Codification and the Politics of Exclusion: A Challenge for Comparativists

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The degree of resistance and the degree of superior power — this is the question in every event. . . .
— Friedrich Nietzsche[1]

In the critical spirit which I argue should animate comparative legal studies, I wish to illustrate how codification can silently promote an ethically deficient globalism, that is, an uncreditable cosmopolitanism.

Far from being a neutral device for mirroring the world, a civil code is a complex machine effectuating wide-ranging interventions in the social and economic spheres and enabling a normalization of individual lives cast in legal terms. Every codification pursues the implementation of a universal language of recognition and adjudication. It acts as a "vehicle of community." In this sense, a code shows that a rule or a set of rules can very well foster communitarian rather than individualistic values. A code encourages the members of a given interpretive community to regard themselves as similar rather than different. It aims to instill a sentiment of belonging and to nurture a culture of equality. As it seeks to bring the actions of free individuals into

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[1] FRIEDRICH NIETZSCHE, THE WILL TO POWER 337 (Walter Kaufmann ed. & Walter Kaufmann & R. J. Hollingdale trans., 1967).

accord with specific objectives by enclosing them within a calculative regime, a code imposes constraints on the issues that can be raised and on what can properly be said about them. When confronted with a code, for instance, individuals are discouraged from claiming that they find themselves in a unique situation and are inhibited from demanding special treatment. Instead, the goal is for individuals to subsume their circumstances under a given rule which necessarily calls upon them to insist on those elements which the code regards as universally significant and which lead them largely to ignore other factors which they may consider as especially meaningful for themselves. In other words, the isomorphic connections that claimants are compelled to establish between their facts and the text inevitably draw them away from the particular and toward the universal; the civil code is a mechanism by which individuals act upon themselves and agree to be acted upon in their turn. Soon, the debate concerns itself with the ascription of meaning to the relevant text unencumbered by, and hence completely detached from, the concrete social situation — an interpretive endeavor that is itself a function of the prevailing doctrinal interpretation of the law whose task it is to adopt a standpoint of impartiality toward all particular experiences and to assent only to those principles and judgements that are consistent with just such an impartial standpoint.

The paradox, however, is that a political agenda in favor of the universalization of law through codification may find that it can only achieve its goal by resorting to the effective denial of sites of contestation within itself. This is to say that there exist sub-cultures which, although they belong to the community to be governed by the universalized text, are not allowed to contribute to the universalization process itself. They find themselves disempowered. I wish briefly to offer two examples of the contradiction I am emphasizing.

My first case study centers on the new Quebec civil code which came into force on January 1, 1994 after nearly forty years of preparation.[2] Anyone familiar with Canadian history will

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[2] *See* Pierre Legrand, *Bureaucrats at Play: The New Quebec Civil Code*, 10 BRIT. J. CAN. STUD. 52, 55 (1995) (noting that Quebec civil code took 40 years to adopt); Pierre Legrand, *Civil Law Codification in Quebec: A Case of Decivilianization*, 1 ZEITSCHRIFT FÜR

be aware that a substantial anglophone community settled in francophone Quebec in 1763. When the first Quebec civil code was conceived, in 1866, it sought to partake in this bilingual society. The code was drafted in French and English simultaneously, some of the drafters being francophones, others being anglophones, and all being bilingual.[3] No article was written in one language then to be translated into another: all provisions were intrinsically bilingual. Neither of the two versions was official vis-à-vis the other; both were official. In fact, the meaning of one version was to be ascertained by reference to the other, as the code provided in one of its most famous articles.[4] The French and English renditions of each article were printed side by side in the official edition of the code.[5] The message was clear: Quebec was a bilingual jurisdiction and meaningful coexistence for the two linguistic communities had to imply genuine dialogue between them in the life of the law. In sum, the bilingualism of the 1866 code appeared as "a fundamental principle of codification" and marked "an important benchmark in the institutionalization of civic bilingualism."[6]

Nowadays, while the anglophone minority constitutes only approximately ten percent of the Quebec population,[7] it continues to play a leading role in cultural, educational, and financial spheres. Indeed, given the depth of its historical presence, the anglophone community's influence remains much more important than its numerical strength would suggest. One readily thinks, for instance, of the existence of anglophone universities and other institutions of higher learning, schools, newspapers, radio and television stations, theaters, bookshops, and so forth. The new code was nonetheless written exclusively in French by a small group of francophone lawyers largely consisting of civil

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EUROPÄISCHES PRIVATRECHT 574, 574 (1993) (reviewing history of adoption of Quebec civil code).

[3] *See* John E.C. Brierley, *Quebec Civil Law Codification Viewed and Reviewed*, 14 MCGILL L.J. 521, 536-37 (1968) (describing organization of drafters' commission).

[4] *See* CIVIL CODE OF LOWER CANADA art. 2615 (1866) (repealed).

[5] This was in fact required by law. *See* An Act Respecting the Codification of the Laws of Lower Canada Relative to Civil Matters and Procedure, S.C. 1857, ch. 43, § 15.

[6] *See* BRIAN YOUNG, THE POLITICS OF CODIFICATION: THE LOWER CANADIAN CIVIL CODE OF 1866, at 15, 44 (1994).

[7] *See* Barry Caldwell, *La question du Québec anglais*, INSTITUT QUÉBÉCOIS DE RECHERCHE SUR LA CULTURE 24 (1994).

servants.[8] In deference to the fact that the Canadian constitution mandates the adoption and publication of all texts enacted by the Quebec government also to appear in the English language,[9] an English rendition of the code was prepared. The English version was, however, entirely based upon the French text. Sadly, it was drafted by a group of francophones not trained in the law.[10] As if to accentuate the secondary status of the English text, the government then elected not to publish the French and English versions of the new code side by side. A lawyer who wished to work from both languages, as had been the practice in Quebec since 1866, had to buy the texts separately, that is, had to pay again. Furthermore, under pressure from the legal community, the Quebec government eventually agreed to publish an "official" commentary to accompany the new code. This text appeared toward the end of 1993. To this day, it remains available in French only.[11]

The paradox I have sought to underscore unfolds thus. The Quebec code pursues an agenda which seeks the rationalization of the law for all Quebeckers. In the process, the government institutionalizes the cultural repression of a significant segment of Quebec society by telling anglophones that the life of the civil law in Quebec is no longer to be bilingual, but is to take place in French only. The-code-as-universal-text loses its ecumenical function as the anglophone minority is informed that it cannot inhabit the code unless, of course, it is prepared to operate in French, that is, to renounce its historico-cultural identity. The smothering of the anglophone community is nowhere more vividly illustrated than in the decision of a francophone judge sitting on the Quebec court of appeal to the effect that an argument attempting to elucidate the meaning of an article of the civil code cannot be allowed to derive interpretive assistance from the English text because the English version of the code is

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[8] *See* Daniel Jutras, *Le ministre et le Code — essai sur les Commentaires*, *in* MÉLANGES PAUL-ANDRÉ CRÉPEAU 460 (1997).

[9] *See* CONSTITUTION ACT OF 1867, § 133; *cf.* Blaikie v. Attorney General of Quebec [1979] 2 S.C.R. 1016, 1029-30 (invalidating Quebec legislation designating French sole official language of Quebec).

[10] *See* John E.C. Brierley, *Les langues du Code civil du Québec*, *in* LE NOUVEAU CODE CIVIL 130, 143-44 (1993).

[11] *See* COMMENTAIRES DU MINISTRE DE LA JUSTICE (1993).

not authoritative.[12] The Quebec experience, therefore, invites us to revisit the assertion of the nineteenth-century Argentine jurist, Alberdi, for whom "any notion of civil code *implie[d]* the notion of national unity."[13] It goes without saying that the rhetoric of exclusion is not made explicit by the text of the code (if only since it would be impolitic to do so). But, I argue that the exclusionary strategy emerges somewhat strikingly from what the code does not say or says only by implication. In other words, the object of my observations is the negative space of the civil code — what is left outside of the explicit code, that about which nothing is expressly said.[14] I maintain that this negative space defines the code just as much as what is to be found inscribed within it. Arguably, the crucial features of the process of recodification that I have identified, all emerging from the sphere of tacit knowledge, are, in fact, to be regarded as infinitely more important than any amendment to the posited law.

I now wish to turn to my second case study. If the European Parliament has its way,[15] the European Community is liable to achieve through codification the marginalization of one of the subcultures that have defined western Europe historically. In suggesting the adoption of a European civil code, the European Parliament fosters a modality of experience which is uniquely characteristic of the Romanist or civil law tradition. Jeremy Bentham, Edward Livingston, and David Dudley Field notwith-

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[12] *See* Municipalité de Verdun v. Doré [1995] R.J.Q. 1321, 1327. The judge argued that the English text has no interpretive value on account of its poor quality, which he attributed to the fact that it is "a mere translation of the original French version" ["*une simple traduction de la version originale française*"]. *See id.* Irrespective of the judge's insolence given the widely known political circumstances surrounding the preparation of Quebec's "bilingual" code, the implausibility of his contentions in the light of the Canadian constitution and received constitutional doctrine prompted the Supreme Court of Canada to reverse him on the matter in just over one hundred words. *See* Ville de Verdun v. Doré [1997] 2 S.C.R. 862, 878-79.

[13] *See* JUAN BAUTISTA ALBERDI, EL PROYECTO DE CÓDIGO CIVIL PARA LA REPÚBLICA ARGENTINA 24 (1868) (emphasis added) ("*Toda idea de Código civil implica la idea de unidad nacional.*").

[14] *See* DOUGLAS R. HOFSTADTER, GÖDEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID 63 (1989).

[15] *See* Resolution on Action to Bring into Line the Private Law of the Member States, 1989 O.J. (C 158) 400, 400-01 (setting forth resolutions to make private laws uniform); Resolution on the Harmonization of Certain Sectors of the Private Law of the Member States, 1994 O.J. (C 205) 518, 518-19 (stating need to make private laws uniform).

standing, it is still the case that "[c]odification is anathema to the common law mind."[16] Indeed, Brian Simpson cogently observes that if the common law were to be codified, then it would "cease to be common law at all."[17] As they militate in favor of codification, therefore, European politicians impugn the common-law tradition and its rationality, an epistemological configuration which demonstrates that there is no historical or practical necessity for a legal culture to operate by way of general rules or under the sway of highly-conceptualized systems. The promotion of a formalistic model, such as a European civil code, overlooks the specificity of a cultural tradition that has wanted to retain (and that has wanted to convince itself that it was retaining) its pragmatic and individualistic character in defense against the slide into the strict legal and universalizing positivism characteristic of continental civilian cultures. It is here apparent how the common-law experience, although it belongs to the community that would be governed by the universal law, is not allowed to mold the universalization process itself.

The power of a European civil code would lie not only in its ability to provide an officialized construction of reality but also in its capacity to limit alternative visions of social life. The collection of legal norms within the new code would monopolize legal discourse in ways that would arbitrarily, but effectively, exclude different views of justice. The common-law rationality would rapidly and decisively find itself marginalized, and common-law lawyers would soon be expected to transfer their basic epistemological loyalties to the civilian model — an intellectual formation that remains fundamentally inconsonant with their conception of justice. The communion assumed to be epito-

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[16] MARTIN LOUGHLIN, PUBLIC LAW AND POLITICAL THEORY 47 (1992); *see also* WILLIAM TWINING & DAVID MIERS, HOW TO DO THINGS WITH RULES 152 (3d ed. 1991) (noting traditional antipathy of common-law lawyers to codification). Even statutes, despite their proliferation, still arouse the diffidence of common-law lawyers. *See* Jack Beatson, *Has the Common Law a Future?*, 56 CAMBRIDGE L.J. 291, 299-300 (1997) (noting resistance of English and American lawyers and judges to statutes). This fact can be explained because "[n]either in textual form nor in its modes of genesis [a]re these documents which should necessarily derail the [common-law] tradition." TIM MURPHY, THE OLDEST SOCIAL SCIENCE? CONFIGURATIONS OF LAW AND MODERNITY 98 (1997) (arguing with specific reference to Constitution of United States and its amendments).

[17] *See* BRIAN SIMPSON, *The Common Law and Legal Theory*, *in* LEGAL THEORY AND COMMON LAW 8, 15 (William Twining ed., 1986).

mized by a European civil code would, in fact, represent, beyond the sum of words, the excommunication of the common-law way of understanding the world and the relegation to obsolescence of its particular insights which heighten awareness of the fact that "proceeding by general rule will at times produce outcomes different from and inferior to the outcomes that would be produced were the rule-makers themselves to address each case in its full particularity."[18] Again, it should be clear that the proponents of a European civil code are not openly seeking an assimilation of the common-law tradition to the civil-law world. I claim, however, that to promote a civil code for the whole of the European Community, given the historical resistance of the common-law tradition to the idea of codification, is necessarily to affirm performatively what is otherwise denied, that is, to assimilate the agents within one legal tradition to a different way of speaking and acting and to different moral preferences that, because they are culturally embedded, are arguably incompatible and incommensurable with their horizon of expectations.[19]

I have briefly considered two attempts to eliminate differentiated sites of deliberation from within, with a view to facilitating the imperium of assimilationist efficiency. It is against the background of my conviction in the enabling virtuosity of participatory pluralism that I wish to conclude by arguing in favor of the need for comparativists so to expose the counterpoint to the dominant legal discourse, "to find within the unilinear rhetorical tendency of any discourse this opposite and yet complementary impulse."[20] How can comparativists pursuing a deep understanding of a given legal culture ignore the fact that the legal discourse they are analyzing is also the product of an inevitable tension within the hierarchy of powers? How can comparativists not ask themselves: Who, through the text of law, exerts power and over whom? Who is being denied access to power and at what cost? What interests are served by the legal discourse as it defines and circumscribes itself in the way it does? Only the

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[18] *See* Frederick Schauer, *Generality and Equality*, 16 LAW & PHIL. 279, 288 (1997).

[19] *See generally* Pierre Legrand, *Against a European Civil Code*, 60 MOD. L. REV. 44 (1997) (arguing for retention of European plurijurality).

[20] *See* MURRAY KRIEGER, THE INSTITUTION OF THEORY 63 (1994).

answers to these questions can allow comparativists, as they purport to re-present what they have observed, to restore the voice of the minorities who, as must be appreciated, are also — and as much as the orthodoxy which claims to confine them to the margins of the law — a constituent part of the legal culture that comparativists-as-observers have come to research and understand.[21] After all, if comparativists do not justify those who cannot or will not speak and do not ascribe meaning to the fact that they also live in the law, who will?

The challenge for comparativists lies in renewing with the gist of the comparative project. Comparativists value diversity as a good and are prepared to affirm it as a good. Comparativists are interested in the dialogical approach to knowledge rather than in monological discourse. Because I am a comparativist, my abiding task is to resist the tendency toward cultural uniformity by highlighting, explaining, and justifying difference. For me, therefore, Quebec and the European Community are not legal universes but legal *pluriverses.* It is Wittgenstein who said: "my interest is in shewing that things which look the same are really different. I was thinking of using as a motto for my book [*Philosophical Investigations*] a quotation from *King Lear*: 'I'll teach you differences.'"[22] I agree. The technologies of codification, while arising from the conviction that there exists a calculable answer to the problems of social life, in fact intersect poorly with the specifics of a world that, while it may well be ontologically unitary, can only be understood through epistemological diversity. And, let me add that my argument is far from being strictly

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[21] For arguments pleading in favor of greater sensitivity to the pain of others and to the power that oppresses them, see RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 141-98 (1989) (arguing that certain fiction novels, depicting characters blind to pain of others, often make us aware of our own insensitive behavior with respect to others); Upendra Baxi, *The Conflicting Conceptions of Legal Cultures and the Conflict of Legal Cultures, in* MONISMUS ODER PLURALISMUS DER RECHTSKULTUREN? 267, 268-69 (Peter Sack et al. eds., 1991) (urging new jurisprudential structures that take into account human suffering); Laurence Thomas, *Moral Deference,* 24 PHIL. F. 233, 243-48 (1992) (arguing for moral deference toward victims of social injustice). However, for a typical illustration of an unwillingness or inability to engage with "the other within," leading a French observer to pronounce the new Quebec codification as "largely successful," see Jean-François Niort, *Le nouveau Code civil du Québec et la théorie de la codification: une perspective française,* 24 DROITS 135, 142-43 (1996).

[22] *See* M. O'C. Drury, *Conversations with Wittgenstein, in* LUDWIG WITTGENSTEIN: PERSONAL RECOLLECTIONS 113, 171 (Rush Rhees ed., 1981).

theoretical. It should now be clear that one can only pursue a programme of universalization of law that will secure the allegiance of the various constituencies over which it seeks to govern and avoid dissensus amongst them by retreating from the imperialist drive to oneness and by doing justice to the profound diversity of legal experience within and across jurisdictions. My point is well captured by James Tully's observation to the effect that "[t]he suppression of cultural difference in the name of uniformity and unity is one of the leading causes of civil strife, disunity and dissolution today."[23] Always, the comparativist must remember that only in deferring to the nonidentical can the claim to justice be redeemed.

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[23] *See* JAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY 197 (1995).