus Juris Civilis*." The most intellectually sophisticated part of the *Corpus Juris Civilis* is known as the *Institutes* (or elements). Based on a second-century Roman model, the *Institutes* was expressly designed to facilitate the task of

4. See Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT'L & COMP. L.Q. 52 (1996).

5. See generally GEOFFREY SAMUEL, *THE FOUNDATIONS OF LEGAL REASONING* 155-288 (1994).

law students.

The *Institutes* ordered the law in what would be described today as "scientific" terms. For the *Institutes*, law consisted of a closed and exhaustive set of propositions or rules often in the form of pithy statements. These rules fell into categories (one has in mind, for instance, the well-known division between "private law" and "public law").⁶ These categories constituted a coherent and comprehensive system which could be taught and studied as a rational construct. In sum, possibly the most significant defining characteristic of the intellectual enterprise sponsored by Justinian was the creation of a "logical" world standing apart from the lifeworld itself. In other words, as the *Institutes* made clear, "the law" is not about concrete individuals embroiled in concrete disputes. Rather, the preoccupation lies with individuals as disembodied bearers of rights and events as typical or abstract contingencies.

For instance, when a dispute occurs between two persons with respect to the entitlement to use a certain thing, the task of the judge or jurist is to "frame" the argument in abstract terms so that it will "fit" within one of the recognized intellectual categories. Is this dispute a matter of "private law" or "public law"? Does it raise an issue of "civil law" or "commercial law"? Does it involve a question of "ownership" or "obligations"? Is the obligation at hand "contractual" or "delictual"? Does the problem concern "formation" or "performance" of contracts? Is the difficulty a function of "consent" or "capacity"? Is there evidence of "defective" consent? Does the "defect" arise from an "error"? Is this an "error as to the substance of the contract"?

At this stage it is likely that there will follow a learned discussion on the meaning of "error as to the substance of the contract." This presentation might well focus on an assessment of the notion of "substance" as interpreted by scholars having pondered the issue and expounded at length on it in the context of the entire systematic framework of the law. It is always the case that the internal consistency or unity of the whole body of law remains paramount for lawyers steeped in the Romanist mold. In this sense, the resolution of the dispute is seen emphatically to be a matter of *law*.

Given that the question for determination is how faithfully to give effect to texts that are considered to represent the will of the sovereign, the debate takes place at the level of the posited law. The

6. J. INST. I.1.4.

situation resolves itself as follows: what is the meaning of the text as it incorporates the will of the legislator, or more daringly, what meaning can the text be made to yield? In the course of addressing the problem, judge and jurist alike hardly concern themselves with the facts of the case. Indeed, once rendered the decision will stand for a proposition of law bearing on the meaning to be ascribed to the relevant legislative text. It is in this way that the judgement will be introduced in textbooks. The facts of the case will promptly vanish from the memory of the entire interpretive community. In any event, they never did more than offer a useful opportunity for the instantiation of the system's conceptual models or a salutary interpretive occasion allowing for the engagement of legal science.

Since the eleventh century, the Roman way of thinking about the law, especially as expressed in Justinian's *Institutes*, has meaningfully influenced all of continental Europe. To this day, it continues to account for the manner in which a Spanish, Swedish, Greek or French jurist understands the law.

The other intellectual formation relevant within the European context is known as the common law tradition because it draws its epistemological inspiration from the law that developed in the royal courts of twelfth- and thirteenth-century England. This "royal law" came to be known as the "common law" to mark the fact that it applied to the whole kingdom rather than varying from borough to borough or shire to shire as was the situation previously. Even in these early days, the common law showed that it was interested in facts instead of legal concepts or systemics. A judge or lawyer reckoned with whether the facts of the matter in dispute could be "matched" to the facts of a previous dispute. Adjudication proceeded on the basis of the ability or inability to match fact patterns. In other words, an argument would be successful if it established a significant connection between sets of facts. As lawyers and judges proved to be ever more imaginative in drawing these links, the common law progressively expanded. The following illustration is apposite.

A plaintiff might claim that upon his return from war, where he had been fighting for his king, he found Smith occupying his land. Smith would explain to the plaintiff that he bought the land in good faith from Jones whose whereabouts were unknown. Now, the plaintiff's lawyer would be aware of a judicial decision in which a judge decided in favor of a plaintiff in similar circumstances. The essential question would be: were the circumstances actually similar in the material sense of the term? If in the earlier case, the intruder whom

the plaintiff found on his farm was not a person who purchased the land in good faith but simply an individual who thought the land was abandoned and decided to settle upon it for his own benefit, would this difference in the facts be material? Was it relevant that in the earlier case the intruder colonized the land without more ado while, in the instant case, the intruder occupied the land after buying it from someone else? More accurately, should such a factual distinction make a difference in the judgement of the court? As the plaintiff would plead one way and the defendant another, it would fall to the judge to determine whether the factual connection was sufficiently compelling. As this example shows, the debate for common law lawyers takes place at the level of factual isomorphs.

The common law argues on the basis of factual analogies rather than in terms of concept meanings and locations within intellectual systems. The aim is to point to meaningful factual connections across a number of earlier judicial decisions in order to assert the existence of an implicit underlying principle. The scope of that principle can then legitimately be extended to cover the new situation. There are several important implications to this style of reasoning. For instance, the common law developed a very procedural or practical approach to adjudication. It also fostered a judicial convention that came to be known as the doctrine of precedent which (formally) governs adjudication. Additionally, it spawned a particular view for teaching and studying the law that reflects the pragmatism mentioned. To this day, the common law world still regards law more as a craft than as a science.

In fact, the common law is "fundamentally inhospitable" to the notion of legal science.⁷ It is not an exaggeration to state that in England a solicitor or barrister is regarded as being more akin to a plumber or carpenter than to a philosopher or humanist. English lawyers remain interested in the concrete dimensions of the life of the law and show little appetite for abstraction. An English judge recently observed that "rules should have no place when deciding questions of practical convenience."⁸ Another English judge wrote that "[a]ll . . . cases depend on their own facts and render generalisations . . . wholly out of place."⁹

7. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 66 (2d ed. 1985).

8. *R. v. Wicks*, 2 W.L.R. 876, 882 (H.L. 1997).

9. *Re T (a minor)*, 1 All E.R. 906, 917 (C.A. 1997).

As one becomes more familiar with the Romanist and common law traditions, it is crucial to recall that barely two generations or so after it emerged, the common law had its first opportunity to Romanize.¹⁰ In the early part of the thirteenth century, Roman law began earnestly to consolidate its hold over continental Europe. This was accomplished largely through the works of Italian jurists who were putting on paper their observations on the *Corpus Juris Civilis*. At the time, the *Corpus Juris Civilis* was the privileged object of study in the law faculties that were being established all over continental Europe (not unlike the way in which the works of Aristotle had become the most important focus of learning for philosophers).

Yet, in the face of this incipient Romanization of European legal cultures, the common law elected to assert its Englishness. By this time, the common law was unique in Europe; it had become a strong, centralized and national legal system characterized by the administrative reforms that took place at the end of the twelfth century. Resistance to the civil law tradition was expressed in several forms. In 1234, Henry III prohibited the teaching of Roman law in London.¹¹ At the Merton Parliament of 1236, the English barons, in what has been depicted as “an outburst of nationality and conservatism,”¹² opposed the clergy’s request to modify English marriage laws with the famous exclamation, “*nolumus leges Angliae mutare*” [“we do not want our English laws changed”]. In 1237, an English judge counseled an English lawyer against using legal materials from across the English Channel.¹³

It is important to observe that this resistance to the Romanist way of approaching law and legal knowledge continued over the centuries so much so that in England there never was a “reception” of Roman law as occurred in Germany, for instance. Incidentally, this is the reason why it is a mistake to suggest that there once was a “*jus commune*” over the whole of Europe. What *jus commune* existed was limited to continental Europe and never embraced mainstream English law. The unpopularity of Roman law is demonstrated by the

10. See R.C. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* 85-110 (2d ed. 1988).

11. See PAUL VINOGRADOFF, *ROMAN LAW IN MEDIEVAL EUROPE* 98 (F. de Zuleta ed., 2d ed. 1929).

12. See 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 189 (2d ed. 1968).

13. 3 Bracton’s Note Book ¶ 1227, at 243 (F.W. Maitland ed., London, C.J. Clay 1887).

fact that in the early part of the seventeenth century, Lord Coke, perhaps the most famous English judge ever, did not hesitate to say that Roman law was “monstrous” and compare it to a “poyson.”¹⁴ Likewise, the distinguished lawyer, Sir John Davies, mocked the civil law tradition as being “gloss upon gloss, and book upon book, and every Doctor’s opinion being a good authority fit to be cited.”¹⁵

It is fair to assume that these accusations were not wholly unrelated to the English rupture with the Church of Rome enacted into law by Henry VIII in 1534, but a few decades before Coke and Davies would blow the patriotic trumpet. Unsurprisingly, when Blackstone published his famous *Commentaries on the Laws of England* in the 1760s and elected to model his table of contents on the outline of the *Institutes*, he created no school. His book met with a lukewarm reception from practitioners. Typical was the reaction of James Mackintosh who rejected “the attempt to give an air of system, of simplicity, and of rigorous demonstration, to subjects which do not admit it.”¹⁶ Practitioners wanted a consideration of the nature of law through history and practice rather than through theory.

As my reference to Blackstone should make clear, I am not arguing that Roman law had no influence whatsoever on English law. Such a contention would be excessive. In fact, one can identify a number of circumscribed and marginal ways in which Roman law made an impact on the law of England. However, the ascendancy of Roman law on English law was consistently limited and exceptional. It could never change the way common law lawyers thought about the law; it could not have displaced the dominant set of epistemological assumptions that centered on the importance of pleadings and procedure. The common law always aimed to remedy any wrong correctly presented, and the courts always sought to do justice between contestants without defining rules *a priori*.

The events around 1200, 1600 and 1800 show that after the common law began to develop in its idiosyncratic way, it never allowed a change of epistemological paradigm. This was largely due to nationalistic reasons that had to do with the desire to define the common law as “unique” or “different.”¹⁷ The fact that the common

14. Edward Coke, Preface to the Seventh Part, 4 Coke Rep. iii, vi.

15. LE PRIMER REPORT DES CASES & MATTERS EN LEY RESOLUE & ADIUDGE EN LES COURTS DEL ROY EN IRELAND fol. 4b-5a (Dublin, John Franckton 1615).

16. JAMES MACKINTOSH, A DISCOURSE ON THE STUDY OF THE LAW OF NATURE AND NATIONS 54 (London, T. Cadell et al. 1799).

17. See generally Peter Goodrich, *Poor Illiterate Reason: History, Nationalism*

law, despite its reiterated desire for epistemological closure, was effectively influenced by the civil law at various junctures in its history does not change anything about the epistemological difference between the two legal traditions today. Whenever Roman views were internalized, they were either modified or combined with native ideas, and were, in any event, meant to further the advancement of English law. This phenomenon was evidenced in the first books on English law written in the late twelfth and early thirteenth centuries. Authors like Glanvill and Bracton drew on Roman themes in order to strengthen native legal doctrine. Their aim was emphatically to produce a credible text on English law for their times. They believed that an infusion of ideas derived from what was regarded as the fountainhead of scientific law could assist them in their task.

The common law as we know it today is, therefore, different from the civil law as we know it today. The common law tradition emerges as being at variance with the Romanist tradition in fundamental epistemological respects, differences desired by the common law. The question arises as to how the emerging legal system within the European Community can accommodate this pluralism which, I argue, it has a historical and ethical responsibility to respect and treasure.

The matter is particularly compelling if one bears in mind, as one should, that law never exists in a vacuum. In fact, law reflects deeply embedded cultural assumptions so that the explanation as to why English lawyers mistrust generalizations or systemic constructs connects with an entire English way of life. In this sense, the common law is best regarded as a specific form of moral inquiry, which allows English lawyers to pursue their quest for meaning and justice. My contention, in other words, is that the difference between these legal traditions is not simply about technical rules facilitating market transactions and enhancing profit margins. If this were the problem, the matter of legal integration in Europe would not detain me for very long. Out of different rules a new rule can always be framed. I argue that the difference lies at a much more profound level than rules, and for that reason, it is much more significant.

The Romanist and common law traditions give effect to two different ways of life in the law. The conflict between systematic theory and historiography that they illustrate is really only a rendition of the larger opposition between universality and particularity in knowl-

edge.¹⁸ Each legal tradition captures a certain disposition of the mind toward reality that is the existence of presuppositions, fears and ambitions often arising beneath awareness which stubbornly resist the erosions of historical change. The issue is not sets of rules or institutions but *mentalités* or worldviews. It may help to think of each legal tradition as a religious faith. How, then, is European integration to proceed if it is to respect religion as a constitutive element of the way in which communities and individuals define themselves over time?

I shall confine myself to a few general observations. First, it is illusory to expect participants in a given legal tradition to transcend their epistemological space. To expect that a Dutch lawyer can ever think about the law like an English lawyer—for instance, that he can feel the same emotions toward judges or statutes—is fanciful and shows a misapprehension of the workings of the unconscious sources of social behavior. Second, it would be a technocratic fallacy of the first order (albeit not an inconceivable one coming from the rootless bureaucrats and managers operating in Brussels within abstract and instrumental frameworks rather than through cultural and moral commitment) to expect that the allegiance of a legal tradition can be secured by forcing it to embrace the epistemological assumptions promoted by another tradition. I have just argued, in any event, that such an enterprise would be doomed to cognitive failure. Third, both legal traditions must be recognized as epistemic peers in that they afford two legitimate approaches to the law which reflect and answer the needs of their respective communities.

Fourth, it is, therefore, the case that European legal integration can not follow a cognitive or institutional model that would be typical of only one of the two legal traditions. For instance, suggestions for a European civil code must be rejected because the common law has never wanted a code, not out of caprice or because it did not know codes existed or felt it did not have the resources to achieve codification. The common law does not want a code because codified law does not correspond to its conception of justice, which simply does not believe that society can profitably be invented and planned on the basis of abstract theory.¹⁹ For the common law, it does not make sense to consider an analytic structure, no matter how sophisticated (and, perhaps, especially if highly sophisticated), to be the ultimate

18. See ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY* 21-22 (1976).

19. See Pierre Legrand, *Against a European Civil Code*, 60 *MOD. L. REV.* 44 (1997).

reality as opposed to the chaos of experience.

Fifth, a meta-language must be devised which will allow participants in each of the two legal traditions to identify comforting legal-cultural forms at the European level and foster faith in the new structures. Sixth, such a meta-language is only possible if participants in each tradition are prepared to accept the legitimacy and validity of the epistemological experience of law developed by the other legal tradition. They must be willing to “step out of themselves” and try to appreciate how and why the other legal tradition thinks the way it does. They must strive, through a *travail de soi sur soi*, to think differently from the way they were conditioned to do by their own culture.

In sum, the objective—and the only ethically commendable objective—is to find a form that will allow each legal tradition to continue to realize its own vision of its own world. The point is not only made at a moral level. If the emerging European legal system will be workable at all, it must secure the agreement of its various constituencies. Only respect for the integrity of different ways of thinking and being in the law can avoid the manifestation of discord.²⁰

20. JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* 197 (1995).

