

S. Soleil, *Aux origines de l'opposition entre systèmes de common law et de droit codifié, Les controverses anglo-américaines des années 1820-1835*. [Sensus iuris]. Société de législation comparée, [Paris 2021]. 371 p.

As I sat down to read Sylvain Soleil's excellent book on the origins of the oppositions between the common law and the codified law, I was reminded of meeting a Belgian Public Prosecutor in the 1990s and asking him to explain how a criminal case was filed and prosecuted in the Belgian courts. As a common law lawyer, I knew of the different civil law traditions in continental Europe and I was curious to hear from a practitioner. He was delighted to answer my questions, adding that he would prove to me that the Belgian codified law was the best system in the world. I was flabbergasted by his remark. Such implied competitiveness had never occurred to me. I was interested in understanding the different legal traditions, not in a value judgement or hierarchisation. In his book *Aux origines de l'opposition entre systèmes de common law et de droit codifié*, Sylvain Soleil goes on a quest to find the origins of this particularly polarised way to view the common law and the civil law. He asks the very pertinent question of why oppositions rather than differences tended to be at the heart of comparisons between the common law and the codified legal tradition, stressing that elements of comparison can be distinguished from one another without necessarily having to be opposed.

A professor of legal history at the University of Rennes in France, Soleil specialises in comparative history of law, history of justice and of administration. In this book he shares his interest in assessing how differences can degenerate into antinomies that are hijacked for doctrinal, ideological and political reasons. Consequently, the resulting antagonism takes on a life of its own and becomes an impediment to putting differences into perspective or to exploring them in terms of complementarities.

The historical context Soleil explores is the so-called Codification Controversy, which he places between 1820 and 1835. In his introductory chapter, he describes how two opposing camps emerged: those promoting codification, on the one hand, and those arguing in favour of the common law on the other. Each camp was convinced the system they defended was best: that the common law was genius in the light of false promises propagated by the codification movement, and that codification brings modernity as opposed to the decadence of the common law. The controversy emerged first in the United States, then in the United Kingdom, spreading ultimately to France, where the interpretation of the controversy led to the belief that the two systems were not only different but also fundamentally antagonistic. In his discussion, Soleil adopts a historical and comparative approach. He describes the Codification

Controversy in six well-researched chapters with a detailed bibliography and draws our attention to a legal historical phenomenon that could enrich lectures to students of legal history and comparative law alike.

The author asks six research questions that he deals with in six chapters respectively. The first two chapters examine how the controversy emerged and evolved in 1824 in the US and in the UK in 1826. Both open with a discussion of the institutional and doctrinal context of the two decades prior to the controversy. The various colonial influences that governed US history meant that several legal traditions were present when the codification debate first emerged in the US, most notably French law and the Louisiana codification, as well as the natural law thinking. Moreover, for many American legal thinkers, their independence from Britain validated turning away from the British model of the common law, asserting their claim of an American system in its own right (chapter 1).

In the UK the debate was not initiated, as commonly thought, by Jeremy Bentham but by James Humphreys, a young Whig barrister and law reformer who opposed the different consecutive Tory governments. Soleil argues that Humphreys' 1826 treatise ('Observations on the actual state of English laws of real property; with the outlines of a Code') outlining his proposal for a code relating to real property was used by authors such as Romilly, Hamond, Macintosh, Twiss, Uniacke and Miller as a catalyst that sparked the codification controversy, ultimately supported by Bentham. Soleil discusses both sides of the arguments. On the one hand, the proponents of a code argue for the simplicity, brevity and precision of a code with modern rules, replacing the chaotic, fragmented, archaic common law. On the other hand, those rejecting codification argue that the common law is based on tradition resulting from continued social convention and therewith allow for greater flexibility and adaptation to societal changes (chapter 2).

The third chapter discusses the role that literary and legal journals and reviews played in the dynamics of the controversy. Journals and reviews in the Anglo-American world represented a large forum through which (mis-)information could be peddled to stake out the battleground and fan the spread of the controversy. Soleil discusses how the controversy was played out in the Anglo-American specialised press, how feverish the debate and controversy became – Soleil likens it to the spread of a virus – and how this paved the way for the protagonists on both side of the argument to present the debate as antagonistic. The many illustrative examples show how powerful these tools were in spreading the controversy.

In chapter 4, Soleil discusses how the two camps referred to the continental European discourse to peddle their own agenda. By drawing on continental

European arguments, the Anglo-American protagonists widened the debate beyond the common law world and allowed for controversies to develop and continue to snowball within the controversy. This in turn hardened the divide between the two legal traditions. Proponents of the debate for and against codification also hijacked the arguments put forward by personalities, such as Justinian and Napoleon, Pailliet, Dupin, Portalis or Savigny. By referring to key figures of the codification movement such as Justinian and Napoleon, the proponents of codification demonstrate how the legal reasoning of these particular codes overcame the legal chaos that had governed the relevant societies. Opponents of codification counter-attacked by reference to Pailliet, Dupin and Portalis to show that the Napoleonic Code did not deliver the promised order, but was rapidly superseded by doctrinal shifts set out in subsequent judgments. Savigny and the German Historical School were also invoked to draw German scholars into the debate and to underline the ambition of placing the debate on a legal scientific level. The Savigny reference justified an account of the historical logic in the evolution of the common law.

In the following chapter, Soleil tracks the French interpretation of the common law. True to the generally held belief in France that it is at the helm of exporting the ultimate work of legal rationalism, namely the Code Napoleon, the common law is the subject of derogatory accounts and general ridicule in the French discourse. The same arguments in favour of codification and against the common law are repeated over and over, using Bentham's arguments as authority. To that extent, the French output on the common law does not lie in providing new or different arguments to the debate started in the US and UK. Instead, the French writings echo the controversy and fan the antagonism through the intense attacks on the common law.

In his last chapter, Soleil proposes to structure the antagonism of the codification controversy into models. He outlines how the antagonism arose from the fact that each ideology built its own worldview and framework for interpreting reality. The proponents of one ideology firmly believed in the superiority of its arguments and rejected those of the opposing ideology.

This book is a well-researched and interesting introduction to the so-called Codification Controversy of the 1820s and 1830s, the consequences of which we still live with today, though I suspect not many lawyers or legal scholars know the details of this particular phenomenon. Soleil also sheds light on how differences in viewpoints can take on their own dynamics and be turned into polarised antagonism and antimonies. He shows how the argument of one camp fuels the determination of the opposition to discredit it and to gain public opinion for their own side. Arguments from one camp become the *raison d'être* of the antagonism of the other camp, the tail increasingly wags the dog

and every stroke of putting the ball into the opposite court distances the debate from its original premises. We cannot read this excellent book without being reminded of more recent polarisation of public discourses, whether political, legal, societal or moral and of how the widespread abuse of misinformation has disastrous societal and political consequences. It leaves us wondering how much more we can learn from Soleil's observations beyond the Codification Controversy.

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