

## Brexit. Or, Is the European Union Educable?

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In an essay from 1998 the comparative law scholar Pierre Legrand asked the question “are civilians educable?”<sup>1</sup> It was a theme that had preoccupied him for some years as he agonized over what he regarded as the intolerant, totalizing, and normalizing manner in which civilian legal systems and their acolytes encounter other legal traditions. He had documented, for example, the ways in which Quebec’s new 1994 Civil Code constructively sought to suppress and exclude the significant and historically relevant Anglophone community in Quebec.<sup>2</sup> Legrand argued that this domineering posture is a product of the civil law’s cosmological and autarkic mentality.<sup>3</sup> “The difficulty,” Legrand lamented, “is that the civil law mind ... is reflexively imperialistic ... because of its penchant for universalization.”<sup>4</sup> Far more than his disquiet over the precarious future of Quebec’s Anglophone community, Legrand came to be concerned about the fate of the English common law tradition in the face of the European Union’s convergence agenda. This was, to Legrand’s mind, an apocalyptic confrontation between England’s still-proud legal culture and Europe’s horsemen of convergence: the ECJ, the Commission, the Parliament. With increasing distress Legrand turned his attention to the way in which the European Community (and later the Union) “is liable to achieve ... the marginalization of one of the subcultures that have defined western Europe historically.”<sup>5</sup> He would go on to insist that “European legal systems are not converging” and to raise ever-more strident objections to the idea of a European civil code.<sup>6</sup> This would not cease until Legrand had written “Antivonbar,” an incendiary manifesto aimed at salvaging the English common law from

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<sup>1</sup> Pierre Legrand, *Are Civilians Educable?*, 18 *LEGAL STUDIES* 216 (1998).

<sup>2</sup> Pierre Legrand, *Civil Codes and the Case of Quebec: Semiotic Musings Around an Ancient Aigu*, in *CONSCIENCE, CONSENSUS, & CROSSROAD IN LAW* 195 (Roberta Kvelson ed., 1995).

<sup>3</sup> *Id.*

<sup>4</sup> Legrand, *supra* note 1, at 226.

<sup>5</sup> Pierre Legrand, *Codification and Politics of Exclusion: A Challenge for Comparativists*, 31 *U.C. DAVIS LAW REVIEW* 799, 803 (1998).

<sup>6</sup> Pierre Legrand, *Against a European Civil Code*, 60 *MODERN LAW REVIEW* 44 (1997).

what he viewed as the Union's closed-fisted and violent politics of supremacy, which had taken the form of the proposed European Civil Code.<sup>7</sup>

The answer to the original question—"are civilians educable?"—was that civilians could only be expected to grudgingly learn to "fail better."<sup>8</sup> Legrand explained that "any reversal or abjuration of a world-view is fantastically difficult, especially when it involves suppressing an overweening sense of superiority."<sup>9</sup> Drawing on Michael Oakeshott, Legrand concluded that civilians—as rationalists—are essentially "ineducable."<sup>10</sup>

For Legrand, this clash was about more than merely the relative strength (perhaps even survival) in Europe of what many comparatists consider to be the world's two grand legal traditions.<sup>11</sup> It was about much, much more. Legrand insisted that law—and legal traditions such as the common law and civil law—are expressions of the broader culture that they serve and out of which they emerge. In this sense, his defense of the English common law was also a defense of English culture more broadly conceived. "Ultimately," Legrand explained, "the reality of European legal convergence becomes problematic as the idea of convergence of European societies, at least from the moment one takes the issue beyond the superficial level of rules and precepts. This is because convergence of a group of legal cultures does not appear any more feasible than would convergence of the different world-views privileged by a wide range of societies."<sup>12</sup>

For Legrand, the fate of the English common law would be a measure of the ethics of the broader European project. Could Europe—in law and politics and society—bend towards "genuine intercultural dialogue, the kind of unceasing and unceasingly stimulating exchange which nurtures a reflective awareness of diversity and fosters an important measure of empathic understanding, if not (benign) admiration."<sup>13</sup> Legrand was skeptical, but he was not hopeless. Common law lawyers in Europe would have to embrace the distinctiveness of their life in the law as a good in itself. They would have to resist the

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<sup>7</sup> Pierre Legrand, *Antivonbar*, 1 JOURNAL OF COMPARATIVE LAW 13 (2006).

<sup>8</sup> *Id.* at 25.

<sup>9</sup> Legrand, *supra* note 1, at 228.

<sup>10</sup> *Id.* (quoting MICHAEL OAKESHOTT, RATIONALISM IN POLITICS 32 (1962)).

<sup>11</sup> See, e.g., JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION 1 (3<sup>rd</sup> ed. 2007).

<sup>12</sup> Pierre Legrand, *Public Law, Europeanisation, and Convergence: Can Comparatists Contribute?*, in CONVERGENCE AND DIVERGENCE IN EUROPEAN PUBLIC LAW 225, 252 (2002).

<sup>13</sup> Legrand, *supra* note 1, at 228.

pervasive suggestion that their way of doing law is inferior.<sup>14</sup> Comparative lawyers more generally would have to commit themselves to an approach that both embraces the inescapable fact of cultural particularity and fosters an “enhanced understanding of alterity.”<sup>15</sup> This would be a comparative law “that values diversity as a good and ... is prepared to affirm it as a good.”<sup>16</sup> Finally, Europeans would have to renounce the project’s strident and inflexible propensity for harmonization. Europeans would have to accept that a “good European” could offer resistance to the project’s universalizing agenda—at least when that resistance is rooted in an ethical commitment to life’s irreducible and unavoidable diversity. “In fact,” Legrand concluded, “it must be appreciated that to master, absorb and finally reduce difference to sameness just cannot make for a ‘good Europe.’”<sup>17</sup> The Europeanisation of the continental law and politics and society, Legrand said, will only “prove persuasive if it will work *through* difference.”<sup>18</sup>

Brexit—whatever else it means—offers us a troubling opportunity to consider where things now stand in relation to Legrand’s appeal for a Europe that recognizes and respects “difference in all its complex ramifications.”<sup>19</sup> The difference that was always there—in law as well as life—has now been formally ratified and reified through the British referendum. There is Britain and there is the Union, sharper and harder now, but as it has always been. The Union has heard this before, in France and Holland and Ireland and Denmark and Greece, and it has not wanted to listen. It is hearing it more loudly now in Hungary and Poland. But, even while the Union sings sweetly about the respect owed to the national communities of which it is constituted,<sup>20</sup> no one believes that it wants

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<sup>14</sup> *Id.* at 229. See MERRYMAN & PÉREZ-PERDOMO, *supra* note 10, at 3. But see Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Schleier & Robert Vishny, *Law and Finance*, 106 JOURNAL OF POLITICAL ECONOMY 1113 (1998); Rafael La Porta, Florencio Lopez-de-Silanes, & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 JOURNAL OF ECONOMIC LITERATURE 285 (2008). *Contra* Ralf Michaels, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law*, 57 AMERICAN JOURNAL OF COMPARATIVE LAW 765 (2009).

<sup>15</sup> Legrand, *supra* note 1, at 228. Comparative lawyers may have an outsized role in the European project. See, e.g., Koen Lenaerts, *Interlocking Legal Orders in the European Union and Comparative Law*, 52 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 873 (2003).

<sup>16</sup> *Id.* at 229.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 230.

<sup>20</sup> See, e.g., Article 4(2), Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, October 26, 2012, O.J. (C 326/01) (“The Union shall respect the equality of Member States

anything other than a distinct European identity, drawing on a particular European society, for a discrete and cohesive European economy, law and politics. European unity is the teleology and “an ever closer union among the peoples of Europe” is its method.<sup>21</sup> The reasons for wanting *this kind* of Europe are so varied and fluid that it is hard to assess them. But they strike me as sadly reactive: European unity as a *reaction* to European bellicosity; European unity as a *reaction* to the newly globalized, borderless world-order; European unity as a *reaction* to the loss of geo-political standing relative to big powers such as the United States, but also China. I least like the offer of European unity as a *reaction* to the crises stirred by steps taken to fashion European unity. This is not an affirmative vision. But it might have been: Europe as a framework within which the continent’s rich—oh so very rich—multi-valence and plurality would be fostered and celebrated.<sup>22</sup> “Divided we stand,” perhaps. Or “*E pluribus unum*,” if that catchy motto had not already been taken. It is tempting to say that this “sum of the parts” approach would have precluded Europe’s many remarkable achievements. But if Brexit can happen—not to mention the roiling refugee crisis and the never-ending debt crisis and southern Europe’s lost generation—maybe those achievements were only ephemeral. Maybe they came at the price of cutting off Europe’s nose to spite its face. Sometimes less really is more, especially if it is confidently and securely rooted in a realizable and realistic consensus. No one really cares exactly how high Icarus was able to fly. It is his crashing into the sea that we all remember. Would a “lesser” Europe—albeit a Europe animated by the dream of validating and actualizing the diversity of the 28—have been able to turn the Leave’s 52 percent into the Remain’s 48 percent? Legrand pointed us to James Tully, who observed that “the suppression of cultural difference in the name of uniformity and unity is one of the leading causes of civil strife, disunity and dissolution today.”<sup>23</sup>

One troubling reason why Europe has taken another path, even if it led through “unity” to Brexit, is that Europe’s most vigorous and convinced advocates have a not-widely-shared disregard for nations and national cultures and national identities. These Europeans are the anti-patriots of a hoped-for supra-national new world order. Their distance from or disdain for any national identity frees them to aspire to and work for a unified supra-national Europe. Indeed, it may compel them to do so. What else do they have to call

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before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.”).

<sup>21</sup> See, e.g., Article 1, Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, October 26, 2012, O.J. (C 326/01).

<sup>22</sup> Remember Article 4(2) of the Consolidated Treaties?

<sup>23</sup> Legrand, *supra* note 1, at 229 (quoting JAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY 197 (1995)).

home? Particularly in Europe, there may be some convincing historical reasons for this stance, but I do not want to resolve the normative debate here. Instead, I want to remark on how unusual this perspective is. Identification with one's country is the global norm. Europe's European unifiers are a radical exception. The World Values Survey obtained results from 97 countries to the query: "How proud are you to be [*substitute your own nationality*]?" In 69 of the countries a majority of respondents said they were "very proud."<sup>24</sup> This result includes nearly 70 percent of Indians,<sup>25</sup> the world's second most populous country.<sup>26</sup> This should be emphasized: nearly twice as many Indians alone express a strong identification with their state than there are Europeans altogether.<sup>27</sup> Large majorities share this sentiment in the world's third and fourth largest countries as well.<sup>28</sup> And the world's most populous country? China is not covered by the survey, but research has repeatedly confirmed "a rising tide of nationalism" in China, especially "amongst China's young university students in urban areas."<sup>29</sup> In a result that eerily points to the outcome of the Brexit referendum, half of the British surveyed said they were "very proud to be British."<sup>30</sup> It is true that ten European Union Member States find themselves in the small minority of nations about which fewer than 50 percent of their citizens express this kind of patriotism.<sup>31</sup> But it is really only France and Germany—the Union's old engine—where this post-national impulse reaches anything like a firm social consensus. Lots of people, all across the Union, still strongly cling to their national identity. Spain stirs considerable patriotism in its citizens—despite all the tension between its regions.<sup>32</sup> Austria, in another (somewhat older) world survey of national pride, ranks fourth, closely

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<sup>24</sup> Karlyn Bowman *et al.*, *Polls on Patriotism*, AMERICAN ENTERPRISE INSTITUTE 22-23 (June 2015), available at [https://www.aei.org/wp-content/uploads/2015/06/Bowman\\_Public-Opinion-Study\\_Patriotism\\_2015.pdf](https://www.aei.org/wp-content/uploads/2015/06/Bowman_Public-Opinion-Study_Patriotism_2015.pdf).

<sup>25</sup> *Id.*

<sup>26</sup> See *Country Comparison – Population*, CIA WORLD FACTBOOK, available at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html>

<sup>27</sup> *Id.*

<sup>28</sup> Fifty-six percent of Americans are "very proud" of their country (out of a population of 300 million). Fifty-six percent of Indonesians are "very proud" of their country (out of a population of 235 million).

<sup>29</sup> Liqing Li, *China's Rising Nationalism and Its Forefront: Politically Apathetic Youth*, 51 CHINA REPORT 311, 312 (2015) (citing a number of studies).

<sup>30</sup> Bowman, *supra* note 23.

<sup>31</sup> Slovenia (49%), Romania (43%), Hungary (43%), Italy (41%), Sweden (40%), Bulgaria (39%), France (28%), Germany (24%), Estonia (21%), and the Netherlands (21%). See Bowman, *supra* note 23.

<sup>32</sup> Spain (55%). See Bowman, *supra* note 23.

following Australia, Venezuela, and the United States.<sup>33</sup> This entrenched national identification was always going to be—and Brexit seems to say that it still is—a profound barrier to European unity. This also serves as a caution against ridiculing this part of the Remain voters' motivations. Britishness—and other forms of national identity—may be nostalgic and retrograde, but it is real and it belongs to the people. As Legrand put it: “these differences are not just superficial or technical distinctions, ... they are differences which play a constituting role in shaping national and cultural identity.”<sup>34</sup> These attachments, Legrand explained, “must be apprehended as a legitimate and often vital aspect of social existence which, as [they help] to define selfhood, deserve to be respected.”<sup>35</sup> Unionists demean and dispute this widely-held *Weltanschauung* at the risk of seeing their dreams dashed any time these “national people” are allowed to speak on the matter of Europe.

Another reason might be Legrand's insight that European universalization is a product of the same comprehensive rationality that conditions the civil law's “purposeful drive toward abstract universalism.”<sup>36</sup> The same impulse for systematization and generalization, Legrand argued, have infected the “convergence agenda that animates a significant academic, bureaucratic and political constituency within the European Community.”<sup>37</sup> Europe, on these terms, consists in an epistemology that, similar to the civil law mentality, seeks to “banish particularized perceptions by ordering them into an exhaustive and categorical ... framework.”<sup>38</sup> Europe is another expression of faith in transcendental universalism. It is the Enlightenment answer to tired Romanticism. This, however, is an ethos that does not have to ask itself why alterity should bow to a totalizing universalism, which is the ultimate good in itself. This approach to integration, Legrand concluded, is merely a “variation on the theme of cultural imperialism.”<sup>39</sup> Others have reflected on the

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<sup>33</sup> See Tom W. Smith & Seokho Kim, *National Pride in Comparative Perspective: 1995/96 and 2003/04*, 18 INTERNATIONAL JOURNAL OF PUBLIC OPINION RESEARCH 127, 129 (2006).

<sup>34</sup> Legrand, *supra* note 1, at 225.

<sup>35</sup> *Id.* Legrand argued that “it is a mistake to underestimate the constitutive links between individual welfare ... and implication in cultural forms, including law, which are recognizable by participants (and which are recognized by others) as being *theirs*.” *Id.* at 226.

<sup>36</sup> *Id.* at 222.

<sup>37</sup> *Id.* at 216.

<sup>38</sup> *Id.* at 217.

<sup>39</sup> *Id.* at 226 (citing I. MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 59 (1990)).

“darker legacies” that should hound Europe’s new, more benevolent imperialist turn.<sup>40</sup> Despite the ugly evidence of past universalisms, dangling around Europe’s neck like the albatross borne by the Ancient Mariner, Europe has preferred to rationally unify and put in order the continent’s cacophonous chaos. “One can perhaps sympathize with the desire for a more orderly, circumscribed world,” Legrand conceded.<sup>41</sup> “One can perhaps relate to [the] yearning for the suppression of discord and dissension.” But the problem with convergence, Merryman warned us, “is more accurately perceived as a problem of *sensitivity*.”<sup>42</sup> We are seeing just how big the problem of a sensitivity-deficit (yes, another crippling European deficit) is in some of the reactions to the Remain voters.

Between these imposing pillars of the European unity mentality there is very little scope for the European Union to “learn” the kind of sensitive, diversity-affirming answer that can be the only appropriate response to Brexit and those in other Member States who feel profoundly linked to their nations and who will continue to bristle at attempts to subsume them into a “unifying pattern not unlike the Platonic belief in a final rational harmony.”<sup>43</sup> But if it is to survive, the European Union must find a way to learn this. Legrand pointed us towards Samuel Beckett, who said that the task of the artist now “is to find a form that accommodates the mess.”<sup>44</sup>

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<sup>40</sup> See, e.g., *Special Issue – Confronting Memories: European “Bitter Experiences” and the Constitutionalization Process: Constructing Europe in the Shadow of its Pasts*, 6 GERMAN LAW JOURNAL 245-512 (2005); *Special Issue – European Integration in the Shadow of The “Darker Legacies of Law in Europe” Europe’s Darker Pasts Revisited*, 7 GERMAN LAW JOURNAL 71-256 (2006).

<sup>41</sup> Legrand, *supra* note 7, at 25.

<sup>42</sup> Legrand, *supra* note 1, at 227 (citing J.H. Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, in *NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE* 232 (M. Cappelletti ed., 1978).

<sup>43</sup> *Id.* at 230.

<sup>44</sup> Legrand, *supra* note 7, at 35 (quoting T.F. Driver, *Beckett by the Madeleine*, 4 COLUMBIA UNIVERSITY FORUM 23 (1961)).

