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Book Review

The Struggle for European Private Law: A Critique of Codification, **Leone Niglia**, Oxford, Hart Publishing, 1st edition, 2015.

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In ‘The Struggle for European Private Law: A Critique of Codification’, Leone Niglia offers a rich and fascinating historical analysis of the development of private law in Europe as well as a powerful critique of the European harmonization efforts. According to Prof. Niglia, the recent efforts to codify private law in the form of an optional instrument (Common European Sales Law, further CESL) threaten many of the achievements of 20th century private law.

Before I turn to discuss some of the concerns raised by Prof. Niglia, let me first introduce several concepts, which are fundamental for understanding his analysis and critique. The first such concept is that of ‘living (private) law’. Private law in Europe today is not about codes and legislation only (what he calls ‘thesis’) but also, and more importantly so, about jurisprudence – adjudication and scholarship (or ‘nomos’). Prof. Niglia suggests that this institutional understanding of private law needs to be seen both as a result of political-legal struggles in the 20th century and an important achievement, which safeguards the contemporary welfarist private law.

More specifically, Leone Niglia argues that it was the ‘politicisation’ of private law during the 20th century, which has stripped civil codes in Europe of their interpretative hegemony, thus freeing private law (by which term is understood the jurisprudence, or the ‘nomos’) from the pressure to apply radically individualist ideology of bourgeois codifications. The politicization took place through three interrelated processes. First, the ideological coherence of civil codes has been eroded in the process of *constitutionalisation* of private law by allowing external (constitutional) values to penetrate private law. Second, in the process of *de-codification*, the jurisprudential forces have recognized the existence of variety of conflicting interests, which needed to be balanced in the framework of private law, undermining thus the universalist aspirations of bourgeois codifications. Third, the politicization of private law has been fueled by the advent of new *special laws*, which recognize particular concerns and power imbalances that have not previously found expression in the bourgeois codification.

The politicization of private law, later combined with Europeanisation, has led to the emergence of contemporary pluralist living law, which in terms of interpretative techniques is characterized by the articulation of private law norms through the process of ‘constitutional synthetisation’. That is to say, a technique of developing private law rules and principles through balancing conflicting material interest in the light of European and domestic constitutional values, which is a precondition for the emergence of plural, non-reified – or living – private law; private law, which aims to secure domestic welfare state commitments while at the same time incorporate European constitutional and legislative demands.

It is this socially responsible, living, private law (ie the jurisprudence in the process of ‘constitutional synthetisation’), which is at stake in the recent European attempts to shift the European private law to full harmonization, and – even more importantly according to Prof. Niglia – to codification.

Thus far the European Union has participated in the institutional framework of ‘living private law’ mainly by enacting *minimum* harmonization directives, and offering thus open standards, easily incorporated in the processes of constitutional synthesis by national (and European) courts. In the recent decade, however, the European Commission, aided by the European Parliament, changed the strategy. In particular, by means of codification, it aims to impose new discipline on jurisprudential forces, both national and European.

The turn to codification gives the Commission a useful tool to impose and expand its radically individualist, market libertarian political agenda. By choosing the form of a self-standing code, the Commission aims to discipline and constrain the processes of constitutional synthetisation and welfarist private law, foremost by tightening the interpretation back to individualist codification, and forcing the jurisprudential forces to take the ‘thesis’ (the code and its rules) once again as a main reference for their reasoning (referred to by author as ‘grammaticalism’). According to Prof. Niglia, this change will lead to the shift from ‘sociality’ narratives of the living private law to the individualist, market libertarian rethoric of the codification.

An excellent example of the hidden normativity of this European codification, Leone Niglia argues, is the scope of its ‘optionality’. CESL gives private actors an option to *choose* the private law regime, including its mandatory rules (sic!). This expansion of private choice, which embraces not only default rules but also mandatory rules, should be seen as a preamble to the Commission’s political push to privatization of private law, unfolding on the background of the scholarly debate about the ‘law market’.

Let me now offer some reflection on this compelling story, to which I at many levels subscribe. The book displays certain tension when it comes to the analysis

of the ‘power’ of codes. On the one hand, Prof. Niglia offers an institutionally nuanced analysis of the importance of the institutional framework (the jurisprudence or the ‘nomos’) for understanding what private law stands for. Simultaneously, however, the reader is confronted with a contention that codifications somehow on their own, through the power of the text itself, can discipline and constrain the ‘nomos’ (jurisprudence). Yet one may wonder if the language / text of codifications (however comprehensive) is – or has ever been – truly as powerful as Prof. Niglia seems to believe. The major lesson inherited from legal realists is the insight that rules are largely indeterminate, and offer a considerable space for various political agendas to bear on the solutions to legal questions. The CESL is furthermore overflowing with open norms and general clauses, which leave considerable space for courts’ constitutional synthetisation.

This brings me to a more important question, namely, what was the role of jurisprudence (courts and legal scholarship) in constructing the progressive, 20th century welfarist private law. In other words, I am concerned here with the relation between institutions (courts and scholarship), rules (codes and laws) and discourse (what Prof. Niglia calls ‘ethos’). If we look at the history of codification, was it the courts that were the carriers of the progressive agenda? Or was it more a broader shift in political discourse in the 20th century, linked to the rise of political power of labour, which has, so to say, ‘taken the courts with itself’, triggering the development of welfarist private law?

By the same token, if the courts are just co-travellers on the waves of a broader political, legal and economic discourse, one may speculate whether (and how long) the courts can resist a contemporary broader shift to neo-liberal political rationalities in the EU – with or without the EU codification. Paradoxically, it is the conservatism of courts, which has a century ago fueled their overt laissez faire liberalism, that today grounds the hopes for shielding some of the social justice achievements of 20th century welfarist private law.

This contemporary political expediency, however, does not warrant a straightforward endorsement of judiciary as somehow progressive forces. One can illustrate this point on the example of the ‘common law’ – a ‘living law’ par excellence. It is not accidental that the common law, which has never passed through the period of codifications, can hardly be described as ‘less liberal’ than private law in continental Europe. I believe that this paradox, if discussed in the book, would have been explained by the fact that the legitimacy of ‘living private law’, grounded on pluralist exchange and justification, must hinge in some way on the question *who* is the group to which the justification is owed.

This prompts me to suggest that there are at least two progressive features to codifications, which the author overlooks. First, in some countries, the codifications may have enlarged the community to which the justification is owed – and

thus also facilitated the uptake of social justice discourses in the 20th century. Second, codifications make clear, perhaps by accident, that private law is the product of politics rather than an artifact of natural social order, which deserves respect solely on that basis. By the same token, the destabilization of the concept of private law as somehow ‘bottom up’ and thus ‘natural’ could have paved the way for the later proliferation of special laws, marking the 20th century politicization of private law in Continental Europe.

More generally, the analysis would have profited from incorporating the analysis of common law, be it in relation to United Kingdom and its liberal private law or in relation to the United States, where the US Supreme Court in the infamous ‘Lochner’ line of cases successfully opposed the progressive legislation for almost 40 years. The history of common law then in my view warrants some caution when it comes to seeing the courts are necessarily representing progressive forces.

Finally, while I fully subscribe to the excellent analysis of the threats stemming from the changing institutional framework of European private law, ie the shift to full harmonization, one should not let pass unnoticed that CESL (or whatever is now to become of it) is a rather socially minded codification. It includes norms that further social causes, such as the protection of SMEs vis-à-vis standard contract terms, which are not necessarily present in all European jurisdictions. Some commentators have even claimed that this social justice outlook of the CESL may prevent its success (being opted for by the businesses). For this reason, a discussion of the relative importance of the changing institutional framework – as opposed to the content of substantive rules – would have made the discussion even richer.

Let me conclude by saying that Prof. Niglia book is a valuable contribution that offers a rich historical analysis of the codification phenomena and a robust critique of the current efforts in European private law, which should be read broadly by (European) private law scholars.