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Special Issue on Critical Legal Theory and European Private Law

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Editorial*

I

On 15 May 2000 the *Amsterdam Institute for Private Law* organised a seminar on 'Critical Legal Theory and European Private Law'. The main purpose of the seminar was to establish the meaning which critical legal studies, and especially Duncan Kennedy's *magnum opus*, could have for the European private law enterprise. We had therefore invited Duncan Kennedy and some of the most prominent participants in the European private law debate to discuss the political dimension of the European private law enterprise. The contributions to the seminar are published in this special issue of the *ERPL*. The seminar was an exciting experience to me and I thank all the contributors for their wonderful papers. I also gratefully thank the editorial board of the *ERPL* for allowing me, as a guest editor, to introduce you to the conference and to this special issue.

II

In 1997 Duncan Kennedy, one of the leading scholars in the critical legal studies movement and a law professor at Harvard, published his *magnum opus*: '*A Critique of Adjudication (fin de sciècle)*'.[1] In this fascinating book Kennedy convincingly demonstrates the political dimension of private law disputes.[2] In most countries, private law is administrated and developed by the courts. According to Kennedy, private law judges are important political actors, although the political role of judges is usually denied, either in good faith (naïve dreaming of separation of powers) or in bad faith (political strategy). This denial is strongest with regard to 'general private law' (contract, tort, property). In his paper at the Amsterdam seminar Kennedy convincingly argues that there are important political stakes in so-called 'technical

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1 Duncan Kennedy, *A Critique of Adjudication (fin de siècle)*, Cambridge Massachusetts 1997.

2 See also his other works, especially the international classic 'Form and Substance in Private Law Adjudication', 89 *Harv. L. Rev.* 1685, 1713-24

issues of private law'. The implication for European private law is that the debate concerning the unification of contract law (or private law) is not politically neutral either, not even for the so-called 'technical issues'. The appropriate strategy in this debate, according to Duncan Kennedy, is to compare one's own legal system with the proposed uniform law and to ask, given one's own political views, whether on balance the results under the proposed new law are likely to be generally beneficial.

During the seminar we saw a lively debate between Ugo Mattei and Pierre Legrand. Interestingly, Mattei and Legrand both accuse each other of having right-wing (conservative) political agendas and both do so while invoking critical legal studies arguments. In his paper Ugo Mattei shows how ideas borrowed from post-modern and left-wing critical legal scholarship in the process of the transplantation from the United States into the European political debate on European private law integration turn into conservative claims: against unification and in favour of the preservation of the national *status quo*. Mattei proposes, as a progressive alternative, a post-modern European civil code. Such a code should contain, on the one hand, a uniform set of mandatory rules which should govern the internal market, and, on the other, a variety of narrative default rules which should reflect the plurality of local values, styles and contexts.

In turn, Pierre Legrand points out that the historical absence of subversive critique in the civil law tradition and argues that a comparatist should fill that gap. A comparatist, in Legrand's view, should not participate in simplifying the unification project which focuses on similarities, but rather has the task of concentrating on diversity and adopting a strategy of complicating. According to Legrand, following its tradition Europe's future lies in plurality rather than in unity and 'difference is not a curse but an opportunity'. In response to his critics he explains that he is in favour of change but not any change that is regressive: a European Civil Code would 'tak[e] us right back to the nineteenth century'.

Thomas Wilhelmsson addresses the question whether the Europeanisation of private law should be systematic or fragmented. He argues that the price to be paid for a classical, systematic civil code would be too high since such a code would necessarily have a structure which reinforces party autonomy based on classical liberal (conservative) laissez-faire socio-economic values. Moreover, such a systematic code would be rigid and not sufficiently open to welfarist and other pressure for change. He therefore argues for fragmented Europeanisation. Thus EC law can even be 'a creative way to break up petrified structures of national law' and may perhaps even bring new social elements into the national legal orders.

In his paper Ewan McKendrick shows that in international contracts between multinational companies on a global market it may sometimes be difficult to locate the cultural values at stake. McKendrick makes a second point: agreeing with Duncan Kennedy (at least for difficult cases) that courts have to balance interests when resolving cases, that there is no right answer as to where to strike the balance, and that different courts do indeed strike the balance in a different place, he wonders whether the contracting parties should not be allowed to choose the jurisdiction which strikes the balance in the way in which they deem to be the most appropriate. The European or global unification of contract law would withdraw this opportunity from them.

In the next contribution Cees Maris assesses Duncan Kennedy's critique of adjudication (especially in relation to Ronald Dworkin's claims of integrity) and its implications for the European private law project. Maris suspects Kennedy of being 'a crypto-liberal who romantically denies his faith': he still believes in the rule of law, human rights, democracy and the separation of powers. In fact, Maris argues, loss of faith in metaphysical truth does not necessarily lead to scepticism concerning legal argument. Therefore, European private law can live long and happily ever after.

III

I hope that this special issue of the *European Review of Private Law* will convince those interested in the subject of European private law that the European private law enterprise can immensely benefit from critical legal scholarship. First, giving space and an audience to critical approaches may help us to open up the European private law movement which admittedly sometimes gives an unsettling impression, even in the eyes of those enthusiastically involved in the unification project, of suffocating 'closure'. Second, adopting their insights may facilitate communication with American jurists who sometimes have difficulty in following and appreciating European pre-realist dogmatism: a less formalist approach may show some of the substantive benefits of European law. Finally, and most importantly, the insights of critical legal scholars may help us to recognise, and to openly appreciate, the political stakes in the European private law debate: whether or not we want uniform private law and, if so, what it should look like are not merely technical but deeply political questions.[3] Which is good news because it calls for passionate debate, as we witnessed during the Amsterdam seminar.

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[3] See further my *The New European Legal Culture,* Kluwer, Deventer 2001. For European contract law see my 'The Principles of European Contract Law: Some Choices Made by the Lando Commission', in: M.W. Hesselink, G.J.P. De Vries, *Principles of European Contract Law; Preadviezen uitgebracht voor de Vereniging voor Burgerlijk Recht*, Deventer 2001.