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LEGAL TRANSPLANTS AND EUROPEAN PRIVATE LAW

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Jan Smits asked me to talk about my book *Legal Transplants*¹ specifically in the context of Pierre Legrand's critical article, "The Impossibility of "Legal Transplants"".² I am both delighted and reluctant to respond. Delighted, because a book written in 1970, published mainly to silence plus extreme disapproval, is now regarded as somehow significant. I am reluctant because I fear I will misrepresent Pierre Legrand's views as much as he misrepresents mine. I confess that in large measure I do not comprehend what he is about. I see no substance, just big words, in his article.

To begin with, I wish to state frankly that I believe his views are old-fashioned. He appears to believe that legal philosophy is the key to understanding law in society. Legal history, including comparative legal history, has little place in his scheme of things. Underlying his approach is the unspoken - yet at times almost explicit - view that law is the 'spirit of the people'. At the very least, for him a legal rule in one country expressed in exactly the same wording in another is not the same law. Context is everything. I could not agree more. Indeed from early days I have argued that a rule once transplanted is different in its new home.

I

Much about Legrand's approach and our disagreement is revealed by his statement (following Benjamin) that the word *Brot* in German means something different from the French word *pain*.³ I agree, of course, but in the context of law the point is simplistic in at least two fundamental regards.

First, *pain* in French and in France is not the same as *pain* in French and in France. For a poor village housewife 'bread' has not the same meaning as for the wealthy Parisian businessman. She has much less choice, is close to the source of supply, and bread plays a very different role in the family diet. Its role in daily life is different. I need not elaborate. But the same is true for law within a single country, even within a single town. The possession of cocaine is, let us imagine, illegal. That means one thing to the petty dealer who sees it as his sole hope of escaping from his ghetto, quite another to the recreational user, quite another to non criminals who live in the same street as the gangs, quite another to law enforcement officers. It is banal to notice that the same legal rule operates differently in two countries: it operates to different effect even within one.

Secondly, law is different from bread because in all its manifestations it is an element of the state. The state is responsible for its coming into being, for its application and for its efficacy. Bread and its consumption are much more matters of personal choice. Of course, where a written statutory law is the same within two countries, its judicial interpretation may well differ because of tradition and ways of legal thinking - that, I think, is Legrand's point. But it is no rare thing for academics to notice and pass on to practitioners the nature of these differences. The very fact that the statutory rule is the same may well cause legal thinking on it in different countries

¹First edition, Edinburgh, 1974; second edition, Athens, Ga., 1993.

²4 *Maastricht Journal of European and Comparative Law*, 1997, pp. 111 ff. As a result of my remit this paper is diffuse: it ranges from evidence of massive transplants that have taken place, to my disagreement with Pierre Legrand, to the role of codes in legal transplants, to surviving differences after codification for a multiplicity of jurisdictions, to the example of the USA. Not all of these topics can be best treated one after the other but are at times intermingled.

³'Impossibility', p. 117.

to converge.

I think I have no need to stress that I have long held that a transplanted rule is not the same thing as it was in its previous home.⁴ Nor need I stress my long-held view that it is rules - not just statutory rules - institutions, legal concepts, and structures that are borrowed, not the 'spirit' of a legal system. Rules, institutions, concepts, and structures might almost be termed tangibles, can easily be reduced to writing, and are accessible.

II

Next, on Pierre Legrand and his differences with me. I come to his concluding section § 10, 'Comparative Legal Studies Otherwise'.⁵ He has dismissed 'legal transplants', and this is his alternative approach. He begins:

The ethics of comparative analysis of law lie elsewhere. Comparative legal study is best regarded as the hermeneutic explication and mediation of different forms of legal experience within a descriptive and critical metalanguage. Because insensitivity to questions of cultural heterogeneity fails to do justice to the situated, local properties of knowledge, the comparatist must never abolish the distance between self and other. Rather, she must allow the self to make the journey and see the other in the way he must be seen, that is, as other. The comparatist must permit the other to realize 'his vision of his world'. Defining a legal culture or tradition for the comparatist means, therefore, 'finding what is significant in [its] difference from others'. Comparison must not have a unifying but a multiplying effect: it must aim to organize the diversity of discourses around different (cultural) forms and counter the tendency of the mind toward uniformization. Comparison must grasp legal cultures *diacritically*. Accordingly, the comparatist must emphatically rebut any attempt at the axiomatization of similarity, especially when the institutionalization of sameness becomes so extravagant as to suggest that a finding of difference should lead her to start her research afresh! To quote Günter Frankenberg, '[a]nalogies and the presumption of similarity have to be abandoned for a rigorous experience of distance and difference'. I argue that comparison must involve 'the primary and fundamental investigation of difference'. The priority of alterity must act as a governing postulate for the comparatist. To privilege alterity at all times is the only way in which the comparatist can guard against the deception otherwise suggested by the similarity of solutions to given socio-legal problems across legal cultures: the fact that the same solution (say, '6') can be reached by multiplying two numbers (say, '3' and '2') or by adding two numbers (say, '5' and '1') does not entail the same operands or cognitive operations. It is the case, of course, that the success of this comparative project must depend upon an initial receptivity to the otherness of the other.

I confess I do not see any substance in this, or in what follows. In no way do I comprehend from it how understanding of law is increased, whether with regard to its development or with the relationship of law and society. I wonder who would deny that the comparatist must be aware of differences? But he must also be aware of the similarities and their causes. Among the most important causes of similarities is borrowing or transplanting; and here, as I have often stressed, the differences are also enlightening.⁶ For me the value of comparative law lies fundamentally in its capacity to explain legal developments, the relationship of law to society, and at this stage of its development - comparative law is in its infancy - the simplest way to exploit comparative law is by examining, and accounting for, similarities and differences in systems that have a historical relationship.

⁴See most recently, Alan Watson, *Law Out of Context*, Athens, Ga., 2000, p. 1.

⁵'Impossibility', pp. 123 f.

⁶For one example, now see Alan Watson, *Society and Legal Change*, Edinburgh, 1977.

III

I believe I detect a subtext in Pierre Legrand's paper: he is opposed to the notion of a common civil code for the European Union.⁷ His subtext, I think, is that a common code would be a misadventure because the law would still vary from place to place.

The law would still vary from place to place. Still, I believe it would be reasonably easy to draft a civil code for the European Union that would provide a framework for greater uniformity of private law.⁸ The lesson of comparative law is that it teaches what has been done, therefore what can be done. My greatest complaint with Pierre Legrand is that he neglects comparative legal history.

I would like to give a few examples - the merest sketch of each will suffice - to indicate what has been achieved on a grand scale by legal transplants.

I. My first example will concern one aspect of the reception of Roman law (and of canon law) in Western Europe. Naturally with the reception and with very different conditions, the *Corpus Iuris Civilis* was much modified. Still often enough, those changes were understood so much in the same way in different countries that it is possible to talk and write about *ius commune*, 'common law', that part of the law that was generally accepted in Western Europe. Indeed, a marked feature of the time, especially of the 17th century, is the appearance of editions of, or commentaries on, Justinian's elementary textbook, the *Institutes*, which also give up-to-date law. To be sure, these references to modern changes tend to stress the authors' own local law, but the books were intended for, and had, a much wider audience. I give a few instances, chosen at random.

- a) First, Natalis Chamart, *Institutiones Juris Civilis Scripti, et non Scripti collectae partim ex textu Justiniani, partim ex usu Belgii*, 'The Institutes of the Civil Law, written and unwritten, collected partly from the Text of Justinian, partly from the custom of Belgium' (Louvain, 1684). So the portions of commentary on modern law relate to the customs of 'Belgium'. What is above all striking, and is to be found in many other works, is that the space attributed to the written, Roman, law is several times greater than that given to the unwritten, existing, local custom. More was transplanted from Roman law than was not. And even a local custom was often a transplant from another's law.⁹
- b) The Saxon Samuel Strykius' (1674-1749) *Institutionum Libri Quattuor* is also garnished with notes giving the up-to-date local law. Naturally the emphasis, usually but by no means exclusively, is on the law of Saxony. Again, the discussion of local law is meager: most notes

⁷See Pierre Legrand, 'Against a European Civil Code', 60, *Modern Law Review*, 1997, pp. 44 ff. This is a position that would seem attractive to many French-Canadians as to many Scots (in the past, when the idea would have been of amalgamation with English law). As with Legrand's 'Impossibility', I find no substance in this article.

⁸Whether such greater uniformity is desirable is another issue.

⁹See, e.g., Alan Watson, *Sources of Law, Legal Change and Ambiguity*, Philadelphia, 1984, pp. 25 ff.

explain the text of Justinian. What must be emphasized is that the book circulated far outside of Saxony: indeed it is among the commonest law books of the time. For the practicing lawyer outside of Saxony, the book (and others) had a particular value: it would alert him to the fact that the Roman rule was not universally accepted, and would provide him with an argument.

- c) Ulrich Huber's *Positiones Juris, secundum Institutiones et Pandectas* (first edition, 1682) includes the modern law within the body of the text, but again the modern law occupies little space. Again, the book circulated well outside Huber's native Friesland.

Naturally, the phenomenon is not restricted to elementary textbooks. The great *Commentarius ad Pandectas* 'Commentary on the Digest', of Johann Voet (first published, 1698-1704) also brings the law up to date in the body of the text, but again the commentary contains mainly Roman law.

- II. A very different example of transplanting can be chosen from feudal law: different because the main source of propagation was not imperial legislation as with the *Corpus Iuris Civilis* but a private work. Borrowing need not be of statute law.¹⁰ Yet the mediaeval *Libri Feudorum* (Books of the Feuds) were in their own field as significant for legal development as Justinian's *Corpus Iuris Civilis*. They seem to have been a private work by Obertus de Orto, a judge of the imperial court of Milan, and composed in the first half of the 12th century. The work was followed by a second and then a third version by the famous Bolognese jurist, Hugolinus, in 1233. Their fame spread through Western Europe, they were glossed, and appear as an appendix to the *Corpus Iuris*, and were lectured on by the same scholars. Books on feudal law were extremely numerous: all, so far as I am aware, based on the *Libri Feudorum*. One quotation from many possibilities, by G. L. Boehmer (1715-1797), in his *Principia Iuris Feudalis* (Göttingen) tells us a great deal: "The sources of common German feudal law are the feudal law of the Lombards received throughout Germany, universal German feudal customs, the common law of the empire contained in imperial sanctions, in Roman and in canon law." Now, what are we to make of this? Pierre Legrand may protest as much as he likes, but this representative 18th century quotation - representative, I insist - indicates a strongly held belief that throughout the Empire feudal law was one and the same, even if not identical from one state to the next. The lesson must be that through transplants law becomes similar, even if not identical, in many jurisdictions: and that lawmakers rely heavily on foreign law for their own changes, whether as legislators, judges or jurists.

But in this section I really want to call attention to one detail that is, in the end, enlightening. The Scot, Thomas Craig, who died in 1608, wrote his *Ius Feudale* which was first published in 1655. His aim was to show the fundamental similarity of the subject in Scotland and England. Yet the book was republished in Leipzig, Saxony, more than a half-century later (1716). The editor Lüder Mencken, describes the work in the title page as *Opus in Germania Dudum Desideratum*, 'A work long longed for in Germany'. In the

¹⁰Another example would be of William Blackstone, *Commentaries on the Law of England*, which were of fundamental importance in the U.S.A.

preface he insists that the book was longed for because of its usefulness in court. Certainly, what the Saxons wanted was not the law peculiar to Scotland. But a Scottish book was valued for court practice in Saxony and elsewhere in Germany. Yet again, for Scotland, the book could be reprinted in Edinburgh in 1732. One final detail: on the title page, Mencken states that the book contains ‘not just the Lombard feudal customs, but those of England and Scotland’. For him, these were also relevant for Saxony, and his wide audience.¹¹

Feudal law may not have been - and it was not - the same throughout Western Europe, but it was much more alike because of the *Libri Feudorum* and the consequent legal transplants.

- III. A third example concerns the early history of the French *code civil* in Belgium. Belgium was annexed to France in 1797, and the French *code civil* automatically came into force on its promulgation in 1804. But when French domination ended, the *code civil* continued to be the law of Belgium. How can that be, since before the imposition of the *code civil* Belgium was a land of numerous local customs?¹² Again, a detail says it all for the effect of legal transplants. A distinguished Belgian jurist, E. R. N. Arntz, published at Brussels in 1875 - long years after the fall of Napoleon - his *Cours de Droit Civil Français*. This book was meant for a Belgian readership, but had references to some new French law. Then in 1879, Arntz published a second edition,¹³ with references to all Belgian and French law, because, he says (p. iii), of the success in France of the first edition. How can this be if legal transplants are impossible?
- IV. Until recently, Turkey was usually regarded as the most extreme example of a modern legal transplant. I will let Esin Örucü, Turkish, and law professor at both the Universities of Glasgow and Rotterdam, open the scene:

What is regarded today as the theory of ‘competing legal systems’, albeit used mainly in the rhetoric of ‘law and economics’ analysis, was the basis of the reception of laws that formed the Turkish legal system in the years 1924 - 1930. The various Codes were chosen from what were seen to be ‘the best’ in their field for various reasons. No single legal system served as the model. The choice was driven in some cases by the perceived prestige of the model, in some by efficiency and in others by chance. Choosing a number of different models may have given the borrowings ‘cultural legitimacy’ as the desire to modernise and westernise was not beholden to any one dominant culture. It would have been possible to choose Switzerland or Germany and borrow solely from one of these jurisdictions. It was instead the civil law, the law of obligations and civil procedure from Switzerland, commercial law, maritime law and criminal procedure from Germany, criminal law from Italy and administrative law from France that were chosen, translated, adapted and adjusted to solve the social and legal problems of Turkey and to fit together. Choice means taking one option as opposed to another, and the existence of choice is what differentiates a reception from an imposition. Thus, the difference between reception and imposition is related to the existence or absence of choice. On this criterion alone, the Turkish experience

¹¹My own copy of the Leipzig edition was bought in Scotland, obviously a physical ‘transplant’ and most likely before 1732. The numbering of sections in the Leipzig edition is different from those of the 1655 edition.

¹²See, above all Georges de Gheweit, *Institutions du Droit Belgique*, Lille, 1736.

¹³Brussels, Paris, 1879.

is a substantial and thorough experience in 'reception'.¹⁴

Historically, Turkish academics had most of their training in universities in the countries from where the receptions came. The fitting of all models to the Turkish situation was indeed undertaken by academics so trained. Language training and translations were extensive. In the early years of the Republic, Swiss, Austrian and German academics also contributed to the new legal system as a consequence of historical accident and thus greatly helped the imported system to take root. Professors such as Schwartz, König, Neumark and Hirsh were given sanctuary in Turkey before the Second World War and held posts in Turkish universities. Many of their Turkish assistant lecturer translators later became influential professors in their own right.¹⁵

My own interest is private law, and I wish only to insert a few details that I have treated before:

- (1) The main draftsman of the civil code, Mahmut Esad Bozkurt, had studied law in Switzerland. That was the law he knew. The general opinion of scholars is that this fact is the main reason for the choice of Swiss law for the base of the Turkish civil code.
- (2) What was borrowed was not just the Swiss codes, but their court decisions and academic opinion. What can be, and is, borrowed is not just statutory rules.
- (3) As Öricü has indicated, there was a continuing relationship between Turkish law and European codes: European professors were appointed to teach Turkish law (through interpreters); prospective Turkish legal academics (and others) studied law in continental Europe.¹⁶

V. But now we have the civil codes or drafts thereof of the states of the former Soviet Union. Ninety seven percent of the draft of book 2 of the new Armenian civil code, Obligations, is taken straight from the Russian civil code. The draft is written in Russian, not in Armenian. My understanding is that the code will come into effect only after the publication of a commentary. The Armenian commentary will be based on the Russian! How can this be? Are Russia and Armenia the same place? Have they become the same culture? Or can it be that law can be transplanted?¹⁷

VI. Finally for this paper I would like to look at one other different type of legal transplant, international sale of goods. It was long felt that transnational mercantile transactions would be greatly helped if there was a uniform contract law that crossed national borders. Thus came into force in 1988 the United Nations Convention on Contracts for the International Sale of Goods. The contract of sale was chosen because it is the most important commercial contract. The Convention when it came into force did not represent the law of any nation state. But since 1988 it has been enacted as law in 54 countries: an enormous example of a legal transplant. Of course, it may be argued that the needs of transnational business make this a special case. Of course I agree. But

¹⁴*Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition*, Deventer, 1999, Nederlandse Vereniging voor Rechtsvergelijking, 59, pp. 81 f.

¹⁵*Critical Comparative Law*, p. 84.

¹⁶For more detail, see Alan Watson, *The Evolution of Western Private Law*, Baltimore, 2001.

¹⁷See already, Alan Watson, *Ancient Law and Modern Understanding*, Athens, Ga., 1998, pp. 48 ff.

that does not alter the fact that ‘foreign’ law could be accepted in many countries. Naturally enough, it was noticed that judicial interpretation in different countries could result in different results. (I would point out though, that even by accepting the Convention the 54 countries bring their national law on the subject much closer together). A first step in harmonizing the law is to hold that domestic proceedings do not transform this Convention (and others) into domestic law, hence the domestic interpretative techniques are not applicable. This approach has been widely successful, but as yet with notable exceptions.¹⁸ The interpretation of the Convention is not uniform within the 54 countries but there is a wide measure of agreement.

I could, of course, go on and on.

IV

The twists and turns, the approaches, to law from outside that is in force in a country are so various that I wish to give yet another example. Napoleon imposed the *code civil* on the territories he conquered in the Rhineland. The Saxon, Karl Salomon Zachariae, was offered a chair at Heidelberg in 1807, and in 1808 he published his first edition of *Handbuch des französischen Civilrechts*. Zachariae did not follow the order of the *code* but has a Pandectist arrangement: The book was translated twice into French, once by G. Massy and C. Vergé (Strasbourg, 1834 - 1846), who destroyed Zachariae’s arrangement, and again by Charles Aubry and Charles Rau (Paris, 1839 - 1846, 6 vols.), who retained Zachariae’s synthetic order and augmented the work. By the time of the third edition in 1856 - 1858, Aubry and Rau’s book had ceased to be termed a translation and had become *Cours de droit français d’après l’ouvrage allemand de C.S. Zachariae*, and by the fifth edition (1897) it was Aubry and Rau, *Cours de droit civil français d’après la méthode de Zachariae*. This work became the most influential doctrinal work in nineteenth century France both on judicial decisions and on university teaching. Thus French law was imposed on parts of Germany, and as a result German legal thought permeated French law.

It then cannot surprise us that the work was published more than once in an Italian translation for use in interpreting the *codice civile*. For instance, Zachariae von Lingenthal-Croine, *Manuale del diritto civile francese*, translated with notes by L. Barassi in four volumes appeared in Milan between 1907 and 1909. In fact, translations into Italian and Spanish of works on the French code were not uncommon. Thus, for instance we have Duranton, *Corso di diritto civile secondo il codice francese* (Naples, 1832-1844) in 22 volumes.

To come finally to the idea of a single code of private law for the European Union. The drafting of such a code would be technically easy, despite political difficulties. The statutory law would then be the same for all the nations. But what about differences of interpretations? I have given several examples of the ability of the lawyers of one country to take an extreme interest in and pay great attention to the juristic opinion and judicial decisions of another country which has a related system.

V

¹⁸For a splendid modern treatment of the success in transplanting the Convention, and of the remaining difficulties see Franco Ferrari, *International Sale of Goods*, Basle, etc. 1999, (French version, *Contrat de Vente Internationale*).

Conformity of interpretation will be a problem, but one must not exaggerate. I have no doubt that legal scholars will scrutinize decisions in all of the countries of the EU. When they notice differences, they will write articles (even books) suggesting the best approach for the future. Moreover, the private law of the countries of the EU is not all that different.

Not only that, but it is possible to imagine some official system to attempt homologation. As one suggestion I would put forward a modified system of the Scottish *nobile officium*. There would be an E.U. high judicial body that did not hear appeals. But when a decision in one country seemed out of line, that body could of itself determine to look at the decisions in the various independent nations. It would issue an opinion as to what it regarded as the best approach to the interpretation of the text of the code, perhaps even supporting the aberrant decision.

VI

To conclude. I believe I have shown that massive successful borrowing is commonplace in law. Indeed, I believe I have indicated, though by example rather than by express statement, that borrowing is usually the major factor in legal change. Legal borrowing I would equate with the notion of legal transplants. I find it difficult to imagine that anyone would deny that legal borrowing is of enormous importance in legal development. Likewise I find it hard to imagine that anyone would believe that the borrowed rule would operate in exactly the way it did in its other home. What I think is significant in the context of this paper is not the identity of interpretation but the fact that identity of rule does lead to much greater similarity between the two systems. In no way should one neglect the differences. They are also fundamental in understanding how, why and when law changes, the direction of legal change, and how law develops in the society in which it operates. I would insist, contrary to what seems to be Legrand's approach in his paper, that it is not abstract legal philosophy about 'what must be' that enables us to understand the relationship of law to society, but detailed examination of law and legal change (and legal stability) in a number of systems that have been in contact. But that detailed examination is hard work.

Originally I finished my paper at the above paragraph. But I remember my remit from Jan Smits, and I would like to make two further points.

VII

First, I wish to return to Pierre Legrand. He writes: 'I do not want to caricature Watson's position.'¹⁹ But he does, so grossly that it cannot be accidental. I believe this is the result of his stated hostility to a European code. He insists that with transplants I have in mind legal rules and primarily statutory rules. He quotes my *Legal Transplants* (p. 107). He writes that I claim 'the picture that emerge[s] [i]s of continual massive borrowing [...] of rules'. My sentence actually stated 'the picture that emerged was of continual massive borrowing and longevity of rules and institutions'. I have continually over more than a quarter of a century insisted that what are borrowed and can be borrowed are legal rules, principles, institutions and even structures. One example of the last is enough: the borrowing of the structure of the Roman second century *Institutes* of Gaius by the sixth century Byzantine *Institutes* of Justinian, the dependence on Justinian of (mainly) 17th century *Institutes* of local law throughout

¹⁹'Impossibility', p. 112.

western Europe, and from there to modern civil codes.²⁰ Indeed, the notorious crux of English and American legal historians, the structure of Blackstone's *Commentaries on the Laws of England* (1765-1769), turns out to be mainly the result of Blackstone's borrowing of the flawed attempt of Dionysius Gothofredus (1549-1622) to set out the structure of Justinian's *Institutes*.²¹

[I suspect that Pierre Legrand's exaggerated emphasis on my interest in rules is because rules²² very obviously can be, and are, copied from those of another society. But this copying would not for him (I think) be a transplant because the cultural ethos of the two societies are different. If I am correct then to a large extent he and I are talking at cross-purposes, using the word 'transplant' in different senses. For me if one society copies the rules, institutions, concepts and structures of another, then it is profoundly influenced by that society's law. It is then important for an understanding of legal change and the relationship of law to society to know what rules, etc., can be copied, and with what changes either in nature or in operation. At the very least, given the enormous amount of copying or borrowing, we must admit that foreign systems are treated by lawmakers as very valuable tools for changing their own system. To repeat: for me the main value of comparative law is the insights it gives into legal change and into the relationship of law and society.]

Legrand emphasizes my insensitivity to differences, but in the very same paragraph of *Legal Transplants* that he misrepresents, I wrote (p. 107): 'the prevalence of borrowing suggested a key to understanding patterns and change. Systems related to one another through a series of borrowings might in their similarities and differences indicate the impetus to growth.' Indeed, the significance of partial acceptance, partial non-acceptance, of foreign law for understanding legal change is one of the main themes of my *Legal Transplants*.²³

Who is Legrand trying to kid?

[I would like to attempt an analogy. I am a tomato grower. I have plastic trays each with 24 small containers filled with a soil mix. Into each container I place a tomato seed, which I proceed to water and fertilize. When the plants are about six centimeters tall, I sell them. A buyer takes one, pinches it out of its container, and plants it in his yard. The plant soon stretches out its roots into the surrounding, very different soil. The purchaser fertilizes it with his own, different from mine, fertilizer. The tomato plant is in a very different ethos on which its future depends. Even the sun strikes it differently. The tomato plant may flourish or even wither. Now to put a question not considered by the Greek philosophers. Is the tomato plant the same plant as it was under my care? If I understand Pierre Legrand correctly his answer is No! There has been no transplant because transplants are impossible.]

VIII

Second, legal transplants are inevitable. Since the later Roman empire they have been a major, if not always the main, factor in legal change in the western world. England is no exception. Nor is the United States. Nor is Québec, even with its differences from the other Provinces. The real issue is whether there should be a deliberate concerted effort, spear-headed perhaps by academics, to create a common law.

²⁰See, e.g. Alan Watson, *The Making of the Civil Law*, Cambridge, Mass. 1981, pp. 62 ff.

²¹See above all Alan Watson, *Roman Law and Comparative Law*, Athens, Ga. 1991, pp. 166 ff.

²²See, e.g., 'Impossibility', pp. 111 ff.

²³See, e.g., pp. 19 f., 21 ff., 27 ff., 50 ff., 69, 71 ff., 79 ff., 82 ff., 97, 105 f.

Codification presents comparative legal historians with insights into legal development. I have mentioned Turkey and Armenia as examples of extreme borrowing from codes of other countries. But codification provides other lessons. Even within one nation where different parts of the country have different law codification can provide a very great deal of unity. Witness the great success of, and high regard for, the French *code civil* (1804) where previously in France there had been a multiplicity of local customs. Likewise the great success of the German *Bürgerliches Gesetzbuch* (1900) when many parts of the country had operated under different codifications, whether the Prussian *Allgemeines Landrecht* (1794), Saxony's *Bürgerliches Gesetzbuch für das Königreich Sachsen* (1865), or even the French *code civil*.

Diversity has its benefits,²⁴ but in law also its drawbacks. Where law in different states differ, yet are involved in some issue, which law is to be applied presents insuperable difficulties.²⁵ Yet it will be objected against a code of private law for the European Union that national pride and identity is much tied up with a system of national law. I understand. But then I would point out how much of a nation's law - rules, institutions, concepts, structures - results from borrowing. And I would observe that notions of law and legal propriety do not always coincide with national frontiers. A small farmer in the Belgian Ardennes will be closer in his legal conceptions to a small farmer in neighboring Germany than to a businessman from Brussels. It remains to add that in many areas of law parties are in large measure free to make their own arrangements that are different from the statutory law: contracts, marriage agreements, even testate succession. Such provisions can be enshrined in a common code. Not only that, but as the examples of Germany and Switzerland show, a common code may allow for local variations.

Again it will be objected that the example of the United States of America is strongly against the notion of any need for uniformity of law. Each state in the Union has its own legislature, and would be adamant against giving it up. Again I agree. But I would insist that much has already been given up for the sake of uniformity. The prime example is the *Uniform Commercial Code* which has been accepted by all of the states. I could mention many others, including the *Federal Code of Civil Procedure* which has been adopted in most jurisdictions. Certainly each state has the right to amend these laws, but a great deal of uniformity has been achieved.²⁶ Also the private body, the American Law Institute, has achieved much for uniformity with its Restatements and proposed Codes.²⁷ Certainly the remaining divergences are not generally seen as a real problem with the exception of the distinction between states

²⁴*Fromage* in French and in France is not always the same as *fromage* in French and in France. Thank God!

²⁵See most recently Friedrich Juenger, *The Problem with Private International Law*, Rome, 1999: Centro di studi e ricerche di diritto comparato e straniero; Saggi, ecc. 37.

²⁶See for some representative views of academics, Elizabeth Warren, 'Formal and Operative Rules under Common Law and Code', 30, *University of California Los Angeles Law Review*, 1983, pp. 89 ff.; Marie Louise Fellows, 'Concealing Legislative Reform in the Common-Law Tradition: The Advancements Doctrine and the Uniform Probate Code', 37, *Vanderbilt Law Review*, 1984, pp. 671 ff.; Mark D. Rosen, '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*, 1994, pp. 1119 ff.; Edward L. Rubin, 'The Code, the Consumer, and the Institutional Structure of the Common Law', 75, *Washington University Law Quarterly*, 1997, pp. 11 ff.; Glen Weissenberger, 'Evidence Myopia: The Failure to See the Federal Rules of Evidence as a Codification of the Common Law', 40, *William and Mary Law Review*, 1999, pp. 1539 ff. I thank Anne Burnett for locating these papers for me.

²⁷See, e.g., *The American Law Institute Seventy-fifth Anniversary*, Philadelphia, 1998.

that accept the concept of matrimonial property and those that do not.

Legal transplants are alive and well as they were in the time of Hammurabi.²⁸

²⁸Not later than the early 17th century B.C.: see, e.g., Alan Watson, *Legal Transplants*, pp. 22 ff.