

# Antivonbar

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This paper developed out of interventions at the ‘New World Legal Orders’ conference sponsored by Osgoode Hall Law School and the Faculty of Law, University of Toronto, which took place in Toronto on 23-24 April 2004; at the Paris colloquium entitled ‘Autres regards sur le Code civil’ held at the *Cour de cassation* on 28 May 2004 as part of the series of commemorative performances produced on the occasion of the bicentenary of the French *Code civil*; at Harvard Law School on 24 September 2004; at the University of Melbourne Law School on 22 October 2004; and at Cornell Law School on 23 February 2005. I am indebted to Robert Wai and Kerry Rittich for inviting me to Toronto, to Horatia Muir Watt for soliciting my contribution in Paris, to Fernanda Nicola and David Kennedy for making possible my visit to Harvard, to Jeremy Kingsley and Tim Lindsey for hosting me in Melbourne, and to Mitchel Lasser for kindly suggesting that I should present my work at Cornell. I am also most grateful to Duncan Kennedy, who generously agreed to act as discussant at Harvard. By way of epigraph to this text, I wish to offer — improbably! — an excerpt from Thurman Arnold. Addressing the matter of cognitive impairment (in an admittedly altogether different context), this passage subtly encapsulates both the intellectual flimsiness of the ‘euro-Pavlovian’ convergence agenda and the magnitude of the comparatist’s contrarian challenge: ‘Originally, the word “trunk” was applied to trees. Suppose later a writer on the science of things in general classifies “elephants,” “trees” and “tourists” under the same heading. The reason for such a classification is that all three possess trunks. The answer to the objection that the trunks are of different kinds can easily be met by saying that to a nicely balanced analytical mind, they all have one inherent similarity, *i.e.*, they all are used to carry things. The elephant’s trunk carries hay to the elephant’s mouth, the tree trunk carries sap to the leaves and the tourist trunk carries clothing’.<sup>1</sup>

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<sup>1</sup> Arnold, TW (1930-31) ‘Criminal Attempts — The Rise and Fall of an Abstraction’ (40) *Yale Law Journal* 53 at 57.

Meanwhile, I dedicate this itinerant version of my text to Casimir and Imogene; they know well the fate awaiting excessive constructions.<sup>2</sup>

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The focus of my argument is a specific manifestation of new legal ordering on the world stage, namely the Europeanisation of posited law within the European Union. The thesis I wish to sketch concerns one salient feature of this legal integration programme, namely the drafting of a European civil code by Professor Christian von Bar. To my mind — and to put the matter succinctly — the idea of a European civil code shows at once law's empire and empire's law. It illustrates law's empire by demonstrating the way in which law dominates and structures the process of economic, political, and social integration within the European Union; for every problem, there appears to be a solution and the solution is almost always law. And it illustrates empire's law by establishing how member states within the European Union whose 'civil law' derives from Roman law (historically, the law of the Roman empire) are imposing their way of life-in-the-law to non-Romanist, or 'common-law', jurisdictions.<sup>3</sup> Taking the first point to be relatively uncontentious, I propose to devote myself to the second claim. As I proceed, I want to maintain, incidentally, that although comparative legal studies needs to broaden its reach,<sup>4</sup> the transnational project in legal governance initiated by Professor von Bar shows how it is a serious mistake to assume that Europe has become unworthy of the comparatist's attention.

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Under conditions that can only be taken to invigorate the famed European 'democratic deficit', Professor von Bar, a German professor of German law based in Germany, is drafting the European civil code. Europe and its laws are laid before Professor von Bar as a series of cursory propositions (*'omnia jura habet in scrinio pectoris sui'*), all to be chosen in the name of Reason and then to be organised as a 'euro-a-line' treasury of nutshell phrases. A *Gerichtshof der Vernunft* of sorts, Professor von Bar, endowed with autonomy and scope, freed from (national) contexts and objects, an unencumbered self sitting outside any law, above any law, acts as master of the law and, in effect, of Europe. ('I on whom all dangles, better still, about whom, much better, all turns'.)<sup>5</sup> Professor von Bar's venture is, it would appear, most enlightened. Order is inherently good. Ordering the

<sup>2</sup> This paper builds on earlier publications. See, eg, Legrand, P (1996) 'European Legal Systems Are Not Converging' (45) *International and Comparative Law Quarterly* 52; Legrand, P (1997) 'Against a European Civil Code' (60) *Modern Law Review* 44; Legrand, P (1997) 'The Impossibility of "Legal Transplants"' (4) *Maastricht Journal of European and Comparative Law* 111; Legrand, P (2003) 'The Same and the Different' in Legrand, P and Munday, RJC (eds) *Comparative Legal Studies: Traditions and Transitions* Cambridge University Press at 240-311.

<sup>3</sup> I do not seek to deny for one moment the historical fact of the common law's own colonising proclivities as evidenced, for example, through its incessantly problematic relationship with autochthonous law in Australia and Canada.

<sup>4</sup> For a compelling plea to this effect, see Baxi, U (2003) 'The Colonialist Heritage' in Legrand, P and Munday, RJC *Comparative Legal Studies* supra note 2 at 46-75. For noteworthy examples concretising this epistemic shift, see Ruskola, T (2000) 'Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective' (52) *Stanford Law Review* 1599; Ruskola, T (2002) 'Legal Orientalism' (101) *Michigan Law Review* 179; Cooney, S et al (eds) (2002) *Law and Labour Market Regulation in East Asia* Routledge.

<sup>5</sup> Beckett, S (1959) [1959] *The Unnamable* in *The Beckett Trilogy* John Calder at 375. The translation/re-writing in English of this French novel is Beckett's own.

law is inherently helpful. Codifying the civil law is inherently salutary. Europeanising the civil law is inherently visionary. How could any 'good European' disapprove of a European civil code? Disagreement is even more difficult to countenance once one considers Professor von Bar's published statement of views, which appeared in 2002, accounting for his codification enterprise. From Professor von Bar's aloof and stable perspective, the European civil code will be — it is said with commendable epistemic assurance — 'impartial', 'dispassionate', and 'neutral'.<sup>6</sup> Surely, no reasonable European can quarrel with a civil code featuring these noble attributes. Ultimately, it seems, Professor von Bar's civil code is meant to emerge as a kind of structured and structuring identity existing independently of anyone's beliefs, interpretive commitments, ideology, interests, and so forth. What could be wrong with *that*? What could be wrong with *Rechtsordnung*? *Nihil pulchrius ordine*. What could be wrong with *Rechtssicherheit*? Ah! '*Sicherheit*' ... There is an important sense in which Professor von Bar's almost touching naivety reminds me of my eight-year-old daughter. Imogene knows that dropped objects fall, that bee stings hurt, and that ice is cold. Such 'self-evident realities' are largely enough for her. My daughter's failure to pursue any sort of ontological inquiry into the identity or status of dropped objects, bee stings, or ice could no doubt be regarded as a failure of critical mind. But perhaps failure of critical mind can be forgiven Imogene while she enjoys what is left of her childhood. Is failure of critical mind as forgivable in the case of Professor von Bar championing pan-European civil codification? Is it forgivable that Professor von Bar should believe — or should tell us that he believes — that the European civil code will be 'impartial', 'dispassionate', and 'neutral' without disclosing how these objectives are to be achieved in a context where one could legitimately have expected sophisticated theorisation? Is it good enough that such 'self-evident realities' should appear to be good enough for Professor von Bar?

To be sure, Professor von Bar's array of 'self-evident realities' finds itself welcomed by the European Parliament and the European Commission, which have officially and repeatedly asserted that they want a European civil code. Indeed, the European Commission has now released an 'Action Plan' expressly advocating 'a more coherent European contract law'.<sup>7</sup> In this 'Action Plan', the Commission states its decision to finance the codification effort (or, as it styles it, the drafting of a 'common frame of reference').<sup>8</sup> Meanwhile, a growing number of lawyers and academics on the Continent are enthusiastically supporting the idea of civil codification for the European Union. It is probably fair to say, then, that it is but a question of time before the European civil code becomes the law of the various member states within the European Union (the only outstanding matter of significance in this regard being the issue of opt-in or opt-out clauses). Along the way, needless to add, the fact that an integrative process like the Europeanisation of law has generated a sense of powerlessness and alienation that expresses itself locally is conveniently overlooked. There is seemingly no awareness at all that in the face of new global patterns, one's legal identity is felt to depend more

<sup>6</sup> Von Bar, C and Lando, O (2002) 'Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code' (10) *European Review of Private Law* 183 at 222, 222 and 228, respectively.

<sup>7</sup> OJ 2003, C 63/01 (12 February 2003).

<sup>8</sup> Id ¶ 59-68.

primordially on one's local experience and that that experience is perceived to be under threat from forces apprehended as external.<sup>9</sup>

The importance of a civil code for a jurisdiction adopting that form of legal ordering can hardly be exaggerated. As Maitland reminds us — to quote one famous outsider — 'do not suppose that a civil code merely settles legal details: those small rules which will interest none but lawyers'. Rather, it deals 'with the most vitally important of all human affairs'.<sup>10</sup> A code is as fundamental to human life as, say, weights and measures. It concerns the 'nuts and bolts' of life-in-the-law. The arrangements and the language of a code are crucial in another way too, for they mark the limits of what can be expressed in the code and about it. In other words, a code constrains legal thought — which, as it posits the code, finds itself posited by it. Indeed, there can be identified what Pierre Bourdieu calls a 'codification effect' causing these constraints to reverberate through the entire legal community (and beyond) and strongly conditioning — even through the unintentional production of discursive effects — the way law is taught, practised, and interpreted within a given jurisdiction.<sup>11</sup> (In this regard, civil-law codes distinguish themselves sharply from those texts that common-law lawyers call 'codes' — a *'faux-ami par excellence'*.)<sup>12</sup>

A civil code is a form of governmentality. As it emphatically prioritises positivism and formalism, a civil code (and its accompanying 'codification effect') excludes other approaches to legal knowledge. Once there is a code, hermeneutical, as distinguished from grammatical, perspectives on law find themselves de-legitimised. Anyone enjoying first-hand experience of codified law knows how far this marginalisation process can go. As such, it is only too appropriate that the etymology of 'order' — the civil code is an *order* — should suggest at once 'arrangement' and 'command', 'organisation' and 'repression'. Because a civil code is a totalising technocratic form, once there is a civil code there is very little 'outside space' left for civilians. To adapt a contemporary philosopher's famous statement: *il n'y a pas de hors-code*. A civil code, then, is much more than a way of dealing with culture. It is culture. (Yes! Culture is more than afternoons spent in significant company at the new MoMA or evenings whiled away at the local 'Hard Rock Cafe'.)

Before I resolutely focus on Europe, let me say a few more words about 'culture'. There is no doubt that 'culture' is a construct or an abstraction in the sense that the word

<sup>9</sup> Eg Lequette, Y (2002) 'Quelques remarques à propos du projet de code civil européen de M von Bar' *Dalloz* at 2202 ('Chroniques').

<sup>10</sup> Maitland, FW (1911) [1906] 'The Making of the German Civil Code' in Fisher, HAL (ed) *The Collected Papers of Frederic William Maitland* Vol III Cambridge University Press at 481.

<sup>11</sup> Bourdieu, P (1986) 'Habitus, code et codification' (64) *Actes de la recherche en sciences sociales* at 41-43 ('effet de codification').

<sup>12</sup> Indeed, the *Uniform Commercial Code*, to take the best-known illustration, is not a 'code'. See, eg, Rosen, MD (1994) 'What Has Happened to the Common Law? — Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development' *Wisconsin Law Review* 1119. See also the leading text, White, JJ and Summers, RS (2000) *Uniform Commercial Code* (5th ed) West at 7-8. A related point is made in Farnsworth, EA (1996) *An Introduction to the Legal System of the United States* (3rd ed) Oceana at 74, where the author observes how 'the term "code" may be misleading for [...] these compilations are ordered collections of separately enacted statutes rather than unitary codes enacted as such'.

does not refer to any concrete 'reality': one cannot see a culture. This means, of course, that the identification (or, others would say, the 'substantialisation') of certain features of the life-world as 'cultural' can only be more or less persuasive. It is precisely this artificial and, therefore, contestable aspect of 'culture' that its detractors use as a target. For them, 'culture' is in the nature of a pot-pourri. To reject 'culture', however, is to accept that identifiable ways of feeling, thinking, and acting are randomly distributed across individuals — something disproved by anthropological research. Despite the dangers associated with simplification and reification, I argue that, just as one can usefully speak of 'the Gothic style' or '*nouveau roman*' or 'Cubism', there are many situations in which, say, 'Japanese culture' is a convenient shorthand, falling well short of a hard and fixed determination, for designating something like 'that which many or most Japanese irrespective of gender, class, and other differences regularly think, feel, and do by virtue of having been in continuous social contact with other Japanese'.<sup>13</sup> Speaking of 'culture' in this way does not automatically privilege coherence, does not entail essentialism, does not necessarily preclude temporal variation, and does not efface individual variations or contestations that can take the form of participation in a range of sub-cultures. Nor does 'culture' need to be understood as positing a number of discrete heritages organically tied to specific homelands and considered best kept separate (like the laboratory specimens in petri dishes one also calls 'cultures'). Nor does 'culture' need to deny their cosmopolitanism to the people being studied. In other words, 'culture' allows for a transnational public sphere and certainly need not connote nationalism or isolationism, that is, something like 'cultural fundamentalism'. Nor does 'culture' need to be linked with ethnicity. Again, the point is simply to acknowledge that everywhere one finds sets of certain learned features that are shared more extensively by people who closely interact with each other than between these people and others with whom they do not so closely interact or among those others. 'Culture' refers to a horizon of intelligibility within which a constellation of (often unexplicable) world-defining dispositions allowing for responses to situations and for the effectuation of discriminations manifest themselves. Thus, 'culture' does not involve any grounding in a causally self-sufficient source. But the fact that the notion can be abused by those who exaggerate the patterning and uniformity of human action, the fact even that such an extreme event as the Holocaust can be regarded as a form of culture-consciousness is not a reason to jettison 'culture'. Who would consider no longer resorting to the word 'democracy' because the Soviet regime abused it for much of the 20th century? There is

<sup>13</sup> Brumann, C (1999) 'Writing for Culture: Why a Successful Concept Should Not Be Discarded' (40) *Current Anthropology* 51 at 57. My summary owes much to this paper. Cf Wilson, G (1987) 'English Legal Scholarship' (50) *Modern Law Review* 818 at 831: 'It would be unwise for example to regard anything in Japanese society as *prima facie* irrelevant to the understanding of Japanese law on first setting out to get to grips with it. The links between law and language, law and the political or social and economic order, law and the history and traditions of the country, its codes of morality, its senses of justice and the relationship between the legal profession and other professions and between legal scholarship and other forms of scholarship, the relative standing of different actors in and around the legal system, all have their impact on law and its administration and the definition of law and legal scholarship'. Robert Gordon similarly draws the link between the legal sub-culture and the culture *tout court*. He observes that 'the specific legal practices of a culture are simply dialects of a parent social speech' and argues that there is no reason why a legal culture should be expected to 'depart drastically from the common stock of understanding in the surrounding culture': Gordon, RW (1984) 'Critical Legal Histories' (36) *Stanford Law Review* 57 at 90.

more. Although, as I mentioned above, I would strongly deny the connection between ‘culture’ and ‘essentialism’,<sup>14</sup> I must add that, in this specific context at least, I would not find problematic a ‘strategic use’ of essentialism in ‘a scrupulously visible political interest’ in order to support resistance against a structure — such as a European civil code — that is irresponsible to identitarian demands (the notion of ‘identity’ being understood not hegemonically but as affording an opportunity for one’s voice to be heard in the relational context that constitutes every identity through differentiation ‘from’).<sup>15</sup>

Let me, then, return to Europe. George Steiner observes that ‘there are questions we must be tactless and undiplomatic enough to raise if we are to stay honest with ourselves and our students’.<sup>16</sup> Yes, discursive taboos must be breached. Yes, one must get one’s hands dirty, so to speak, and openly regret that the fashionable way to be a ‘good European’ is to acquiesce, time after time, to the suppression of local particularism. One must ask, then, why in the age of globalisation this earnest drive for codification, that is, for apodictic formulations, symmetrical arrangements, and definitive classifications? How can the idea of a self-spinning, self-repairing, self-enclosing web attract in the age of networks and rhizomes? In my view, an important part of the answer has very simply to do with something like the ‘comforting game of recognition’, with the reassurance that familiarity generates.<sup>17</sup>

In Germany, to this day, the Roman-based apprehension of law-as-science easily deflects the postmodernist or critical or even interdisciplinary work that has proved so influential in anglophone jurisdictions over the last decades. To German — or, indeed, French or Italian or Spanish — academics specialising in civil law (and these represent, by far, the largest and most prestigious community within national legal academies), such speculative scholarship remains a distant and basically irrelevant rumble. Let us recall that for Professor von Bar, the European civil code will be ‘impartial’, ‘dispassionate’, and ‘neutral’. Dropped objects fall, bee stings hurt, and ice is cold — no matter what anyone believes or thinks about any of this. Even though it is not descriptively tenable to distinguish sharply between reason on the one hand, and authority, dogma, and prejudice on the other, yes, on the Continent academics continue to believe in the probative efficacy of fixity of meaning as a foundational idea and, equally importantly, to have faith in fixity of meaning as an achievable objective. And for these academics,

<sup>14</sup> Eg Fuchs, S (2001) *Against Essentialism* Harvard University Press at 12-70 and passim. This author convincingly defends a theory of culture located beyond essentialism. See also Bhabha, HK (1993) *The Location of Culture* Routledge.

<sup>15</sup> Spivak, GC (1996) [1985] ‘Subaltern Studies: Deconstructing Historiography’ in Landry, D and MacLean, GM (eds) *The Spivak Reader* Routledge at 214 [emphasis original]. I do not dispute the fact that the argument from subalternity can only do so much ‘work’ when applied with reference to the common-law tradition, a point helpfully made to me by Annelise Riles at Cornell. My reply is that I focus squarely on the common law *in Europe*, which cannot be regarded as a purveyor of hegemonic meaning vis-à-vis the civil law. Indeed, the common law is directed towards surviving policy-driven cultural erasure. It, too, needs to be delivered from a paradigm of deliverance. Yes, the argument from subalternity is intrepid. But it must be.

<sup>16</sup> Steiner, G (1967) *Language and Silence* Faber & Faber at 82.

<sup>17</sup> Foucault, M (1971) ‘Nietzsche, la généalogie, l’histoire’ in *Hommage à Jean Hyppolite* Presses Universitaires de France at 160 (‘le jeu consolant des reconnaissances’).

fixity of meaning depends first and foremost on propositional language. The point, therefore, must be to replace the nomadic, spontaneous, open-ended, porous, wild character of law with a logical and firm system of concepts and rules. Because it claims to be disengaged and monadic, that is, 'objective', only such a system of concepts and rules can appear, respectably, as the seat of wisdom and judgment and, in the end, as the locus of universal or transcendental justice (at least in the sense of the 'I' becoming the universal referent). Where papal infallibility was once the inviolable rule, the civil code now stands for legislative infallibility: a code is *res judicata* and, as the Roman tag reminds one, *res judicata* stands for the law's truth.<sup>18</sup>

For Professor von Bar, therefore, codification is not a mere question of reducing the life-world and the life-world of the law to the aesthetics of a train schedule. Rather, for him, the codified form, in as much as it guarantees the 'scientific' nature of knowledge about law, is the necessary concretisation of Reason. And for the rule of Reason to obtain — for a reasonable assessment of competing alternatives to occur — the world under adjudication must fit within a single frame fully comprehensible to its assessor. Any effort to summarise, restate, or reconstruct pellmell data into a coherent body of propositional systematisations must assume the translation of all claims — not least the common law's 'demented particulars'<sup>19</sup> — in one language. This strategy is as old as thought itself. Consider the classical Greek philosophers, who sought to submit the polycentric character of Greek myth to the rule of monistic reason. Indeed, for all their critical edge, even Heidegger's ontological analysis of 'Being' and Gadamer's reconciliative hermeneutics ultimately fail to escape the monistic pattern.<sup>20</sup> Professor von Bar, operating at another intellectual level altogether, arrives on the European scene having already been inscribed in a specific textual form, having already been taught, a long time ago, that his own national civil code is largely a reflection of Reason, that law can be systematised into juristic science, that '*Recht ist Wissenschaft*'. If the common law will now be translated into the language of 'system' and 'science' (Heidegger once remarked how 'system' is key to 'scientificity'),<sup>21</sup> Professor von Bar can have purchase on the full range of European laws. If the common law will now be encrypted into the language of the grid, Professor von Bar will be in a position to perform the reasonable assessment of competing alternatives that is required of reasoned argument and that is assumed, by individuals like Professor von Bar himself, to connect with goodness, rightness, and justice (never mind that scoundrels, too, can speak the language of Reason). Thus, incommensurability (of the kind I advocate) presents a challenge to Professor von Bar's monism precisely because it holds that the world is irreducibly plural in character, that it is organised, for example, in various modes of cognition that do not fit within a single frame (other than in a perfectly superficial and, therefore, uninteresting way),

<sup>18</sup> '*Res judicata pro veritate accipitur*': D.50.17.207.

<sup>19</sup> Beckett, S (1957) *Murphy* Grove Press at 13.

<sup>20</sup> The historical significance of monism is captured, eg, in Feyerabend, PK (1987) *Farewell to Reason* Verso at 116. For another argument to the effect that the history of philosophy in the West is the history of a philosophy of the same whose hidden purpose has always been to find a means to attenuate the shock of alterity, see Levinas, E (2001) [1949] *En découvrant l'existence avec Husserl et Heidegger* (3rd ed) Vrin at 261-82. See also Parekh, B (2000) *Rethinking Multiculturalism* Harvard University Press at 16-49.

<sup>21</sup> Heidegger, M (1971) [1936] *Schellings Abhandlung: Über das Wesen der menschlichen Freiheit* (1809) (2nd ed Feick, H) Max Niemeyer at 45 ('*das Systematische ist das Wissenschaftliche einer Wissenschaft*').

that 'true' statements can only be made relative to a lexicon (even if one accepts that all significance is sayable, it remains that sayability is situated), and that assertions do not determine truth conditions by virtue of their propositional content alone.<sup>22</sup>

To Professor von Bar, the deworlde European civil code is the guardian of rationality, the stern rebuker of idiographic deviations best regarded as belonging to an obsolete era and as surviving into the present under false pretences, properly envisaged, ultimately, as something of a scandal, as a morbid state of affairs yearning to be rectified, as a *blight*. Let us not forget that, etymologically, the case, the '*casus*', is not just the fortuitous, the contingent, the occasional, the *hic et nunc*; it is also the fall — '*la chute*'. And most interestingly, the etymology of '*chute*' connects with words like '*méchant*' and '*méchanceté*', which, amongst other meanings, connote the idea of something devoid of value. Thus, Professor von Bar is the redeptor, the man who will cancel or resorb all accidentality — 'improving the result with a lick of Euclidian geometry'.<sup>23</sup> As Professor von Bar suppresses circumferential phenomena, as he subsumes the case under the concept and the proposition, as he raises the case from its fall, he presents himself as *homo justus* — the just man. Professor von Bar, if you will, is Plato expelling the poets from the Republic. In the present context, the 'poets' appear largely in the guise of common-law lawyers.

It is, indeed, primarily the poetics of the common law that defies any pan-European reduction of law to propositional language. Of course, the common law, too, is a species of writing. And, evidently, legal traditions are neither monolithic nor stable. And, needless to say, there can be no sharp and fixed distinction between legal traditions. Clearly, there are within the common law nomothetic strands just as there can be identified within the civil law instances of idiographic tendencies. But lest we lose sight of basic, historically-shaped, politically-delineated, and sociologically-sensitive epistemological pointers, the common law is fact-based adjudication rather than propositional language, rhetoric rather than logic — the open hand rather than the closed fist, to borrow from familiar Renaissance imagery. For Professor von Bar, who lives with the common law 'in the brittle familiarity of mere acquaintance',<sup>24</sup> *who can only take into account common-law testimony from within his own culture* in a context where his *Weltanschauung* cannot conceive of an alternative *Weltanschauung*,<sup>25</sup> the common law is thus encountered as an obstacle, as an impediment, as a *pierre d'achoppement*. For Professor von Bar, only the creation of a symbolic form like a code can allow for an intelligible and defensible apprehension of reality. Any other approach to legal knowledge disqualifies itself. The regulative question is then easily resolved in favour of a conceptual instead of an empirical experience of the world. In keeping with the Roman idea of '*jus*' as '*area*', Professor von Bar will not permit an indefinite diversity of empirical manifestations. He will, rather, appropriate all these cases that are the life-of-the-law, that are, properly, the world of the law. In the context of Professor von Bar's strategy of world-appropriation,

<sup>22</sup> Incommensurability is not incommunicability. In fact, cognitive connections represent a necessary semantic pre-requisite to the appreciation of *epistemological* incommensurability, a kind of constitutive dialogical premise. See Legrand, P 'The Same and the Different' *supra* note 2 at 281–84.

<sup>23</sup> Beckett, S (1984) [1949] in Cohn, R (ed) *Disjecta* Grove Press at 138.

<sup>24</sup> Steiner, G (1996) [1964] 'Cake' in *The Deeps of the Sea and Other Fiction* Faber & Faber at 202.

<sup>25</sup> See Eco, U (1984) *Semiotics and the Philosophy of Language* Indiana University Press at 12: 'World visions can conceive of everything, except alternative world visions'.



the case sees its distinctive features effaced until it completely dissolves into the concept or the proposition. The case is assigned, attributed: it finds its home (although, etymologically, '*casa*' has nothing to do with '*casus*'!). The case is marked with the seal of the law. The code, as a form of law, will contain what would otherwise overflow: experience (Bataille's 'immense labour of renunciation, dispersal, and turmoil that constitutes human life, distinct from legal existence and as it takes place in fact').<sup>26</sup> And experience will transcend what would otherwise imprison it — localism.

As he proceeds with his instrumentalist and uniformitarian agenda, Professor von Bar assumes that he is a free man. As such, he believes that he is rationally choosing what ought to be done. But the fact is that whether in any given instance Professor von Bar is 'choosing' anything is highly questionable. A formalist because of the way he, armed with his predispositions (his *Vorverständnis*), was socialised into German law, into German legal culture (that is, into German law's *habitus*), Professor von Bar can no more 'choose' to do non-formalist law than one can choose to do aerial swimming. (Indeed, even 'the consciousness of being conditioned does not supersede our conditionedness'.)<sup>27</sup> Far from Professor von Bar dominating Europe and its laws, Europe and its laws are in fact weighing down on Professor von Bar very much like the now proverbial 'brooding omnipresence in the sky'. Professor von Bar is trapped within his cosmogony — economists would perhaps refer to an example of 'path dependence'. In the law-world into which Professor von Bar was inducted a few decades ago, there is a right way to do law and a right way to draft a civil code, too. Yes, Professor von Bar must conform, which is to say that he must submit. Otherwise, he might draft something that would not be regarded as a 'good' code according to received standards of 'goodness' within his law-world. Law is indeed governing the self and, as his peers attest to Professor von Bar's faithfulness to ideals or to his betrayal thereof, the self's potential for humiliation is never far away. (In all these respects, the parallel with Imogene can be pursued. She must also submit to the world, to the adult world, which adjudicates whether or not she behaves well or badly. Freedom can only happen within this world, which was constituted before her and without her.)

In one important sense, then, Professor von Bar is a man anchored in history. His governance project is profoundly historical in so far as it propounds a scheme for rationalising (legal) rationality much as Gaius, Justinian, Accursius, Azo, Beaumanoir, Du Moulin, Domat, Pothier, Portalis, and Windscheid did before him. Professor von Bar's identity as 'rationaliser of law' is deeply indebted to his famous predecessors in whom he is (opportunistically?) reincarnating himself and whose frameworks he is purporting to perfect. Like Windscheid, for instance, Professor von Bar will be the 'jurist as such'.<sup>28</sup> And, lest it be forgotten, let us recall how Professor von Bar's logic of calculation harks back to a centuries-old academic tradition connecting law and geometry. To quote a

<sup>26</sup> Bataille, G (1970) [1933] 'La notion de dépense' in Hollier, D (ed) *Oeuvres complètes Vol I: Premiers écrits* Gallimard at 318-19 ('immense travail d'abandon, d'écoulement et d'orage qui [...] constitue [la vie humaine, distincte de l'existence juridique et telle qu'elle a lieu en fait]').

<sup>27</sup> Gadamer, H-G (1990) *Wahrheit und Methode* (6th ed) JCB Mohr at 452 ('Das Bewußtsein der Bedingtheit hebt die Bedingtheit selbst keineswegs auf').

<sup>28</sup> Windscheid, B (1904) [1884] 'Die Aufgaben der Rechtswissenschaft' in *Gesammelte Reden und Abhandlungen* Duncker & Humblot at 111 ('der Jurist als solcher').

famous 16th-century French law professor, 'the elements of law, the bases of its maxims and of its fundamental problems are like the points, the lines, and the surfaces in geometry'.<sup>29</sup> The same analogy appears in a late 20th-century French work on legal theory where the author claims that 'ideally, of course, the solution to any litigation would be mathematically deduced from clearly defined legal rules'.<sup>30</sup> Professor von Bar is situated within this academic tradition — a man artificially immobilised in 'a mass of past shadow'.<sup>31</sup> To Professor von Bar, the law-as-science tradition is 'always-already' exclusively meaningful, very much like his native German language: when one hears one's 'own' language, the stage of reflective interpretation does not happen at all. One is *of* the language or, if you will, the language *is* one in the sense that it is constitutive of one's identity in a manner that short-circuits the subject/object dichotomy. Likewise, Professor von Bar is 'always-already' committed, without any reflective interpretation, to a legal situation, say, the 'law-as-science' tradition — which, as it strives for a code apprehended as an object without ambiguities, represents, so to speak, Professor von Bar's vehicle for entering into (his own) history. The legal tradition provides Professor von Bar with a (legitimate) mode of being historical.

But as he resolutely proceeds to mould Europe into the form that is most firmly embedded in the only signifying system that he knows and values, as he purports to codify Europe's laws, Professor von Bar is not a mere jurispuppet. Though in significant ways *involontaire*, his discourse remains an initiative. There is, thus, another sense in which Professor von Bar, in a kind of dialectical reversal, proves aggressively antihistorical. For Professor von Bar wants to detach himself from facticity, which, in Europe, means the presence of at least one cultural alternative to codified legal systems in the shape of laws where reception of Roman law did not obtain historically. Although not to be understood as essentialist or fundamentalist reifications, these laws are immediately recognizable as a discrete and stable discursive formation featuring both existential-ontological and material-practical dimensions and inviting meaningful reference to them as an autonomous epistemological cluster and permitting the comparatist to dismiss the charge that he is fabricating an unduly reductionist differentiation (the fact that the two legal traditions have between them a certain number of describable relationships and that they can, *in this sense*, be seen as an inter-epistemological entity does not deprive them of their primordial epistemological individuality: separation precedes connection). Multiplicity of identities and instances of *métissage* notwithstanding, the sheer fact of the matter, as experience demonstrates, is that common-law lawyers do not tend to reveal ascertainable proclivities towards law-as-mathematics. This is an important feature of the common-law mind, not an inconvenient limitation.

Thus, Professor von Bar is Vico, yes, but he is also Descartes repudiating all that is not intelligible in terms of his self-certainty — all of codified law's supplements, let us say. Being Descartes, Professor von Bar must wring the neck of the common law in order

<sup>29</sup> Le Douaren, F (1765) [1561] '*In primam partem Pandectarum, sive Digestorum, methodica enarratio*' in *Opera omnia* Vol I at 3 ('*sed revera haec sunt elementa juris, & fundamenta maximarum, gravissimarumque disputationum: licut in Geometria punctum, linea, superficies*'). I refer to the Lucca edition.

<sup>30</sup> De la Marnierre, ES (1976) *Éléments de méthodologie juridique* Librairie du Journal des notaires et des avocats at 193-94 ('*l'idéal serait évidemment que la solution de tout litige puisse être mathématiquement déduite de règles juridiques clairement définies*').

<sup>31</sup> Beckett, S [1929] *Disjecta* supra note 23 at 22.

to stuff it into what is, to him, the familiar cognitive pigeon-hole of codified law. Only through this ethnocentric determination in favour of codification can Professor von Bar get hold of life-in-the-law and frame it within a steadfastly logical space. This attempt to force experience into logical categories of non-contradiction suggests a search for purity. The fact that the common law, too, can legitimately be described as an ontology, as a primordial structure of knowledge, as a way of being-in-the-law-world that goes at once beneath and beyond cognition, as a (purportedly) self-consistent way of understanding, organising, and reproducing law and legal experience (the life-of-the-law and life-in-the-law) — the fact that the common law features distinctive conversational maxims, characteristic communicative conventions, typical practices of argumentation, the fact that the common law harbours an idiosyncratic set of recurrently emergent, relatively stable, institutionally-reinforced discursive strategies, the fact that the common law offers a certain lexicon of legal terms, a certain range of intellectual-historical allusions, the fact that the common law favours certain theoretical moves and that it has specific views as to norms of logical propriety and a particular sense of what nonsense might be, in short, the fact that the common law defines a framework of intangibles within which interpretive communities operate over the long term (even though not completely and coherently instantiated) and which has normative force for these communities both by empowering them and by limiting their possibilities of experience (in fact, there is much overlap between the notions of ‘facilitation’ and ‘constraint’) — none of this impinges on Professor von Bar, none of this detains him. On Professor von Bar’s radar screen, the idea of a plurality of rationalities is, ultimately, unsustainable. As he sits with his BGB close at hand, Professor von Bar takes the view that he has little to learn from the common law as intersubjective discourse, which he does not regard as having the force of argument apart perhaps from a few epigrammatic formulas (what more could be expected from muddy adhocism?). Indeed, no doubt in order to help countermand the common law’s disruptive energy, Professor von Bar pointedly refers to the common law’s ‘weaknesses’ (without, however, telling us what these are, presumably because they are so embarrassingly ‘self-evident’).<sup>32</sup> To Professor von Bar, the common law is not unlike what a kaleidoscopic work such as *Finnegans Wake* and its unlimited semiosis would have appeared to Schiller or Goethe: strange (bits and pieces sticking together and coming apart to make seemingly endless combinations of ever-altering circumstances), fiercely ambiguous (in effect, refractory to interpretation), uncontainable, anarchic, subversive, satirical even — in short, *ugly*.

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Within today’s European Union, the common law is Professor von Bar’s own other, the difference of his belonging — which Professor von Bar is unable to encounter as addressing *his* own deficiencies and incapacities. Somehow, Professor von Bar must resolve this painful, possibly traumatic antagonism, this incessant questioning — I refer to the common law’s resilient ‘no’ to the authoritative and, at times, authoritarian claims in favour of Romanisation and, later, civilianisation; I have in mind the common law’s

<sup>32</sup> Von Bar, C and Lando, O ‘Communication on European Contract Law’ supra note 6 at 234. In the same vein, Professor Ole Lando, on the occasion of a debate in Passau on 30 October 2005, expressed the view that the common law features ‘much confusion’. By way of illustration, he indicated that as chair of a task force devoted to the unification of the laws regulating contractual relationships within the European Community ‘[he] worked with two or three English lawyers, who did not always agree on what the common law said’.

resolutely antirrhetic stance.<sup>33</sup> How to proceed, then? Professor von Bar's answer is to cancel the common-law tradition, to confine it to the pre-history of European law while inaugurating European law's history. In order to understand the common law, even in the precarious sense of what it means to 'understand' something, Professor von Bar would have to enter the common law and live through it. But Professor von Bar hardly adheres to the hermeneutics of facticity. If anything, he is a structuralist more at ease with overarching systems of integral relations, someone for whom knowledge means systematisation, objectification. In other terms, Professor von Bar prefers to be 'hoisting the real unjustifiably clear of its dimensional limits'.<sup>34</sup> Historical and cultural particulars are to be overcome; ruptures and discontinuities are to be surmounted — all of this is to be confined to 'the offal of experience'.<sup>35</sup> Aiming to develop a coherentist administration of people and things, that is, to provide Europeans with operational guidelines, effective social management, and programme implementation, Professor von Bar's clear and ordered thinking can, should, and will triumph over legal differentiations apprehended as something like the *bricoleur's* debris, a badge of underdevelopment, a sign of pathology, a disease — in the words of Adorno, a 'stigma' indicating that 'not enough has yet been done'.<sup>36</sup> Professor von Bar wants to repress historical and cultural difference in favour of an institutionalised system of concepts and rules that claims to speak all at once and once for all, that asserts unalloyed pan-Europeanism. The common law is made to stand, within Professor von Bar's anticipatory characterisation, as something defined in advance in the sense (only) of that which can be grasped and endorsed in a classificatory order. To Professor von Bar, no loss of world is involved and the gains are obvious (incidentally, one of these advantages, duly noted by Alan Watson, is that 'codified law [...] makes possible, if not exactly desirable, adequate law teaching at a very low level of competence').<sup>37</sup>

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The common law will not be authorised to continue to be what it has wanted to be, what it has been, and what it is. The common law will not be allowed to be itself. For Professor von Bar, the way in which the common law actualises itself in an authentic manner is to be destroyed in the name of the rule of technology, bureaucracy, and the commodity form. Within his governance project, the basic characteristics defining the common law's being — its contrapuntal being vis-à-vis the civil law's — are to be estheticised out of existence without any investigation being conducted into the belonging of which a cultural form like the common law is the expression, without any examination of the *presence* of the common law. Not appreciating that law is 'always-already' implicated in a wider network of meaning, Professor von Bar cannot mind that the repudiation of the common law would leave common-law lawyers at odds with the culture they inhabit (I refer to culture *tout court*) — a 'culture of fact', to quote historian Barbara

<sup>33</sup> See Goodrich, P (1992) 'Ars Bablativa: Ramism, Rhetoric, and the Genealogy of English Jurisprudence' in Leyh, G (ed) *Legal Hermeneutics* University of California Press at 43-82; Goodrich, P (1992) 'Poor Illiterate Reason: History, Nationalism and Common Law' (1) *Social and Legal Studies* 7; Goodrich, P (1995) *Oedipus Lex* University of California Press at 41-67 and passim.

<sup>34</sup> Beckett, S [1929] *Disjecta* supra note 23 at 19.

<sup>35</sup> Beckett, S (1965) [1931] *Proust and Three Dialogues* John Calder at 78.

<sup>36</sup> Adorno, T (1951) *Minima Moralia* Suhrkamp at 184 ('Differenzen als Schandmale, die bezeugen, daß man es noch nicht weit genug gebracht hat').

<sup>37</sup> Watson, A (1981) *The Making of the Civil Law* Harvard University Press at 173.

Shapiro<sup>38</sup> — which would continue, in its various discursive guises, to articulate its moral inquiry according to traditional standards of justification. Professor von Bar does not care that, pursuant to his detraditionalisation à *vapeur*, common-law lawyers would find themselves compelled to surrender cultural authority and to accept unprecedented effacement *within their own culture*. I will not even venture to allude to the notion of the ‘legal unconscious’ as developed by Pierre Legendre, the distinguished legal historian and psychoanalyst.<sup>39</sup> Is Professor von Bar prepared to say that the unconscious has no epistemic status whatsoever? Is reason not at all shaped by the unthought? Does reason not *depend* on the unthought? Has Professor von Bar even addressed the matter? No. The common law, apprehended as standing in a derogatory relationship with the civil law, will be chloroformed without more ado.

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One can perhaps sympathise with the desire for a more orderly, circumscribed world. One can perhaps relate to Professor von Bar’s yearning for the suppression of discord and dissension, to his missionary zeal for enlistment. One can perhaps embrace Professor von Bar’s fear of the dead hand of custom. One can perhaps subscribe to Professor von Bar’s impatience with the common law’s peripatetic ways. One can perhaps appreciate how annulling the common-law tradition as a form of life-in-the-law is soothing to Professor von Bar — ‘the man of law who yields to “intellectual comfort”, to the tranquillity of being able to rest on the existing law reduced to “legislative texts”’.<sup>40</sup> One can perhaps understand how Professor von Bar wishes to resist the Americanisation of the world by opposing a pan-European civil code to the common-law model. One can perhaps see how Professor von Bar thinks that a foundational practice like law needs grounds. One can perhaps empathise with Professor von Bar as he assumes that European law needs grounds. (A ‘code’, which etymologically connotes the idea of ‘support’, is a ground.) Yes. But one must also deeply regret how Professor von Bar is making things so easy for himself, how he is not even *attempting* to go beyond himself. Even if he will eventually fail — can civil law turn against itself, can civil law become uncertain of itself, can civil law be educated into doubt? — he should *fail better*.<sup>41</sup>

Paradoxically, for example, this ‘grounding’ of law that Professor von Bar purports to achieve is taking him away from an engagement with the world at ground level — on the street, so to speak — where the singular and irreducible is what is real in contrast to what can be subsumed under concepts and categories. What would it be like for an academic such as Professor von Bar to relocate himself at ground level, no longer a logical ascertainment of Europe but, in a non-trivial sense, its inhabitant? For one thing, it would mean to show concern for life-in-the-law, to attend to life-in-the-law as it expresses itself in its multiplicity, to appreciate that life-in-the-law is not always semiotically organised. For Professor von Bar to engage facticity would mean to find himself in particularised situations resistant to concepts, classifications, symmetry, and rules — not to mention the propositional style of legal discourse itself. But this is not to be. Instead, Professor

<sup>38</sup> Shapiro, BJ (1999) *A Culture of Fact: England, 1550-1720* Cornell University Press.

<sup>39</sup> Legendre, P (1983) *L’empire de la vérité* Fayard at 21: ‘the unconscious is a jurist, too’ (*l’inconscient lui aussi est juriste*).

<sup>40</sup> Trigeaud, J-M (1987) ‘L’image sociologique de l’homme de droit et la préconception du droit naturel’ in *Essais de philosophie du droit* Studio editoriale di cultura at 226 (*l’homme de droit qui cède au “confort intellectuel”, à la quiétude de pouvoir se reposer sur le droit existant ramené aux “lois”*).

<sup>41</sup> I borrow from Beckett, S (1996) [1983] *Worstward Ho* in *Nohow On* Grove Press at 99.

von Bar is codifying European laws. And he can be expected to make an impressively tidy job of it, too. After all, Professor von Bar is in love with his vehicle (in the way, perhaps, a mathematician is in love with his figures).<sup>42</sup>

What if we were to interrupt this argument and indulge in a little scenario? Imagine that it is now September 2050. Imagine a conference. Imagine a conversation about Professor von Bar's European civil code, which, by then, would have been in force for, say, 22 years. Imagine what an Italian academic might be telling her Dutch colleague. Imagine this soliloquy. 'It has been 22 years, you know. And where are we? My sister is a furniture designer. She sells her furniture in Germany. She is having major trouble with her German distributor. She has to look for a German lawyer. This is strange, wouldn't you say? The civil law is now the same in Italy and Germany, two member states within the European Union! Just think! The European civil code has been in force for 22 years. Twenty-two years ago, we were told that Europe was moving beyond inconvenient, distressing, local legal practices and all that. And still, my sister needs to find out about the way German courts have interpreted the European civil code. Her Italian lawyer tells her that she needs to find out what German judges have made of Article 144 of the code. She, of course, does not read German. But the problem is that her Italian lawyer does not read German either. He has been told that the outcome of her dispute with her distributor hinges on the German concepts of "*Verzug*" and "*Mahnung*". But he does not know anything about any of this. You see, despite Professor von Bar's best efforts, Europe still has not achieved uniformisation of law. Local legal practices have not, in fact, been abolished. I think we now see that codification cannot supply transcultural efficacy, that it cannot foreclose the matter of differentiation of laws. In fact, the European civil code has made matters worse for my sister. She had heard that the law was now uniform across the European Union and, on the faith of that information, she failed to set aside enough money to cover her legal costs abroad. With this major German lawsuit looming, she is in financial trouble. As I recall, though, Professor von Bar's project was based on very dubious data. Indeed, Professor von Bar had expressly acknowledged at the time that he "ha[d] not undertaken any empirical studies to assess the magnitude of any of [the] costs" claimed to be attributable to legal diversity. In his words, he "consider[ed] it to be a safe assumption, supported by anecdotal evidence, that significant cost factors [were] involved and that these costs factors [were] operative in practically all sectors of the market economy".<sup>43</sup> No empirical studies. Anecdotal evidence. Incredible, don't you think? Now, do you recall Gunther Teubner's view about EU law generating new, if unintended, differences across and within discursive configurations (including national law) prevailing in the various member states or Hugh Collins's argument, for example, to the effect that formalism is an unsatisfactory regulatory tool for business transactions?<sup>44</sup> There was also that professor in the United States claiming that uniformisation of law

<sup>42</sup> I draw on Beckett, S [1937] *Disjecta* supra note 23 at 172. The original is a letter drafted in German by Beckett.

<sup>43</sup> Von Bar, C and Lando, O 'Communication on European Contract Law' supra note 6 at 198 and 198-99, respectively.

<sup>44</sup> Teubner, G (1998) 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' (61) *Modern Law Review* 111; Collins, H (2000) 'Formalism and Efficiency: Designing European Commercial Contract Law' (8) *European Review of Private Law* 211.

was useless anyway.<sup>45</sup> Professor von Bar never addressed these contentions. Well, here we are now... There is still this indeterminacy. It is like a massive residue of indeterminacy. I was reading Beckett the other day and I came across a form of words that very much reminded me of the way in which Professor von Bar must have approached the matter of a European civil code. For him, the code must have been “solution clapped on problem like a snuffer on a candle”.<sup>46</sup> Pierre Legrand — remember him? — would have said that then the European legal scene was plunged into darkness!’

I suggest that it would be easy to establish that Professor von Bar’s project is politically complicitous, inherently oppressive, and fundamentally antihumanistic. As Professor von Bar sings oh-so-sweetly to Power, as he intones his variation on the old lullaby, ‘*La douceur du commerce*’, even as he promotes the cheap fiction about the lowering of transaction costs constructed to license the spread of civil-law forms,<sup>47</sup> I find it unlikely that the European civil code will prove socially progressive and not pander to market-oriented ‘law-and-economics’ dogmas of the kind some neo-Italian academics converted to the cult of ‘core’ efficiency currently worship (or have they recently switched to more fashionable programmes?).<sup>48</sup> Indeed, the European Commission’s ‘Action Plan’ states that ‘contractual freedom should be the guiding principle’ for codifiers.<sup>49</sup> But I must resist addressing these matters here.<sup>50</sup> The argument I have wanted to present is that Professor von Bar is pursuing a politics of supremacy by advocating (without any support) the virtues of the civil-law ethos over the common law’s, by arguing (without any evidence) that the civil law has revealed more truths, and by promoting (without any data) the view that the civil law offers a richer way to live in the law.<sup>51</sup> As

<sup>45</sup> See Stephan, PB (1999) ‘The Futility of Unification and Harmonization in International Commercial Law’ (39) *Virginia Journal of International Law* 743, who argues that there is under-appreciated economic value in local (legal) specialisation and differentiation.

<sup>46</sup> Beckett, S [1938] *Disjecta* supra note 23 at 92.

<sup>47</sup> Cf Barthes, R (1957) *Mythologies* Le Seuil at 46: ‘What does it matter, *after all*, if order is a little brutal or a little blind, as long as it allows us to live cheaply?’ (‘*Qu’importe, après tout, que l’ordre soit un peu brutal ou un peu aveugle, s’il nous permet de vivre à bon marché?*’) [emphasis original].

<sup>48</sup> Even if a European civil code were to create Pareto efficiencies in cross-border law (of course, Professor von Bar does not put the point in such sophisticated terms), it remains to be seen why the Poitiers-Bordeaux and Madrid-Sevilla contracts should be subjected to the same regime as international agreements. There is more. If Professor von Bar wants to resort to rational-choice theory in support of uniformisation of law, he requires, at the very least, to demonstrate how harmonised law is efficient. See, eg, Linarelli, J (2002) ‘The Economics of Private Law Harmonization’ (96) *American Society of International Law Proceedings* 339 at 342.

<sup>49</sup> OJ 2003, C 63/01 (12 February 2003) ¶ 62.

<sup>50</sup> I will also resist the point helpfully made to me by Roy Goode, a lawyer whose knowledge of commercial law and familiarity with commercial practice I need not emphasise: given that most contract law — outside of competition law and consumer protection law, both of which are already heavily regulated by European Community law — is dispositive in character, is it not arguable that differences across national laws do not seriously trouble businesses since business people can simply vary or exclude rules they do not like? Now, what is the use of a European civil code that parties are free to vary or exclude at will? I stress that the views I express throughout this paper ought not to be attributed to Roy Goode in any way.

<sup>51</sup> Cultural totalitarianism need not be structured by the interactive dynamics of aversion. It may be prompted, for instance, by a fear of loss of identity. Anthony Giddens’s theory of subjectivity provides a

he intervenes against the common law first and foremost as a *civilian*, Professor von Bar is advancing a variation on the popular theme of 'better-law' comparison — an idea that has long forfeited intercultural and epistemological validity.<sup>52</sup> Whatever he is trying to achieve as he implements his brand of instrumentalism and managerialism in the hallowed name of 'European integration' — and whatever he is in fact achieving — Professor von Bar is most seriously reducing the space for legal pluralism on the European scene. Whatever else he is doing, Professor von Bar is imposing the civil law's 'floorplan' on the common-law tradition. Professor von Bar simply cannot sustain the view that a civil code is a kind of Being or Truth — the legal answer to the *Seinsfrage* — somehow independent from, or antecedent to, any network of historically- or culturally-constituted artefacts — a legal form that would not be integrated into any semantic network whatsoever, a legal form that would be the 'not' of that which is, that would be the 'not-culture'. Given the role that civil codes have historically played within the civil-law tradition, the idea of codification being independent of historically-specific conditions — institutional, contextual, experiential — cannot be accepted. Civil codes characteristically belong to civil-law jurisdictions and epitomise the civil law's yearning for scientificity. As Professor von Bar seeks to have a civil code adopted by the European Union, he is clearly imposing onto the common law a form — and, with it, a world-view — that the common law has deliberately eschewed and that is historically and philosophically alien to it and to its conceptions of (the merits of) unpredictability, uncontrollability, and variability.<sup>53</sup> Professor von Bar's European civil code aims to exclude the common law as a 'player' on the European stage, very much in the way 19th-century codifications excluded custom as a player. Professor von Bar purports to

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helpful explanatory framework in this respect. For Giddens, action and interaction operate on three layers: discursive consciousness (what is verbalised or easily verbalisable), practical consciousness (the habitual, routinised background awareness on the fringe of consciousness and not itself the focus of discursive attention), and the 'basic security system' (the unconscious experience or motivation intervening at the basic level of identity security): Giddens, A (1984) *The Constitution of Society* Cambridge University Press. In my experience, most civilians do not vocally express the view that the civil law is 'better' than the common law and, for this reason, that the common law must be replaced by a civil-law logic within the European Union. The situation differs, however, at the other two levels and easily translates itself into condescending or avoidance behaviour on the part of civilians vis-à-vis common-law lawyers as when a German colleague volunteers the opinion — a lamentable statement that I overheard on the occasion of a seminar at a Dutch university on 8 September 1997 — that the common law is *only* suited to rural conditions! Typically, such manifestation of impudence is experienced in silence by common-law lawyers themselves and by comparatists-as-observers. 'Good academic manners' (at least on the European side of the Atlantic) suggest that it is indecorous to call attention to this form of interaction. In fact, to bring to discursive consciousness a type of behaviour that is occurring at the level of practical consciousness or in terms of the basic security system — that is, to follow a strategy of *consciousness raising* — is liable to lead, as I have had occasion to experience on many occasions, to accusations of overreaction and misperception of the situation and, indeed, to attempts at silencing.

<sup>52</sup> For advocacy of 'better-law' comparison, see Zweigert, K and Kötz, H (1998) *An Introduction to Comparative Law* (3rd ed) Weir, T (trans) Oxford University Press at 15 and *passim*. For a decisive argument highlighting 'better-law' comparison's in-built conservatism and uncriticality (and, in effect, presenting this agenda as an instance of false consciousness), see Hill, J (1989) 'Comparative Law, Law Reform and Legal Theory' (9) *Oxford Journal of Legal Studies* 101 at 106-07.

<sup>53</sup> There is always contestation within a community, and it would be untenable to suggest, for example, that all common-law lawyers think rigorously alike on this issue. There are no pure and uncomplicated cultures. The presence of a few common-law lawyers by Professor von Bar's side may be taken to illustrate nomothetic tendencies within English legal culture expressing the view, perhaps, that for the



excommunicate the common law's particularistic conception of justice in favour of the civil law's 'universalistic' or transcendental stance. Against the background of one of the most powerful statements to have been written by a comparatist-at-law in recent years — Geoffrey Samuel's observation to the effect that at common law 'legal reasoning is a matter, not of applying pre-established legal rules as such, but of pushing outwards from the facts'<sup>54</sup> — let me briefly revisit some epistemological claims in order to appreciate how deep Professor von Bar's marginalisation of the common law's ontology, of the common law's rationality, of the common law's persistent *immediacy*, actually reaches.

Through the code, the civil law asserts that the legal reality of the case, the legal being of the case, can only lie within the language of propositions and concepts, that is, within the code itself. Thus, the code stultifies any law-making fecundity the case may hold. For the civil-law tradition, the case must not, as case, generate law; it must not produce 'jus', it cannot foster a 'law-area' (which, of course, is not to say that it does not do so *in fact*). Negated as law-maker, the case's destiny is to dissolve itself (and its self) into the figure of the code. The civil law thus favours the logic of dissolution of self into form (thereby contravening, inevitably, the logic of self). Interestingly, the 'figure' into which experience thus vanishes in the superior name of propositions and concepts shares etymological roots, through the Latin verb '*figere*', with 'fiction'. As civilians seek to efface the casualness of the case and assert a law that purports to transcend experience and circumstances, as they attempt to transcend the fragmentation wrought by facticity, they engage in a fictitious exercise. As civilians suggest a gap between the case that would be embedded in contingency and the code that would somehow transcend contingency, as they proclaim the code as 'impartial', 'dispassionate', and 'neutral', as they confine the case to what must lie beyond the letter of the law on account of its contingency, as they force the case to submit to the jurisdiction of the figure, which alone would guarantee conformity with 'impartial', 'dispassionate', and 'neutral' institutionalised values, as they proceed to institutionalise life ('*vitam instituere*', states the Digest),<sup>55</sup> civilians engage in what can only be described as a fictitious exercise. As the case is dislocated, as it is moulded, fitted, or fictionised into the code, as it is sculpted into the code — the word 'fictile', which means 'made of earth or clay, by a potter', shares common etymological roots with 'fiction' (in the sense of 'fashioning' or 'to fashion') — the elimination of facticity leads to unavoidable ficticity. Pace Professor von Bar ('*elle n'est pas au bout de ses beaux jours, la crise sujet-objet*'),<sup>56</sup> codes are not 'impartial', 'dispassionate', or 'neutral': first, no one can escape one's determinacy ('the "self" is itself always production rather than ground');<sup>57</sup> second, the technocratic form, too, is political.<sup>58</sup> The idea that the being of the case yields to the Being of the code is at best wishful thinking and probably stands

civil law to accommodate the common law's epistemology would be to fortify an orthodoxy vis-à-vis which (internal) dissent is necessary. I would strongly argue, though, that these lawyers' interest cannot be reduced to such considerations. So much is clear from my private conversations with one of them for whom the idea of 'good Europeanism', as he understands it, features as a powerful motivator.

<sup>54</sup> Samuel, G (2002) *Epistemology and Method in Law* Ashgate at 104.

<sup>55</sup> D.1.3.2.

<sup>56</sup> Beckett, S [1955] *Disjecta* supra note 23 at 147

<sup>57</sup> Spivak, GC (1988) *In Other Worlds* Routledge at 212.

<sup>58</sup> See Kennedy, Duncan (2002) 'The Political Stakes in "Merely Technical Issues" of Contract Law' (10) *European Review of Private Law* 7.

for some worse form of cognitive dissonance. The sheer fact of the matter is that a code is not any more necessary nor any more transcendent than a case. A code is, ultimately, as contingent as a case. A code fabricates a law-world. While the code and, therefore, the civil law, rest on a fiction purporting to supply a law detached from the facts, at common law, on the contrary, the casual structure is never excluded from the law. *It is* the law. The being of the case is the law and the being of the law is the case. No mediating exercise of fiction is required in order to move the case into the law. The law exists *as* the case. In the civil law, the case is but an instantiation of a pre-existing and pre-eminent code wherein it must quickly lose itself. The code thus exists in a singular connection between (perceived) essence and accident, between (perceived) metaphysical necessity and empirical, factual reality. The case must fall under the law. In the common law, the case falls to be the law.

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Consider Paul Feyerabend's observation: 'if the world is an aggregate of relatively independent regions, then any assumption of universal laws is *false* and a demand for universal laws *tyrannical*: only brute force (or seductive deception) can then bend the different moralities so that they fit the prescriptions of a single ethical system'.<sup>59</sup> Now, my argument is that, irrespective of anything else, Professor von Bar is doing irreparable violence to the common law. A European civil code, whether *jus cogens* or *jus dispositivum*, will relegate the common law, in time, to a historical footnote. As befits the kind of contrarian comparativism I advocate (according to which the skill and knowledge of comparatists and their mediating abilities express themselves in an archeology or genealogy of uncovering, in a decipherment of the poetics and politics of dwelling, and in a *re-presentation* of the rudiments of an ontology in dialogically meaningful form such as will *sustain* otherness),<sup>60</sup> it is that violent, exclusionary feature of Professor von Bar's project that I have wanted to highlight *because it is there*, no matter how much, as they continue to play the part that has been scripted for them, the nodding heads on the European scene want to ignore this reality. Professor von Bar and his friends simply cannot be hunting with the hounds and running with the fox. Professor von Bar cannot be propounding the solid virtues of conventionalised and canonised civilian orthodoxy and also be claiming credit for transcultural cosmopolitanism. To engage in an act of epistemic privileging of the kind Professor von Bar is forcefully pursuing, to prioritise the typical civilian model as relentlessly as he does can *only* mean the end of the common law's epistemic itinerary: a code's *raison d'être* is precisely to eradicate customary law and its persistent concern for detail. Once there is a code, the common law is no longer able to expand from the facts. It must become concerned with the application of pre-established legal rules in a way that is incompatible with its ontology. In the process, it must undergo an epistemological overhaul which robs it of its *authenticity*. The fact is that even though we live them simultaneously and manage to reconcile them in an obscure and private economy, civil law's nomothetism and common law's idiographism are irrevocably *irreconcilable*.<sup>61</sup> To those who continue to claim that

<sup>59</sup> Feyerabend, PK *Farewell to Reason* supra note 20 at 99 [emphasis original].

<sup>60</sup> For Bakhtin, 'dialogism is the characteristic epistemological mode of a world dominated by heteroglossia': Bakhtin, MM (1981) *The Dialogical Imagination* Holquist, M (ed) Emerson, C and Holquist, M (trans) University of Texas Press at 426.

<sup>61</sup> I adopt and adapt Derrida, J (1967) *L'écriture et la différence* Le Seuil at 427.

it is untenable to differentiate between the two legal traditions from an epistemological perspective and in terms of *mentalité*, as I do, I suggest some fieldwork. Teach at Oxford for a year. After that, teach at the Sorbonne for a year. Now, how much *métissage* in each place, actually?<sup>62</sup> Two years at Oxford followed by two years at the Sorbonne will generate even greater awareness of difference and make my point even more forcefully. The more the observer takes legal ontology seriously, the more he digs, the more he researches the matter ('what-is-the-case'), the more difference becomes unconcealed. It is like using a telescope: the more powerful the tool, the more the stars will reveal their difference from one another.<sup>63</sup> (The argument that there *should* be more *métissage* raises altogether different issues. One thing is clear though, and it is that a European civil code cannot contribute to the cause of *métissage* any more — or any differently — than did colonialism or other forms of imperial commodification of thought that sought to banish history and rule local knowledge inadmissible.)

As it lays itself down, the European civil code *ipso facto* decrees the common law to be outside of it, outside of the new European law. Literally, the common law is *outlawed*.<sup>64</sup> How can it be acceptable that, given the *presence* of diverse legal ontologies within Europe, civilians should be setting the universalising agenda for European Union law in specifically civilian terms, that is, in the *categorical* language of propositions and systems, of rules and definitions? How can a legal tradition legitimately be propounding a universal law for Europe according to its own epistemological assumptions when another legal tradition dwelling in a different law-world is also to be found within the European universe in question? I argue that the seemingly 'universal' message that the civilian programme enunciates rests, in fact, on its own particularised and localised perspective on legal knowledge. The civilian agenda is historically contingent. It follows that the universalisation that civilians are promoting for Europe is exclusionary in that it marginalises an alternative world-view *from within*: 'if there is one universal, it cannot be inclusive of difference'.<sup>65</sup> The common law is co-opted into participation in an experience from which it is simultaneously excluded: it is asked or expected to adhere to the idea of a universal law for Europe that will apply to all constituencies within the European Union, but that will not be a law with which it can identify. Never having been disproved, the common law is nonetheless required to concur with a selfhood that defines itself in opposition to it. At the same time as civilians make no effort to articulate, clarify, and authenticate common-law epistemology on its own terms, the common law is enjoined to identify *against itself*. How can one regard as an *improvement* a world in which the common law is not allowed to live an inherited existence and is denied the

<sup>62</sup> I emphasise that I do not advocate anything along the lines of 'original purity'. Evidently, all identities — including *legal* identities — are in some way syncretic.

<sup>63</sup> Tarde, G (1999) [1893] *Monadologie et sociologie* in Alliez, E (ed) *Oeuvres* Vol I Institut Synthélabo at 72: 'wherever a scholar digs beneath apparent indistinctness, he discovers a wealth of unexpected distinctions' ('partout où, sous l'indistinct apparent, un savant creuse, il découvre des trésors de distinctions inattendues').

<sup>64</sup> Anyone defending the common law would also be located outside the law, would be an outlaw, too. As one knows, outlaws enjoy little legitimacy. In a curious reversal, it is the victim of epistemic violence — the common law — that is recast as violent (outlaws *are* violent) and its defenders as polemical. How interesting, really! To argue in favour of a European civil code is not polemical. To argue against it is.

<sup>65</sup> Spivak, GC (1993) *Outside in the Teaching Machine* Routledge at 165. Cf Hamacher, W (1997) 'One 2 Many Multiculturalisms' in Weber, S (ed) *Violence, Identity, and Self-determination* Stanford University Press at 325: 'there is only one that would be one too many, which would be one and one only'.

possibility of self-actualisation? How can one regard as an *improvement* a world in which the common law is reduced to atomistic elements, which are subsequently disaggregated into modular units and reassembled through acts of calculation? How can one regard as an *improvement* a world in which the ideals that animate the common-law mind are subordinated to the civil-law will? How can one regard as an *improvement* a world in which one legal language is erased? John Merryman aptly remarks that ‘the problem of convergence is more accurately perceived as a problem of *sensitivity*, of preserving scope for that which is particular and special’.<sup>66</sup> How much *sensitivity* is being shown by Professor von Bar, then?

In a nutshell, the brand of antiparticularism advocated by Professor von Bar is, as if time had stood still, giving effect to the 19th-century view that ‘only by transcending what distinguished Swabia from Prussia, or Bavaria from Schleswig-Holstein, could Germany become, in law as in ideology, one’.<sup>67</sup> Ultimately, there is ‘the nothing new’, and one is contemplating the dreariness of *déjà vu*, the remake of an old movie on the theme of ‘empire’.<sup>68</sup> Yet, as my 2050 scenario indicates, Professor von Bar’s venture into scientific governmentality, into the written subjugation of life-in-the-law, is, in fact, doomed. The cogitator’s formalistic harnessing of legal multiplicity will founder. His homogenised, centralised, and standardised construction will collapse. His doctrinal abstraction and formal logical rationality will fall short. His blind spots will have the better of his gaze. The European civil code will not generate the *beata vita* that it is meant to create. While on autopilot, Professor von Bar fails to appreciate that systematicity has its limits, that knowledge is inherently centrifugal. Is it not the case that between the clearest rule and the facts, there will always be a moment of judgment?<sup>69</sup> Now, is it conceivable that that judgment should be disembodied, detached, and transcendent? Thus, the non-conceptual realms of experience, practice, habit, power, tradition — the code’s ‘impregnable without’<sup>70</sup> — will continue to assert themselves over and against Professor von Bar’s manically intransigent set of weapons. The life-world will refuse enclosure, will resist embalming.<sup>71</sup> Indeed, a poet, the Spanish writer Antonio Machado, aptly renders the inevitable point: ‘All the efforts of human reason tend to the elimination of [the other]. *The other does not exist*: such is rational faith, the incurable belief of human reason. Identity = reality, as if, in the end, everything must absolutely and necessarily be *one and the same*. But *the other* refuses to disappear: it subsists, it persists; it is the hard bone on which reason breaks its teeth. [There is] what might be called the incurable *otherness* from which *oneness* must always suffer’.<sup>72</sup>

<sup>66</sup> Merryman, JH (1978) ‘On the Convergence (and Divergence) of the Civil Law and the Common Law’ in Cappelletti, M (ed) *New Perspectives for a Common Law of Europe* Martinus Nijhoff at 232 [my emphasis].

<sup>67</sup> Murphy, WT (1997) *The Oldest Social Science?* Oxford University Press at 44, n 22.

<sup>68</sup> Beckett, S *Murphy* supra note 19 at 1.

<sup>69</sup> Ricoeur, P (1950) *Philosophie de la volonté* Vol I: *Le volontaire et l’involontaire* Aubier at 165.

<sup>70</sup> Beckett, S [1967] *Disjecta* supra note 23 at 152.

<sup>71</sup> The after-life of the *Uniform Commercial Code*, to return to this particular example, illustrates my point. See, eg, White, JJ and Summers, RS *Uniform Commercial Code* supra note 12 at 8-10. At 8, the authors write flatly that ‘the Uniform Commercial Code is not uniform’. In conversation, Robert Summers has remarked that in many respects interpretive divergences have been increasing with time. On occasion, he says, three different lines of authority prevail as regards the meaning of a text. This is the case despite the historical facts of strong market integration and compelling homogeneity of the common law *mentalité* across the United States.

<sup>72</sup> Machado, A (1989) ‘Juan de Mairena — Sentencias, donaires, apuntes y recuerdos de un profesor

Such, then, is Professor von Bar's aporia: while he robustly agitates in favour of the formalisation of law with a view to achieving the order of unity, his unwillingness to internalise the reality of an experience of law fundamentally at variance with his own horizon of possibilities and yet located within the universe over which he purports to rule can only be expected to generate discord. Professor von Bar 'by asserting unity denies unity'<sup>73</sup>. Arguably, the surest way to encourage renewed identity attachments is to try to suppress them. Good news for the common law, then? Yes, of course. But this is very much the kind of good news that will be too little and that will come too late. The common law will have been *de-embedded* and the chaos wrought by the neurotic illusion that legal determinacy can be achieved through codification will have been generated leaving no room for any meaningful reformatory initiative.<sup>74</sup> Now, there can be no question of suggesting that a form of life-in-the-law, such as the common law, is to be exhaustively and permanently defined by the existing practices that fashion legal being. My point is that because of the relegation of the common law to a position of debased secondariness which a European civil code will structurally (and inevitably) effectuate, no matter how imperfectly, no invigoration of the common-law tradition can realistically be expected through Professor von Bar's formulaic agenda (although, once again, the common law clearly *requires* to engage in a hermeneutical reflection upon itself). Even to the extent that a code will, in the end, mean other than what it has meant to mean, the common-law tradition will remain heterogeneous to the *order* of codification and, as such, will find itself detrimentally affected by it.<sup>75</sup>

What is needed now? Let me mark the limits of what is possible by observing that the civil law's approach to the common law is incorporated within the civil law's own ontology. Indeed, the very idea of 'relatedness' is a function of the horizon of intelligibility of the relating observer. Thus, the way in which one configure's one world — and the way in which one is configured by one's world — impact on the manner in which one relates to other possible configurations that one encounters in a context where these interactions themselves in their turn reinforce the self as it becomes the unfolding of these relations. Short of Professor von Bar, then, starting to work critically through his prejudices and assumptions, trying to see how they arose and how they became naturalised (Imogene's ballet teacher impressed on her that real learning could only begin once years of bad posturing had been unlearned), amanuenses to practitioners and marketeers and *ronds de cuir* promoting a European civil code must 'deploy a curtain of silence as rapidly as possible'.<sup>76</sup> A brief period of mourning may perhaps follow. Let Professor von Bar,

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apócrifo' in Macrí, O (ed) *Poesía y prosa* Vol IV: *Prosas completas* (1936-39) Espasa-Calpe, II at 1917 ('De lo uno a lo otro [...] *Todo el trabajo de la razón humana tiende a la eliminación del segundo término. Lo otro no existe: tal es la fe racional, la incurable creencia de la razón humana. Identidad = realidad, como si, a fin de cuentas, todo hubiera de ser, absoluta y necesariamente, uno y lo mismo. Pero lo otro no se deja eliminar: subsiste, persiste; es el hueso duro de roer en que la razón se deja los dientes [...] como si dijéramos en la incurable otredad que padece lo uno*') [emphasis original].

<sup>73</sup> Beckett, S *Proust* supra note 35 at 70.

<sup>74</sup> I am reminded, for instance, of Teubner's argument regarding the unforeseen creation of inter-discursive — and, with specific reference to law, of intra-discursive — dislocations through legal uniformisation agendas: Teubner, G 'Legal Irritants' supra note 44 *passim*.

<sup>75</sup> I owe Mitchel Lasser for raising this question with me. My answer is not necessarily his.

<sup>76</sup> Beckett, S [1932] *Disjecta* supra note 23 at 45. I make this claim (and those that follow) with my eyes

if he so wishes, mourn over the ontological incapacity of a code — even an enthroned code — to bring closure to the matter of stability of text and meaning. Let him mourn over the ontological incapacity of a code to achieve Kant's systematic unity. Let him mourn over the loss of willed transcendence. Let Professor von Bar mourn over the fact that he cannot, unlike Justinian, be 'after God, a father common to us all'.<sup>77</sup> And then? Something like a relativisation of the civil law's ontology. Something like *Gelassenheit* (which Heidegger defines as 'the abandonment of transcendental imagination').<sup>78</sup> Something like abatement of mathematics, surrender to singularity, and rehabilitation of local knowledge. Something like *Ortung* instead of *Ordnung*. Something like a politics of disappropriation — or de-civilianisation — validating the common law's entitlement to its normative, 'a-scientific' specificity, to its *habitus*. Something like a halt to the civilising and civilianising mission. Something like a suspension of *disbelief* in the common law. Something like an ethnography of (legal) difference.<sup>79</sup> Something, perhaps, like a *celebration* of the common law — or is this asking too much?

Arguably, by linking the two legal worlds, the European Union has dramatised their cognitive disconnections; propinquity has made possible a new awareness of difference.<sup>80</sup> A law for today's Europe is one that will inscribe Keats's 'negative capability', a 'quality' he regarded as 'form[ing] a Man of Achievement' and which is present 'when man is capable of being in uncertainties, Mysteries, doubts', when one is capable of operating beyond the realm of epigrammatic statements.<sup>81</sup> In 'answer [to] the call of European memory [which] dictates respect for difference, the idiomatic, the minority, the singular' — a 'responsibility towards memory, [which] is a responsibility towards the concept of responsibility itself which regulates the justice and the justness of our behaviour, of our theoretical, practical, and ethico-political decisions' — comparatists-at-law must

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wide open. In one of his recent public statements, Professor von Bar argues that the European Union requires 'a sharply-defined set of legal concepts and integral rules'. Commenting on the European Commissions's 'Action Plan' (supra note 7), he adds that 'a common frame of reference must necessarily order the legal rules it contains' so as 'to provide a coherent structure for the array of concepts [...] it invokes'. 'Coherence' is, in important ways, a matter of 'dogmatic[s]'. Sharp concepts, integral rules, necessary order, coherent structure, dogmatics: the very language of the discerning comparatist on the European scene! I refer to von Bar, C and Swann, S (2003) 'Response to the *Action Plan on European Contract Law: A More Coherent European Contract Law* (COM (2003) 63)' (11) *European Review of Private Law* 595 at 599 and 601.

<sup>77</sup> Nov.98.2.2 ('*post deum communis omnibus pater*').

<sup>78</sup> Heidegger, M (1959) *Gelassenheit* Günther Neske at 57 ('*das Sichloslassen aus dem transzendentalen Vorstellen*').

<sup>79</sup> I have stated before — and it is worth repeating here — that I am not seeking to absolutise 'difference'. As it wants to have its 'difference' acknowledged by the civil law, the common law seeks to be recognised as 'the same as' the civil law. In this sense, one notes that identity always resides, at least in part, somewhere else — and perhaps most obviously in a contrapuntal configuration. Thus, one cannot think about 'difference' without embracing its contradictory other, 'sameness'. One could also say that in the very act of differing from one another, the common-law and civil-law traditions have something *in common*. For a more detailed exploration of this theme, see Legrand, P 'The Same and the Different' supra note 2.

<sup>80</sup> This point is forcefully made in Merleau-Ponty, M (1945) *Phénoménologie de la perception* Gallimard at 216: 'There is confirmation of the other by me and confirmation of me by the other' ('*Il y a confirmation de moi par autrui et confirmation d'autrui par moi*').

<sup>81</sup> Rollins, HE (ed) (1958) [21 or 27 December 1817] *The Letters of John Keats, 1814-1821* Vol I Harvard University Press at 193.

argue for a cosmopolitan gaze that will favour innovative (and epistemologically non-hegemonic) modes of legal governance.<sup>82</sup> The civil-law and common-law discourses, each with its own rhetorical alignments and internal grammar, *must* be apprehended as reflecting discrepant and, indeed, contrapuntal ontologies or ways of being-in-the-law-world (and, of course, of ways of being-in-the-world *tout court*). The question is: how can each of them be acknowledged on its own terms so that one is not found to be doing violence to the other (and to the idea of pluralist or participatory democracy), that is, to be *terrorising* the other?<sup>83</sup> It is a question of knowing how to transform and improve the law within a historical space situated *between* or *beyond* the nomothetic and the idiographic narratives, where the nomothetic and idiographic sites of enunciation find themselves in productive tension. It is a question of negotiation of ontologies (and certainly not of the civil law moving to correct the common law's errant ways). It is, inevitably, a question of *bricolage*. In the words of Beckett, 'to find a form that accommodates the mess, that is the task of the artist [or comparatist!] now'.<sup>84</sup>

There may be a certain *grandeur* to the rhetoric of European civil codification — and, indeed, Mitchel Lasser has remarked that 'the debate over whether or not to codify probably represents the single most fundamental question of Civilian legal theory in at least the last two hundred years'.<sup>85</sup> It must be seen, though, that what is sacrificed in order to obtain *grandeur* has to do with sources of understanding like experience, custom, convention, intuition, perception, awareness. What is sacrificed also — immense opportunity costs indeed! — is human variability itself and, with it, the basic fact of mutability of conditions of legal existence. There is simply no way to establish a claim to the effect that one legal form permits a better grasp of the world than all others or is a better instrument of communication than all others. Each form, if it is operating at all, is operating well enough for some community of people. Each form, if it is being used at all, is being used by some people to interact effectively enough with others who employ the same form. Even if it is magic that a community believes in, then magic

<sup>82</sup> Derrida, J (1991) *L'autre cap* Editions de Minuit at 75-76 ('le devoir de répondre à l'appel de la mémoire européenne [...] dicte de respecter la différence, l'idiome, la minorité, la singularité') [emphasis original]; Derrida, J (1994) *Force de loi* Galilée at 45 ('Cette responsabilité devant la mémoire est une responsabilité devant le concept même de responsabilité qui règle la justice et la justesse de nos comportements, de nos décisions théoriques, pratiques, éthico-politiques').

<sup>83</sup> Lyotard, J-F (1979) *La condition postmoderne* Editions de Minuit at 103: 'Terror means the efficiency derived from the elimination or the threat of elimination of a partner out of the game of language we were playing with him. He will be silent or will assent not because he has been disproved, but because he has been threatened not to be allowed to play' ('On entend par terreur l'efficience tirée de l'élimination d'un partenaire hors du jeu de langage auquel on jouait avec lui. Il se taira ou donnera son assentiment non parce qu'il est réfuté, mais menacé d'être privé de jouer').

<sup>84</sup> Driver, TF (1961) 'Beckett by the Madeleine' (IV/3) *Columbia University Forum* at 23.

<sup>85</sup> Lasser, M (2004) *Judicial Deliberations* Oxford University Press at 147. But this thoughtful characterisation must contend with the spectacular fact of the relentless under-theorisation of the codification initiative that has manifested itself over the years. I address this issue in Legrand, P (2004) 'A Diabolical Idea' in Hartkamp, AS et al (eds) *Towards a European Civil Code* (3rd ed) Kluwer at 261-65. In this same book, one further step along the path of theoretical simplism is taken in Hondius, E 'Towards a European Civil Code' at 11: 'one might expect authors to take issue with the idea of harmonisation. These, however, with the exception of Legrand in chapter 14, seem to be absent in this volume. The conclusion must be clear: contract law is ready for codification, or at least a Restatement'. Quaere: how would this fare as a syllogism in a first-year class of rhetorics?

has, within limits, a certain efficacy within that community. I need not even argue that legal pluralism is inherently good. It is enough for me to say that legal traditions and the diversity of forms of life-in-the-law they embody remain the expression of the human capacity for choice and self-creation and, as such, deserve to be respected as incorporating a vital aspect of social existence which helps to define selfhood. Legal communities and individuals within these communities deserve to be given their historical due. They are entitled to deep-level *recognition*.<sup>86</sup> Indeed, they can demand recognition of their ontological identity but also of their *positional* identity; I have in mind, for instance, the common law's antirrhetic positioning vis-à-vis the civil law. In this sense, legal ontologies are *political* in the deepest meaning of the word. And, in the *presence* of these ontologies, Professor von Bar must answer the call of inheritance: 'We inherited a cultural structure, and we have some duty, out of simple justice, to leave that structure at least as rich as we found it'.<sup>87</sup> By what right, then, is the civil-law tradition sitting in judgment of the common-law tradition (which, through Professor von Bar, is what it is effectively doing)?<sup>88</sup> Ancestry? Sheer laws of number? Is the so-called 'new European legal culture' to be based on hegemonic behaviour asserting itself through disempowerment and disenfranchisement of alterity?<sup>89</sup> It is unfortunate, after all, that Professor von Bar does not have a penchant for quest-abandoning Romanticism. It could save him much industry, it could save us much noise. And it could save Europe from hubris. It could also make Professor von Bar look like the comparatist he so wishes to be.

Commenting on Wagner's *Parsifal*, Nietzsche thought it 'too limited', 'too christian'. The European civil code is not *Parsifal*, and I am not Nietzsche. But it is 'too limited'. And, mostly, Professor von Bar's governance tool, as it seeks to author the legal self by incarnating the sacred rules and compass of legal geometry, is 'too christian'.<sup>90</sup>

I compared Professor von Bar to my daughter. Lest it be thought that Imogene cannot ask searching questions, let me mention how, as we were walking on a Corsican beach late at night one summer, she stared at the red dot on the horizon and asked me why Mars *needed* to exist.

Well, here we are now (*'et nous voilà, ce soir'*, in Brel's words) faced with the phenomenological and phenomenal indigence of Professor von Bar's project, which

<sup>86</sup> For a general argument to the effect that assimilation represents the cardinal sin against authenticity, see generally Taylor, C (1994) 'The Politics of Recognition' in Gutmann, A (ed) *Multiculturalism* (2nd ed) Princeton University Press at 25-73. For a historical and philosophical framework, see Williams, RR (1997) *Hegel's Ethics of Recognition* University of California Press.

<sup>87</sup> Dworkin, R (1985) *A Matter of Principle* Harvard University Press at 233.

<sup>88</sup> The argument that Professor von Bar should be applauded for wresting the harmonisation agenda from a usurping European Court of Justice and for transferring it (back) to the legislative sphere strikes me as Whiggish in the extreme. The fact that this claim was made to me by an Italian academic perhaps says something about the civil-law tradition's unresolved relationship with its judges.

<sup>89</sup> I disregard the specious argument to the effect that the common law would not lose its identity even after sublation into the civil-law framework in the sense that it would maintain its identity except to say that that identity would then incorporate a civilian epistemology.

<sup>90</sup> Colli, G and Montinari, M (eds) (1980) [4 January 1878] *Nietzsche Briefwechsel* Vol II/5: *Friedrich Nietzsche Briefe: Januar 1875 - Dezember 1879* Walter de Gruyter at 300 ('zu christlich [...] beschränkt').



having failed to recognise that only in *deferring* to the non-identical can the claim to justice be redeemed, ‘forgets’ to take the ethical stance that would make discursive room for the civil law’s other-in-the-law to exist and, thus, ‘forgets’ to attest to the complexities, angularities, and nuances of our pluriversal (law-) world. Ultimately, Professor von Bar’s only hope is ‘of doing a little better the same old thing, of going a little further along a dreary road’.<sup>91</sup> But, as he pursues his programme under the hypnotic spell of rationalisation and abstraction, as he relentlessly designs an order that would be clear, homogeneous, and fixed, as he narcissistically attempts to re-create (or is it ‘wreck-create’?) the civil law’s other-in-the-law in the civil law’s own image, Professor von Bar is confirming that the other, in the end, exists conditionally only, that it is allowed to exist as long as it will resemble the self: ‘become like me and I will respect your difference’!<sup>92</sup> Such is Professor von Bar’s ethics. Civil law’s empire! Civil law’s imperial gaze! Civil code as the pinnacle of human possibility! Common law’s ontology not being taken seriously at all, being stigmatised for its (unidentified) ‘weaknesses’!<sup>93</sup>

I have said everything that I had to say about the European civil code. I have nothing to add to what I have said. ‘Whatever I said it was never enough and always too much’,<sup>94</sup> and I have nothing to add. It is now time for all those civilians who have never studied the common law in the common-law world, who have never taught the common law in the common-law world, for whom the common law is a *béance*, to dismiss my argument as ‘strident’, ‘exaggerated’, ‘extreme’, ‘conservative’, ‘reactionary’ — of course, a civil code for Europe is the epitome of a genuinely ‘cutting-edge’ idea: a code to modify other codes... hello Sisyphus! — ‘pessimistic’, ‘sceptical’, ‘destructive’ — but what if what is being destroyed is itself destructive? — ‘anti-European’, ‘caustic’, ‘lofty’, ‘disdainful’, ‘occult’, ‘ponderous’, ‘wrong’, ‘flawed’, ‘esoteric’, ‘hyperbolic’, ‘silly’, ‘blustery’, ‘insubordinate’, ‘sombre’ perhaps, ‘bad’, ‘confrontational’, ‘insane’, ‘iconoclastic’, ‘flippant’, ‘innocent’, ‘ambitious’, ‘arcane’, ‘bitter’, ‘recondite’, ‘irreverent’ (I have actually heard this one!), ‘self-serving’, ‘vacuous’, ‘sophomoric’, ‘left-leaning’, ‘right-leaning’, ‘left-wing’, ‘right-wing’, ‘extreme-left’, ‘extreme-right’, ‘wrong-headed’, ‘self-important’, ‘Cassandra-like’, and ‘full of crap’ (a ‘collegial’ observation that I overheard on the occasion of a colloquium in Paris on 23 March 2001 during the mid-afternoon interlude: *ah! ces chers collègues...*), or otherwise benighted. Civilians can ignore the fact that I am not dismissing one side of the coin (‘code’) in order simply to replace it with the other side of the coin (‘no-code’), but that through the idea of ‘enculturation of law’ I am *changing the coinage*. Civilians can haughtily brand my thesis an exaltation of difference of the postmodernist ilk (pretending to know about so-called ‘postmodernism’) and maintain that I am praising the beauty of an array of closed boxes. Civilians can also claim that not every form of diversity is to be commended (as if I were arguing that diversity always

<sup>91</sup> Beckett, S [1949] *Disjecta* supra note 23 at 139.

<sup>92</sup> See Legendre, P (2004) *Ce que l’Occident ne voit pas de l’Occident* Fayard at 60.

<sup>93</sup> Cf Barthes, R *Mythologies* supra note 47 at 165: ‘Faced with the foreigner, Order knows only two forms of behaviour which both partake in mutilation: either recognize him as clown or defuse him. In any event, the essential is to take away his history’ (*Face à l’étranger, l’Ordre ne connaît que deux conduites qui sont toutes deux de mutilation: ou le reconnaître comme guignol ou le désamorcer [...]. De toute façon, l’essentiel est de lui ôter son histoire*).

<sup>94</sup> Beckett, S (1959) [1955] *Molloy* in *The Beckett Trilogy* John Calder at 34. The translation/re-writing is by Beckett with the assistance of Patrick Bowles.

trumps every other value) and that to want everyone to embrace diversity is to impose a substantial monism (*ditto*). Civilians can then justify their feigned indifference and consequent refusal to engage with contrarian views — that is, opinions apprehended by them as frustrating, destabilising, and intolerably discerning perhaps.<sup>95</sup> After all, ‘to be really good at “doing law”, one has to have serious blind spots and a stunningly selective sense of curiosity’.<sup>96</sup> Meanwhile, the only way for comparative legal studies — specifically, for a *comparaison vagabonde* — to establish its pertinence against the historical fact of legal heteroglossia in a highly complex multicultural world remains to establish itself theoretically, which must mean at least a commitment to the idea that ‘the only fertile research is excavatory’ — and, therefore, to the construction of the disclosure of traditional and cultural data ‘always-already’ hidden within legal ontologies.<sup>97</sup> In this way, ‘estoppel’ or ‘mitigation’, for example, remain *sui generis* empirically-valid terms rooted in existential configurations of being-in-the-law-world rather than notions to be explained away in functionalist or ‘objective’ language or to be recast as ‘a codified breach of a local arrangement, organised by the knaves for the fools’.<sup>98</sup>

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I should like to close this open text not by referring to Levinas, which I could have done, but by offering an excerpt from Derrida’s (*en hommage ému, aussi*) — a kind of *Notbehelf*: ‘To keep forever attention in suspense, that is to say, alive, awake, vigilant, ready to go into any other road, to let come, lending an ear, listening to it faithfully, the other word, hanging on the breath of the other word and of the other’s word — right here where it could still seem unintelligible, inaudible, untranslatable’.<sup>99</sup>

<sup>95</sup> There is, to my knowledge, one significant exception: Zeno-Zencovich, V (1998) ‘The “European Civil Code”, European Legal Traditions and Neo-Positivism’ (4) *European Review of Private Law* 349.

<sup>96</sup> Schlag, P (1998) *The Enchantment of Reason* Duke University Press at 140.

<sup>97</sup> Beckett, S *Proust* supra note 35 at 65.

<sup>98</sup> *Id* at 67.

<sup>99</sup> Derrida, J (2003) *Béliers Galilée* at 37-38 (‘[Tenir] à jamais l’attention en haleine, c’est-à-dire en vie, éveillée, vigilante, prête à s’engager dans tout autre chemin, à laisser venir, tendant l’oreille, l’écoutant fidèlement, l’autre parole, suspendue au souffle de l’autre parole et de la parole de l’autre — là même où elle pourrait sembler encore inintelligible, inaudible, intraduisible’).

## A NOTE ON ETHICS (AGAIN)

There is the event, which occurs within a situation, which adds to a situation. This event — or this supplement — constrains one to decide on a new manner of being. One must henceforth relate to the situation according to the supplementing event. It is a matter of fidelity to the event. It is a question of moving within the situation to which this event has added while thinking through the situation according to the event. Thus, the event forces one to invent a new manner of being and of acting within the situation.<sup>100</sup>

There is the presence of the common law, which occurs within the European Union, which adds to the European Union. The presence of the common law constrains civilians to decide on a new manner of being-in-the-law. Civilians must henceforth relate to the European Union according to the presence of the common law. It is a matter of fidelity to the presence of the common law. It is a question of moving within the European Union to which the presence of the common law has added while thinking through the European Union according to the presence of the common law. Thus, the presence of the common law forces civilians to invent a new manner of being-in-the-law and of acting within the European Union.

<sup>100</sup> Badiou, A (2003) *L'éthique* Nous at 61-62. I owe this reference to Peter Goodrich.

## APPENDIX

### **Brief Remarks, Mainly for Positivists**

- i The fundamental points underlying the Treaty of Rome are that there should be an opening of economic borders within the European Union, that the member states should recognise each other's law, and that 'market citizens' should have the opportunity to select the legal regulation that best suits them. This structure, therefore, assumes difference across the legal 'systems' of the various member states.
- ii The Treaty of Rome itself accepts the presence of differences across legal 'systems' within member states, for the Treaty's concern with the harmonisation of laws expressed in Article 94 (formerly 100) acknowledges either that these differences are insurmountable or that they ought not to be fully transcended. (In this respect, the doctrine of 'direct effect' developed by the European Court of Justice arguably suffers from a legitimacy problem.) Indeed, 'harmonisation' does not connote the idea of a 'common meeting point' and certainly means neither 'uniformity' nor 'equivalence'. It does not, therefore, require any 'convergence' of national laws in order to materialise. (In fact, 'harmony' can only be present to us through the differing of the notes.) The preamble of the 1992 Treaty of European Union and Article 7 of the Protocol on subsidiarity and proportionality appended to the 1998 Treaty of Amsterdam both recognise the inevitability or value of legal pluralism as do, in effect, all European directives by conceding a national margin of appreciation to member states.
- iii The European Court of Justice, which is entrusted with the interpretation of the Treaty of Rome (as subsequently amended), has no adjudicative power to eliminate differences across the laws of the various member states, not even as regards those member states' readings of European Community law itself. According to Article 234 (formerly 177) of the Treaty, its role is strictly consultative. Once the European Court of Justice has pronounced on what it regards as the correct interpretation of European Community law, it falls to the national courts, embedded as they are in diverse legal cultures, to apply the law, including European Community law. Again, the structure of this interpretive framework shows how differences across legal 'systems' are not meant to be erased. (The European Court of Justice's proactive stance in favour of the assimilation of laws across member states, therefore, also raises a serious issue of legitimacy.)