

# **The More Contract Laws Change...**

*On postmodernism and the evolution of European contract laws*

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## **Introduction**

The purpose of this thesis is to examine the foundations of some philosophical arguments against or in favour of a uniform contract law, by means of a European Civil Code. It has been argued that there should be no such universal (i.e. Euriversal) code because that would conflict with postmodern<sup>1</sup> values.<sup>2</sup> But it has also been argued that we should want a hard code precisely because of this conflict.<sup>3</sup>

In this essay it will be examined what the consequences of postmodernism are for the politico-juridical debate on whether there should be such a code. To answer this question, two sub questions arise. What is postmodernism? This question will be addressed in chapter one. It will be divided into two subcategories: what is the philosophical background of postmodernism and how does postmodernism relate to contract law.

The second question is: in what way -if any- does postmodernism help us to determine the usefulness of a European civil code for the purpose of harmonisation of contract laws? This question has already been addressed by two authors: Legrand and Mattei. Their contribution to the debate will be discussed in chapters two and three respectively.

Chapter two will examine the reasons on the basis of which Legrand argues against a European civil code. Legrand put forward several arguments, but for the sake of this thesis, we mainly look into the more philosophical arguments amongst those. These arguments point out that our opposition of a civil code should stem from postmodernism.

Chapter three discusses the reasons on the basis of which Mattei holds the opposite. Mattei holds that we should stop importing postmodernism from the lawyers of the American continent.

Chapter four relates the opinions of Legrand and Mattei to the conception of postmodernism given in chapter 1. Thus, it provides an answer the question in what way the debate on postmodernism can provide clarity in the debate on the usefulness of a European Civil Code.

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<sup>1</sup> The hyphen between post and modern is left out for legibility's sake.

<sup>2</sup> Legrand 1997.

<sup>3</sup> Mattei 2002.

# **1 The Use of Postmodernism in Civil Law**

## **1.1 Supposing that it is, what is Postmodernism?**

It is precisely the epistemic claim that things are, and that we can know about it, that is refuted by the postmodern philosophers. In that sense opponents of postmodernism find themselves in a luxury position that they can define what postmodernism is, as they, unlike their opponents, affirm the intuitively attractive epistemic claim that things are and can be known.

The following paragraphs make no attempt to choose sides by defining postmodernism. Instead this chapter considers postmodernism from the view of its proponents in paragraph 1.1.2 and contrasts that with the view of its opponents in paragraph 1.1.3. It firstly will examine the word from a historical perspective by means of an introduction into the subject in paragraph 1:1:1.

### **1.1.1 On Postmodernism, defining the indefinable**

The notion is often said to have started as an architectural concept, referring to the end of the era of functionalist straight Bauhaus-lines.<sup>4</sup> The word itself however already appeared in the 1870' s, when a painter, John Chapman, used the term for what is now known as post-impressionism.<sup>5</sup> Jean- François Lyotard introduced the concept into the philosophical canon and thereby to other realms of sciences in 1979, by his magnum opus: *La condition postmoderne*.<sup>6</sup>

"Postmodernism" became a trendy adjective at the end of the twentieth century.<sup>7</sup> Hence Featherstone quotes the Independent of 24<sup>th</sup> December 1987 by: "this word has no meaning, use it as often as possible".<sup>8</sup> Yet he immediately contrasts it with a remark in another paper over a decade earlier in August 1975: "that "[P]ostmodernism is dead" and that "post-postmodernism is now the thing".<sup>9</sup> It seems as if the opposite goes as well for any statement that is made about postmodernism. Still, despite these cynical remarks, in a thesis about the use of postmodernism by contract law theorists, a definition would be more than practical.

One such attempt of definition is found in the Routledge Encyclopedia of Philosophy under the entry postmodernism. There it is supposed that although postmodernism remains hard to define, there is consensus about two key assumptions.<sup>10</sup>

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<sup>4</sup> Hobsbawm 1994, p. 516.

<sup>5</sup> Hassan, <[http://www.ihabhassan.com/postmodernism\\_to\\_postmodernity.htm](http://www.ihabhassan.com/postmodernism_to_postmodernity.htm)>.

<sup>6</sup> Leezenberg & de Vries 2001, p. 210.

<sup>7</sup> Mattei, Di Robilant 2002, p. 31, Featherstone 1988, p. 195.

<sup>8</sup> Featherstone 1988, p. 195.

<sup>9</sup> Featherstone 1988, p. 195.

<sup>10</sup> Concise Routledge Encyclopedia of Philosophy 2000, under ' postmodernism '.

“First, the assumption that there is no common denominator -in “nature” or “truth” or “God” or “the Future”- that guarantees either the Oneness of the world or the possibility of neutral or objective thought. Second, the assumption that all human systems operate like language, being self-reflexive rather than referential systems- systems of differential function are powerful but finite, and which construct and maintain meaning and value.”<sup>11</sup>

Any postmodernist who adheres to the above definition has to confirm that definitions are nothing but social constructs. Definitions might reveal what postmodernism could be, but it does not reveal the true nature of the Postmodern, as such true natures are unknown, if they exist at all.<sup>12</sup>

Thus I am forced to relate the definition to other possible views on what postmodernism is. In the following paragraphs I'll relate authors in favour and against postmodernism to the definition of postmodernism given. By doing so, the reader can weigh the view on postmodernism of these three authors against their opponents, who -more or less- adhere to positivism. Thus, postmodernism is not defined in this section but described by different sources so that the reader of this thesis is free to distil his own idea of postmodernism, or to choose from any of the given positions, or to have no opinion on the matter at all.

### **1.1.2 Postmodernists on postmodernism**

In this paragraph I'll describe three authors who are commonly associated with postmodernism. There is a vast range of philosophers that fit into this description. Leezenberg and De Vries mention: Rorty,<sup>13</sup> Derrida,<sup>14</sup> Lyotard<sup>15</sup> but do not mention Nietzsche in relation with postmodernism. Litowitz does classify Nietzsche with this term, and apart from him Foucault, Derrida, Lyotard and Rorty.<sup>16</sup> Maris and Jacobs only mention Nietzsche, Derrida and Lyotard in the postmodern context.<sup>17</sup> In the following I will consider Rorty, Lyotard and Derrida as an overlapping consensus in the *canone* that the above authors mention, as by describing them all, this thesis would turn into a history of philosophy of the twentieth century.

#### **Rorty**

Rorty says in relation to this first definition that in contradiction with the ideals of the Enlightenment, “the Truth is not out there.”<sup>18</sup> As a consequence of this lack of a substantial Truth definition, Rorty argues (together with Wittgenstein and Davidson), that language becomes contingent.<sup>19</sup> What conclusion should follow from the idea that there is no neutral or objective notion of Truth possible? Rorty addresses several answers, which are all addressed underneath. Of these answers there is only one that Rorty finds satisfactory.

A first answer would be to conclude that nothing can be True at all, Rorty states that this would be

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<sup>11</sup> The source of this definition: the Concise Routledge Encyclopedia of Philosophy.

<sup>12</sup> Such would be very odd, as I hope to illustrate in chapter 1, as it is very un-postmodern to say that there is a true nature of the thing that can be known.

<sup>13</sup> Leezenberg & De Vries 2001, p. 202.

<sup>14</sup> Ibid. p. 206.

<sup>15</sup> Ibid. p. 209.

<sup>16</sup> Litowitz 1997, p. 14.

<sup>17</sup> Maris, Jacobs 1997, p. 322, 326.

<sup>18</sup> Rorty 1989 p. 5, 44, and Rorty 1991 p. 21, 35.

<sup>19</sup> Rorty 1989, p.22.

self-defeating, for the reason that if 'nothing is true' then that very statement is not true either.<sup>20</sup> Secondly, in the same way it is self-defeating to say that every belief is as good as any other.<sup>21</sup> If that were so then that very belief is as good as any other and it is also as good as any other belief to say that not every belief is as good as any other".<sup>22</sup> This objection goes as well for a third statement that truth is the contemporary opinion of a chosen individual or group, again because the statement itself does not survive its own truth-definition.<sup>23</sup> It appears from this statement that "truth is the contemporary opinion of a chosen individual or group", is a contemporary opinion rather than the absolute Truth. So the statement itself is also a contemporary opinion. Rorty does not say any of this. He only maintains that there is nothing to say about Truth from an independent perspective.<sup>24</sup> To say that "truth is correspondence to reality" is according to Rorty, for pragmatists such as himself: "an uncashable and outworn metaphor" Rorty's idea of the impossibility of a neutral concept of Truth coheres with the first part of the Routledge definition given in the first paragraph.

With regard to the second part of the definition, concerning texts, Rorty mentions that literary interpreters tend to take philosophy too seriously<sup>25</sup> if they think that philosophy has led to new 'results' that should be implied in their literary theories.<sup>26</sup> He then quotes Geoffrey Hartman by saying that: "Theory itself is just another text; it does not have a privileged status," and relates this remark to the impossibility of defining Truth.<sup>27</sup> A theory is not more True or less True than any other.

From this it can be concluded that although a book of James Joyce can be preferred above one of Stephen King; to say that it *simply is* 'better' is senseless. Even more so as *Ulysses* does not 'correspond more with reality' than *The Green Mile*. Rorty does not say that it is *wrong* to say that any book is better than another. That would imply a truth-definition from an independent perspective; which Rorty refutes.<sup>28</sup> Rorty does not want to endorse any definition of truth.<sup>29</sup>

He would rather say that he prefers the stylistic components or the characters of the book he prefers most. Realists would then object that these arguments of style and character are apparently the universal values of the pragmatists. Rorty refutes this argument in the strongest terms.

"The realist is [...] projecting his own habits of thought upon the pragmatist when he charges him with relativism. For the realist thinks that the whole point of philosophy is to detach oneself from any particular community and look down at it from a more universal standpoint. When he hears the pragmatist repudiating that desire for such a standpoint, he cannot quite believe it. He thinks that everyone, deep down inside, *must* want such detachment."<sup>30</sup>

Rorty thus bounces any realist objection against pragmatism by saying that the realist tries to enforce his truth conception upon the pragmatist. Lyotard considers this same realist objection by describing it as modern remnants of the enlightenment.

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<sup>20</sup> Rorty 1991, p. 23.

<sup>21</sup> Rorty explains this in his article *solidarity and objectivity*., His article: *Postmodernist bourgeois liberalism*, is a short and funny essay on how postmodernism relates to this type of relativism. Both can be found in Rorty 1991.

<sup>22</sup> Rorty 1991, p. 23.

<sup>23</sup> Rorty 1991, p. 24.

<sup>24</sup> Rorty 1991, p. 24.

<sup>25</sup> Rorty 1991, p. 78.

<sup>26</sup> Rorty 1991, p. 78.

<sup>27</sup> Rorty 1991, p. 79.

<sup>28</sup> Rorty 1991, p. 23, 24.

<sup>29</sup> Rorty 1991, p. 23, 24.

<sup>30</sup> Rorty 1991, p. 30.

## Lyotard

Lyotard maintains a similar position as Rorty does. Lyotard, in his famous *The Postmodern Condition*, held that scientific knowledge might best be considered as a discourse.<sup>31</sup> That discourse has to be legitimized, we have to know why we put our effort into it. Scientific discourses used to be legitimized by a grand narrative.<sup>32</sup> Those narratives seek legitimacy via a desired future, an Idea that should be accomplished, such as that of enlightenment or of socialism.<sup>33</sup> The Enlightenment explained the use of knowledge via universal peace. Grand narratives however, lost their credibility in a postmodern context<sup>34</sup> and sciences therefore find themselves being based on quicksand.

In *La condition postmoderne* Lyotard describes the collapse of the use of philosophy as a legitimization for sciences and arts, due to the postmodern crisis. Science has to legitimize the rules of its scientific approach. The *discourse* about this legitimisation used to be a philosophical one.<sup>35</sup> Discourses in general used to explain what is or might be objectively true and the outcome of this truth-discussion established the purpose of sciences.

According to Lyotard it is Postmodern to be unable to believe meta-narratives like that of the Enlightenment.<sup>36</sup> This inability arises from the adopted point of view that there is nothing to say about Truth and thus neither about the added value of the meta-narratives *from an independent perspective*. Lyotard rephrases this as follows:

“First of all, the speculative apparatus maintains an ambiguous relation to knowledge. It shows that knowledge is only worthy of that name to the extent that it reduplicates itself [...] by citing it's own statements in a second-level discourse (autonymy) that functions to legitimate them.”<sup>37</sup>

This claim constitutes the first part of the definition Routledge gives. Even if there is a God's eye view possible, we cannot know it.

The second part of that definition affirms that something can sensibly be said about Truth from within a linguistic construction. Lyotard confirms this in *The Postmodern Condition* by referring to the Wittgensteinian metaphor of language games.<sup>38</sup> Lyotard holds that every statement should be considered as a 'move' in such a game.<sup>39</sup> There is thus no escaping the game of language. Yet in *The differend* Lyotard relativises the success of this metaphor by saying that you don't play around with language and that in that sense there are no language games. There are stakes tied to genres of discourse.<sup>40</sup>

<sup>31</sup> Leezenberg & de Vries 2001, p. 210, Lyotard 1984, p. 3. This statement relates to the first lid of the Routledge definition.

<sup>32</sup> Lyotard 1984, p. xxiii.

<sup>33</sup> Lyotard 1984, p. 3, 4, 11.

<sup>34</sup> Leezenberg & de Vries, p. 193. Lyotard 1948, p. 38. This statement refers to the second lid of the definition., it can also be compared with the Kuhnian term paradigm, although it is subject to discussion whether Kuhn is postmodern or not.

<sup>35</sup> Lyotard 1984, p. xxiii.

<sup>36</sup> Lyotard 1984, p. xxiv, Lyotard considers this definition extremely simplified, but for mere illustrative purposes, I think it is satisfying.

<sup>37</sup> Lyotard 1984, p. 38.

<sup>38</sup> Wittgenstein did not want to define the notion of 'language game', as defining is a part of a language game. The word for Wittgenstein emphasises that speaking a language is an activity, a form of life, rather than knowing a static collection of words and grammatic rules.

<sup>39</sup> Lyotard 1984, p. 10.

<sup>40</sup> Lyotard 1983, p. 188, Rojek, Turner eds. 1998, p. 60.

As with Rorty, for Lyotard the postmodern condition does not lead to 'anything goes' relativism.<sup>41</sup> Although justice is not related to truth or universal criteria, we still can arrive at judgements, without those criteria.<sup>42</sup> Derrida embroidered on postmodernism and justice in his lecture *The Force of Law*. This lecture will be discussed in section 1.2.1. Before this can be done, Derrida is examined in general hereafter.

## Derrida

What Rorty describes in terms of truth, and Lyotard in terms of *discours*, is explained by Derrida by 'means of the 'referent' or the 'signifié'.<sup>43</sup> The notions refer to the work of the famous linguist Saussure. According to the Saussure, the linguist has to examine the system of language and thereby has to abstract from individual variations.<sup>44</sup> Saussure does this by making a distinction between the signified/referent, as the mental understanding of a word on the one hand, and the signifier, the sound, or the acoustic image on the other.<sup>45</sup> He makes this distinction because the sound and the letters that are attributed to a word are arbitrary<sup>46</sup>, with the exception of a few onomatopoeia, such as "cock-a-doodle-doo." There is no necessity that the word "dog" refers to a dog. The word could equally refer to a flower.

For Derrida is the mental concept, the referent, -unlike Saussure suggests- equally arbitrary as the sound of the word is. Derrida exemplifies this with the word *differant*<sup>47</sup>, the deliberately misspelled version of the word *different*. There is, according to Derrida, no independent access to the referent.<sup>48</sup> This is why Derrida also claims that there is nothing outside text, *il n'y a pas de hors-texte*.<sup>49</sup> Texts do not transcend from the paper to something outside that text.<sup>50</sup>

Derrida thereby affirms Kant in saying that the thing as it is, the world outside, *das Ding an sich*, to which Derrida refers to as the "transcendental signified" or the *differance*<sup>51</sup> is intrinsically unknowable. Consequentially, distinctions such as that between man and wife, or fact and value, literally and figuratively, can neither be neutral in themselves.<sup>52</sup> One such senseless distinction would have been that the word, the signifier, is secondary in Saussure's system, to the signified, original concept.<sup>53</sup> The other way round could have equally been the case, but by arguing therefore, one falls in the same trap as Saussure did by tacitly considering the signifier as secondary. And by arguing on a higher level, that distinctions are bad in general, can neither help us out, .

The most famous remark by Derrida that there is nothing outside text might seem counterintuitive in

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<sup>41</sup> Rojek, Turner eds. 1998, p. 59.

<sup>42</sup> Lyotard 1984, p. 41.

<sup>43</sup> Leezenberg & de Vries 2001, p. 208.

<sup>44</sup> Derrida 1967, p. 24.

<sup>45</sup> Derrida 1967, 21-25.

<sup>46</sup> Leezenberg & de Vries, 2001, p. 156.

<sup>47</sup> Derrida 1967, p. 38.

<sup>48</sup> Leezenberg & de Vries 2001, p. 208. Derrida 1981a, p. 4, 5, Derrida 1972, p. 10, 11.

<sup>49</sup> Derrida 1967, p. 227, the remark that there is nothing outside text, coheres with the second part of the Routledge definition.

<sup>50</sup> Leezenberg & de Vries 2001, p. 206, 207.

<sup>51</sup> Derrida 1981c, p. 4, Derrida's remark that the transcendental signified is intrinsically unknowable, refers to the first lid of the Routledge definition.

<sup>52</sup> Derrida 1967, p. 24.

<sup>53</sup> Derrida 1967, p. 78.

the first instance. Yet it points out the same that Rorty pointed out by citing Geoffrey Hartman.<sup>54</sup> A theory on what text is best, is in itself a text, on which one can write a theory that specifies which theory is best.<sup>55</sup> And that meta-theory might then be compared with other meta-theories in a meta-meta-theory. And so on and on, until the end of time and beyond. Hence Derrida concludes that there is nothing outside of text. Any metaposition can be juxtaposed by another, including this one.

As Derrida specified his opinions on the relationship of justice and postmodernism in his lecture, he will be considered in more detail in paragraph 1.2, where the non-definition I give in par. 1.1 on postmodernism is related to the field of contract law.

### **1.1.3 Non-Postmodernists on postmodernism**

So the definition in the Routledge encyclopaedia seems to be in accordance with what these authors thought about postmodernism. This still does not mean that everybody has to agree on the definition or with postmodernism itself. The first lid of the Routledge definition is, a commonplace to Misak:

“[A]most a philosophical commonplace nowadays if we reject the idea that there is an infallible source of knowledge, on which we can found our principles or beliefs.”<sup>56</sup>

Yet those who refute postmodernism, for instance in the name of Rationality,<sup>57</sup> disagree with precisely this assumption on the impossibility of Knowledge.<sup>58</sup> What do non-postmoderns think of postmodernism?

As a consequence of the anti-foundationalist<sup>59</sup> position of postmodernists, they reject positivism. Postmodernism can thus be seen as a reaction on positivism.<sup>60</sup> This goes for positivism as well as for logical positivism. The first strain was developed by Auguste Comte and maintained that science should be founded in empirical facts.<sup>61</sup> The second maintained along similar lines that there are facts that can be discovered through verification. Unlike Comte's positivism, facts are the central unit of the logical positivists to which everything can be reduced.<sup>62</sup> Comte was also a reductionist, but saw experiences as a basis of scientific knowledge.<sup>63</sup>

The postmodern position that there is no independent source of Truth stipulates that we have not got access to the Facts. Positivism on the other hand does not regard truth as problematic.<sup>64</sup> Truth corresponds with the facts; and these facts are found through science. The classical positivist idea of

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<sup>54</sup> Rorty 1991, p. 79, the same notion of Truth that Rorty has, is already argued for by Tarski, in his 1944 revolutionary article “The Semantic Theory of Truth” published also in Nye 1998, 192-213.

<sup>55</sup> Rorty 1991, p. 79.

<sup>56</sup> Misak 2000, p. 2. Yet there are still ethical foundationalists. Nussbaum tries to found human rights in universal values, and is thus unwilling to accept what Misak considers to be a commonplace. Nussbaum 1992, p. 205.

<sup>57</sup> Such as Searle and Hobsbawm do.

<sup>58</sup> Leezenberg & de Vries 2001, p. 199.

<sup>59</sup> Rorty would call it anti-foundationalist but his colleagues such as Derrida 2001, have reservations against this term.

<sup>60</sup> Leezenberg en de Vries 2001, p. 200, although it must be noted that seeing postmodernism as a reaction to something else is precisely the metaphysics of binary oppositions that Derrida is aiming against. ( Derrida 1981a, p. 5.)

<sup>61</sup> Kroes, *Inleiding Wetenschapsfilosofie*, Fac W&mw TUE, Eindhoven 1993 p. 150. Leezenberg & de Vries 2001, p. 158.

<sup>62</sup> For instance the early, logical positivist Wittgenstein: “ 1 Die Welt ist alles, was der Fall ist. 1.1 Die Welt ist die Gesamtheit der Tatsachen, nicht der Dinge.” Wittgenstein 1975, p. 12.

<sup>63</sup> Leezenberg en de Vries 2001, p. 61.

<sup>64</sup> Leezenberg & de Vries 2001, p. 158.

scientific knowledge being based on experience has been proven to be untenable.<sup>65</sup> In the same time the newer positivist ideas that are commonly associated with the Wiener Kreiss<sup>66</sup>, have been subjected to severe criticism by Popper' s questioning the demarcation between science and non-science,<sup>67</sup> by the statement of Quine and Duhem that hypotheses cannot be subjected to falsification in isolation,<sup>68</sup> and Kuhn's sketch of the history of science as a history of shifting paradigms.<sup>69</sup>

Despite the untenability of positivism, there are still philosophers who do not want to rest on their loins in face of the Quine-Duhem-statement. This resulted in anti-postmodern positions that there are facts that can be known, such as those held by Searle.<sup>70</sup>

Searle makes a distinction between "institutional facts" that depend on human agreement, and "brute" facts, "that do not depend on human institutions for their existence"<sup>71</sup>. We only need the institution of language<sup>72</sup>, but that is not so much for the fact itself but for the statement needed to state that fact.<sup>73</sup> We know these facts if we have a true representation for them. To have knowledge of something means: "to have a true representation for which we can give certain sorts of justification or evidence. It is precisely herein that it becomes obvious that Searle does not explain himself with stating these in his words "platitudes". For he defines facts as "corresponding with truth"<sup>74</sup> and truth is for Searle, "a matter of correspondence to facts"<sup>75</sup> Given the untenability of classical empirism and positivism, Searle has to explain the possibility of knowledge. He explains the possibility of this via speech acts.<sup>76</sup>

Another view that can be contrasted with the Routledge definition of postmodernism is that from Hobsbawm. In his historical classic on the 20<sup>th</sup> century he describes postmodernists as follows:

“All “postmodernists” had in common an essential scepticism about the existence of an objective reality, and/or the possibility of arriving at an agreed understanding of it by rational means. All tended to a radical relativism. All, therefore, challenged the essence of a world that rested on the opposite assumptions, namely the world transformed by science and the technology based upon it, and the ideology of progress which reflected it.”<sup>77</sup>

It appears from this quote that Hobsbawm refutes the idea that there is no independent view possible on *das Ding an sich*. Postmodernists challenge what Hobsbawm considers to be the essence of the world, as for the postmodernist, essences -if they exist- are intrinsically unknowable.

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<sup>65</sup> Leezenberg & de Vries 2001, p. 158-159, 61-63.

<sup>66</sup> Leezenberg & de Vries 2001, p. 52-55.

<sup>67</sup> Leezenberg & de Vries 2001, p. 67-74-.

<sup>68</sup> Leezenberg & de Vries 2001, p. 81-83.

<sup>69</sup> Leezenberg & de Vries 2001, p. 87-93.

<sup>70</sup> Leezenberg & de Vries 2001, p. 200.

<sup>71</sup> Searle 1995, p. 2, p. 150.

<sup>72</sup> Searle 1995, p. 2.

<sup>73</sup> Searle 1995, p. 2.

<sup>74</sup> Searle 1995, p. 8.

<sup>75</sup> Searle 1995, p. 199.

<sup>76</sup> See Stokhof 2000, p. 219-222. Stokhof remarks that Searles explanation of meaning through speech acts that are public utterances of intentional situations (mental understandings) and that the mental picture and the utterance are thus comparable with each other ; that this explanation in the end is as vulnerable against the criticism that was also made against the basic assumption of mentalism (an aspect of logical-positivism), namely that it has an individualistic vision of language, that is refuted by means of Wittgensteins language game metaphor. Stokhof 2000 p. 50, 88, 221, 243-245. It is beyond the scope of this thesis to elaborate on this subject.

<sup>77</sup> Hobsbawm 1994, p. 517.

### **1.1.4 Conclusion**

In the above I tried to describe a general consensus of the word postmodernism. I did so by relating the position of postmodern authors to the definition the Routledge Encyclopedia of Philosophy gave. Yet there is a lot to be said about this definition that can be used in defence of postmodernists but also as a defence of anti-postmodernists. Rorty is for instance often classified to be a postmodernist<sup>78</sup>, yet he does not describe himself this way. Neither does Derrida, who once admitted to be a deconstructivist but later in life admitted not to be attached to this word. Lyotard does describe himself as postmodern<sup>79</sup>, but then he defines postmodern in at least ten ways in the first chapter of *Le postmoderne expliqué aux enfants*.

It should appear from the above why it is nearly impossible to give a proper definition in the dictionary sense of postmodernism and why Hassan bloodily remarks:

“The term, let alone the concept, may thus belong to what philosophers call an essentially contested category. That is, in plainer language, if you put in a room the main discussants of the concept--say Leslie Fiedler, Charles Jencks, Jean-François Lyotard, Bernard Smith, Rosalind Krauss, Fredric Jameson, Marjorie Perloff, Linda Hutcheon, and, just to add to the confusion, myself--locked the room and threw away the key, no consensus would emerge between the discussants after a week, but a thin trickle of blood might appear beneath the sill.”<sup>80</sup>

Definitions are not a postmodern invention, as definitions rather aim to eliminate criticism about their subject than to endorse a critical attitude. Yet it can be appealed to in a pedagogical sense, as Rorty's pragmatism pointed out.<sup>81</sup> The difficulty of defining postmodernism will be a recurring theme in this thesis. It is now necessary to relate this epistemism about truth, definitions and truth-definitions to law in general and especially to contract law.

## **1.2. Postmodernism and the Law**

### **1.2.1 Force of Law**

In discussing the postmodern crisis, Lyotard never addressed any specific juridical issue. Being an aesthetic, he hardly ever addresses political issues. Derrida denies this in a series of lectures wherein he claims that a discussion on deconstruction is inherently connected to the idea of justice.<sup>82</sup>

Jurists on the other hand are increasingly interested in how postmodernism relates with their subject.<sup>83</sup> Dworkin and Kennedy are the most famous contributors to the debate on how to combine postmodernism with the imposing of laws.<sup>84</sup>

Derrida, by means of this lecture, paid attention to the field of law, like no other postmodern

<sup>78</sup> Litowitz 1997 and Hottois, Van den Bossche and Weyemberg 1994 refer to Rorty as a postmodernist. Leezenberg & de Vries 2001 too, although they denote that Rorty calls himself pragmatist instead.

<sup>79</sup> Lyotard 2001, chapter 5.

<sup>80</sup> <[http://www.ihabhassan.com/postmodernism\\_to\\_postmodernity.htm](http://www.ihabhassan.com/postmodernism_to_postmodernity.htm)>.

<sup>81</sup> See infra 1.1.2, Rorty 1991, p. 78.

<sup>82</sup> Derrida 2001, p. 57.

<sup>83</sup> Mattei, Di Robilant 2002, p. 31.

<sup>84</sup> See Maris 2002 for a clarification of Dworkin's and Kennedy's positions.

philosopher did before him in such explicit terms.<sup>85</sup> In two lectures, in front of a Critical Legal audience, he explained the origin of the force of law via the mystical founding of power. This lecture seems one wherein Derrida stresses once more to be a very fine postmodernist, yet Litowitz interprets this text totally different.<sup>86</sup>

Litowitz points out that Derrida borrows illicitly from Plato and Kant, by saying: “Surprisingly, in “Force of Law” Derrida comes very close to setting up a full-scale theory of justice and an accompanying account of law.” and a little further on: “Although I provide a lenient reading of Derrida’s lecture on law and justice, I ultimately conclude that Derrida’s conception of justice is largely problematic because it ironically carries metaphysical and epistemic claims which Derrida has elsewhere rejected.”<sup>87</sup> Litowitz rejects possible epistemical claims Derrida made, as Derrida pointed out in earlier work that such claims cannot be made.

“What, exactly, is the metaphysical and epistemic status of this “justice”? How can it be “present” in all contexts when Derrida has elsewhere said that nothing is ever fully present in and of itself.”<sup>88</sup>

Litowitz holds Derrida to be problematic as Derrida suddenly appears to have a quasi-transcendent conception of justice.<sup>89</sup> Any such transcendency would be in conflict with any earlier work of Derrida.<sup>90</sup> There are several elements that make Litowitz conclude that the text diverges from earlier work. Litowitz holds that Derrida claims that Justice, which is distinct from Law, is *not* deconstructible.<sup>91</sup> Another epistemic claim that Litowitz claims that Derrida makes, is that deconstruction can never reach a state of complete justice since justice *is* transcendent and never wholly immanent.<sup>92</sup> Litowitz further holds that Derrida holds that justice consists of three aporiae, and that it requires a commitment to traditional emancipatory ideals and the recognition of marginalized groups.

I think these remarks stand in sharp contrast with the remarks Derrida made in his lecture. The most metaphysical claim Derrida at first sight seems to make about justice is that “deconstruction is justice”<sup>93</sup> This sentence can easily be misunderstood, as if Derrida indeed has an idea on what justice *is*. In order to understand that Derrida does not mean to say any of that, the preceding sentences are of immanent importance.

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<sup>85</sup> This is a statement made on my own behalf, Derrida states in his lecture on the force of law that so many other philosophers pointed out the same.

<sup>86</sup> Not only different from my interpretation, Litowitz interpretation radically differs from the Dutch translator Rico Sneller Derrida 2001, and Barry Smart in Rojek, Turner eds. p. 60, who says that “ There can be no final word on justice, indeed that is a necessary condition of its possibility, as Derrida recognizes when he cautions that ‘one cannot speak *directly* about justice, thematize or objectivize justicem say “ this is just” and even less “I am just”, without immediately betraying justice!’”

<sup>87</sup> Both citations can be found at page 87 of Litowitz 1997.

<sup>88</sup> Litowitz 1997, p. 105.

<sup>89</sup> Litowitz 1997, p. 88.

<sup>90</sup> As Litowitz points out at Litowitz 1997, p. 89-91.

<sup>91</sup> Litowitz 1997, p. 91, the emphasis on “not” is original.

<sup>92</sup> Litowitz 1997, p. 91, the italics of the word *is*, are mine, to stress that Litowitz claims that Derrida makes an empirical claim by saying that justice *is transcendent and never wholly immanent*.

<sup>93</sup> Cornell, Rosenfeld, Carlson 1992, p. 15.

“But the paradox that I'd like to submit for discussion is the following: It is this deconstructible structure of law (*droit*), or if you prefer of justice as *droit*, that also insures the possibility of deconstruction. Justice in itself, if such a thing exists, outside or beyond law, is not deconstructible. No more than deconstruction itself, if such a thing exists.”<sup>94</sup>

Derrida emphasises twice “If such a thing exists”, thereby he admits in this quotation that he does not know what justice is, or what deconstruction is, in any metaphysical or epistemic sense. We do not *know whether* there *is* a world of the *noumena*. We cannot know what justice *an sich* looks like, supposing that it exists in the first place. Derrida affirms his anti-realist and postmodern position once more by stressing that he only supposes that such things exist when he 'describes' justice. This is typical for Derrida, as he in other works also pointed out that *l'altérité, l'autre* cannot be presupposed.<sup>95</sup> The same goes for justice and deconstruction. We can appeal to this notion but we cannot touch upon it.<sup>96</sup>

Whatever interpretation of this lecture might be correct, the interpretation-difficulties that arise on close examination of the lecture are similar to those that arise upon the examination of declared postmodernists versus declared anti-postmodernists. Some philosophers of law already dealt with the question how to say something when nothing -maybe not even this- can be said for sure. Their way of dealing with this epistemic impossibility is dealt with in the next paragraph.

### **1.2.2 Other juridical reactions to postmodernism**

Derrida is not the only one to have addressed the epistemic problems with regards to the field of law. The most well known juridical reactions to epistemic postmodernism are those of Duncan Kennedy on the one hand and that of Ronald Dworkin on the other. They neither subscribe to the idea that there is an extra-legal ultimate source for right answers.<sup>97</sup> Yet for Dworkin this is no reason to abandon the idea of righteousness at all. Dworkin does this by considering law being ascertained by human interpretation.<sup>98</sup>

“There is a better alternative: propositions of law are not simply descriptive of legal history, in a straightforward way, nor are they simply evaluative in some way divorced from legal history. They are interpretative of legal history, which combines elements of both description and evaluation but is different from both.”<sup>99</sup>

Dworkin thereby opposes himself to those who subscribe fully to the consequences of the impossibility of truth claims. This is not so much because he believes in an objective truth, but rather because he thinks that it is beneficiary for most of us to believe in objectivity.

“My point is only that when a society develops this critical attitude, which insists that its own customs and conventions are constantly vulnerable to test and revision against some higher and more independent standard, it irretrievably forfeits the convention-rooted kind of objectivity available within a less critical, simpler community.”<sup>100</sup>

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<sup>94</sup> Cornell, Rosenfeld, Carlson eds. p. 14-15, the equivalent passage in the Dutch version: Derrida 2001 is found at p. 57.

<sup>95</sup> Sneller in: Derrida 2001, p. 10.

<sup>96</sup> Sneller in: Derrida 2001, p. 10, Rojek, Turner eds. 21998, p. 60.

<sup>97</sup> Dworkin 2000, p. 222, Maris 2002, p. 113.

<sup>98</sup> Maris 2002, p. 113.

<sup>99</sup> Dworkin 1982, p. 180-181.

<sup>100</sup> Dworkin 2000, p. 222.

Kennedy rejects all claims of truth, whether they correspond to a metaphysical reality or as cohering with reconstructive interpretation.<sup>101</sup> Kennedy therefore does not aim to reach further than the conclusion that there is no right answer in the end.<sup>102</sup>

“I want to be careful not to fall aporetically into the interpretation I am rejecting here. I'm not so sure that it's impossible to show -maybe someone can show- that objectivity, rationality, the subject, and representation are all impossible. I just don't think anyone has shown it so far, but I could be wrong. I've lost faith in the enterprise of trying to show it, as I have in the idea of a perpetual motion machine, in spite of the fact that I have neither a good grasp of the third law of thermodynamics nor a theory of why it's impossible to show that objectivity is impossible.”<sup>103</sup>

Yet this does not need to be the prelude to the end of reasoning. As Maris shows, Kennedy is closer to American pragmatism than to scepticism.<sup>104</sup>

“On closer inspection, he by no means sees legal reasoning as “mere rhetoric”. Reason is still alive, for Kennedy shares the pragmatist assumption that competing legal conceptions can be compared for their practical success.”<sup>105</sup>

Thus we still do not have to be sceptic about the possibility of legal arguments at all. We remain able to compare the practical success of the suggestion Legrand makes against a European Civil Code versus Mattei's idea that we should have such a code immediately, which will be done in the following two chapters.

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<sup>101</sup> Kennedy 1997, p. 348-350. Maris 2002, p. 115.

<sup>102</sup> Kennedy 1997, p. 350.

<sup>103</sup> Kennedy 197, p. 350.

<sup>104</sup> Maris 2002, p. 131.

<sup>105</sup> Maris 2002, p 131-132.

## **2 Legrand and postmodernism**

### **2.1 Introduction**

The question how postmodernism influences the debate concerning the necessity of a European Civil Code, is already addressed. Most notable in this respect is the work of Pierre Legrand. Legrand is probably the most well known jurist arguing against a European code. In an article that is suitably called: *against a European Civil Code*, he aims to defend the differences between the countries of the European Union with respect to their civil codes. He does so mainly from a philosophical -if not postmodern- point of view.

Europe, according to Legrand, is plurijural, and precisely therein lays its strength. In order to uphold his view that differences of Europe should be preserved, Legrand presents 4 reasons. Legrand argues that pleading in favour of a code is arrogant<sup>106</sup>, fallacious<sup>107</sup> backwards<sup>108</sup> and impractical.<sup>109</sup> His arguments against a European Civil Code will be discussed in the remainder of this chapter. The emphasis of discussion will be placed on the relationship of these arguments with postmodernism.

The arrogance-argument and the backwards-argument deal with postmodernism as a possible barrier for a European Civil Code and are therefore summarized in separate paragraphs, paragraph 2.2.1 and 2.2.2 respectively. The other, more pragmatical arguments are dealt with in paragraph 2.2.3. In the concluding section 2.3 Legrand arguments shall be compared with the postmodern conception of postmodernists, as discussed infra. 1.1.2.

## **2.2 Legrand versus a European Civil Code**

### **2.2.1 Arrogance**

The first part of Legrand's argument aims to show how embedded the difference between Common Law and Civil Law is in the psychology and history of Anglosaxon and the continental tradition respectively.<sup>110</sup> Law is a cultural product. The English feel uncomfortable with rigid rules, whilst the French feel a need for an emotional structure. Hence Legrand considers these two separate *mentalités* as two different *moralités*.<sup>111</sup> They are constituted in different ways and their being different is insurmountable.

Civil law and Common law, in his view, must:

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<sup>106</sup> Legrand 1997, p. 56.

<sup>107</sup> Legrand 1997, p. 58.

<sup>108</sup> Legrand 1997, p. 58.

<sup>109</sup> Legrand 1997, p. 60.

<sup>110</sup> A detailed description of the difference between the Anglosaxon Common Law and the continental Civil Law, is given in Zweigert, Kötz 1998, chapters 1-4.

<sup>111</sup> Legrand 1997, p. 47.

“be seen as two discrete epistemological formulations with the latter having elected, to borrow from Oakshott once more, not to formulate itself as rules (although the possibility to do so was technically open to it) and not to fashion itself as a system, that is, to take the road not travelled. These epistemologies are conditioned by, and constantly reinforce in their turn, deeply-embedded world- views, within the societies in which they have developed to the point where there can be found -unsurprisingly, I should think- a pattern of congruence between a legal culture and a culture tout court”.<sup>112</sup>

The radical being-different of Common Law -as opposed to Civil Law, has been a recurring theme in the work of Legrand. In *What Borges can teach us*, Legrand examines three cases wherein three English judges appear to reason from a philosophically different angle than continental judges would do.<sup>113</sup> A first difference that Legrand considers is that all judges tend to pragmatically reason towards the desired outcome.<sup>114</sup> Secondly, in all these cases Common law preferred to depict itself as a technique of dispute resolution instead of being scientific.<sup>115</sup> A third difference is that Common Law values facts rather than systemics.<sup>116</sup> A civilian -whether German, Italian, French or Swedish- can only imagine with great difficulty that adjudication *could* be approached in such terms.<sup>117</sup> Thus, Legrand reaches the conclusion that Common law pragmatism stands in contrast with the Continental formal legal systems.<sup>118</sup>

The radical and irreducible being different of the epistemological trajectory of Common Law has been accounted by Legrand in sum to be caused by 6 factors, two of which already mentioned. Other such factors are the lack of systematisation and the mere aspiration of systematisation of Common Law.<sup>119</sup> Furthermore the character of a “rule” and of “rights” differ radically from that of the civilian approach.<sup>120</sup> On top of that, the role of facts is of immanent importance to common law, whereas in civil law any trace of circumstances is eliminated and an idea or a concept is established instead.<sup>121</sup>

The above serves to explain why Legrand calls it arrogant to choose between these two different codes. If one would choose in favour of any of the two, he would thereby suggest that the one is more worthy than the other; and that that one is so superior that it should supersede<sup>122</sup>. To say that a civilian code should supersede would be to empower the drafters with the ability to construct an officialised version of reality.<sup>123</sup> The European Civil Code would limit alternative visions of social life. Legrand pleads that we should appreciate those differences, as “differences are salutary”,<sup>124</sup> and to not appreciate these differences is by suggesting that one is more worthy, is arrogant.<sup>125</sup>

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<sup>112</sup> Legrand 1997, p. 48.

<sup>113</sup> Legrand 1997, p. 67.

<sup>114</sup> Legrand 1999B, p. 67- 69.

<sup>115</sup> Legrand 1999B, p. 69. Legrand 1996, p. 64-65.

<sup>116</sup> Legrand 1999B, p. 71.

<sup>117</sup> Legrand 1999B, p. 69.

<sup>118</sup> Legrand 1999B, p. 71.

<sup>119</sup> Legrand 1996, p. 65.

<sup>120</sup> Legrand 1996, p. 67-68, 70.

<sup>121</sup> Legrand 1996, p. 68-69.

<sup>122</sup> Legrand 1997, p. 56.

<sup>123</sup> Legrand 1997, p. 54.

<sup>124</sup> Legrand 1997, p. 57.

<sup>125</sup> Legrand 1997, p. 56.

### 2.2.3 Backwards

Another argument that Legrand puts forward is, that it would be a retrograde step to plead for a European Civil Code, as it privileges faith in a centralised political authority, and what is possibly worse, in formalist truth.<sup>126</sup> Legrand poses that a plea for a civil code would suggest:

“that the whole of the law governing the daily life of citizens can be reduced to a set of neatly organised rules and that claim runs against the more progressive idea that:  
“law simply cannot be captured by a set of rules, that 'the law' and 'the written rules' do not coexist, and that there is, indeed, much 'law' to be found beyond the rules”

The idea of a Civil Code belongs to the era of the authoritarian world of Napoleon.<sup>127</sup> The making of such a code can, according to Legrand, only be assumed under the hypnotic spell of formal rationality.<sup>128</sup> In the postmodern era we cannot desire legal monism any more. Thus, Legrand concludes in the strongest terms that:

“Legal positivism and the closed system of codes, which the fetishism of rules commands must be regarded as obsolete.”<sup>129</sup>

Legrand bases his criticism on the idea of introducing a new Civil Code on earlier motives of other drafters of codes, in combination with postmodern objections against those motives. Civil codes are remnants of a positivist era wherein we thought that legal reality was to be known and that it could be fully captured and taxonomized in a set of legal norms. So Legrand argues that now that we have entered the age of complexity, legal monism has given way to a multiplicity of legal sources, to polyjurality.<sup>130</sup>

### 2.2.3 Other reasons against the code

Apart from these somewhat philosophical arguments, Legrand mentions two practical reasons against the code. I sum them up in this paragraph.

Legrand accuses those who argue in favour of a European Civil Code, as that code would lead to a golden age, resembling that of the *ius commune* that started of in the Roman Era and developed in the early Renaissance.<sup>131</sup> Legrand pursues the historical argument that there never in European legal history has been a law common to all European states. Although the *ius commune* was taught even at British universities, there never was a profound influence upon the practice of the common law system.<sup>132</sup>

A last argument Legrand puts forward against a civil code is that such a code would be impractical.<sup>133</sup> The codification of European private law is a utopian enterprise. He argues that a common text of reference will be ascribed a different meaning, because the interpreters of a future civil code will derive

<sup>126</sup> Legrand 1997, p. 58.

<sup>127</sup> Legrand 1997, p. 59, n8.

<sup>128</sup> Legrand 1997, p. 59.

<sup>129</sup> Legrand 1997, p. 59.

<sup>130</sup> Legrand 1997, p. 59.

<sup>131</sup> Legrand 1997, p. 58.

<sup>132</sup> Legrand 1997, p. 58.

<sup>133</sup> Legrand 1997, p. 60.

from incompatible styles.<sup>134</sup> Though the text is the same, it does not necessarily mean that the reception of the same text is the same. Legrand predicts that differences in reception are bound to happen, as the civil tradition departs from the axiomatic stage whereas the common system functions descriptively or inductively.<sup>135</sup> Thus Legrand concludes:

“[U]nity can only arise from a commonality of experience, which assumes a commonality of meaning, which presupposes in turn a symbolic commonality”<sup>136</sup>

## 2.3 Conclusion

Should there be a European Civil Code? Legrand concluded that pleading in favour of a European Civil Code is arrogant and that we therefore should preserve the present variety of systems of law.

But for the exact opposite reasons one may claim that it is just as arrogant to preserve the combination of different systems of civil law. Postmodernists such as Rorty, Lyotard and Derrida do not know what is Best. There is no postmodern point of view on whether it is best to have a European Civil Code.

There is another problem with the arrogance argument. The other option, namely to preserve the current situation would be just as arrogant. Any option is arrogant in that sense that it enforces itself upon its opponents, while there is nothing inherently wrong with the not-chosen options. It would mean that it is impossible to adopt any option.

But once the debate on civil law reform is entered, a choice has to be made. Doing nothing is a choice in favour of what we already have: a 'system' of different systems of law. And choosing for anything would always involve the not choosing of the other option and would thereby be arrogant towards the system that was not chosen as this system was -postmodernly speaking- neither objectively worse nor objectively better than the other.

Arrogance can thus be no argument in favour of either side. Favouring any system above another is inherently arrogant for those who uphold the claim that there is nothing to say about a system on neutral terms. It will not convince any opponent.

We do not need to conclude from the above that a self-confessed postmodernist cannot make choices at all. The true sceptic in his ivory tower may be indifferent towards anything. Yet anyone can be excused for his arrogance in situations where a choice *is inescapable*. This is already illustrated by the classic case of the donkey of Buridan and two equal heaps of straw. If the heaps are exactly equal and equally far from the donkey, the postmodern and anti-arrogant donkey will die of hunger as he does not know where to start eating. In real life, donkeys do not suffer from fatal heap-indifferences, because they are so arrogant to choose a pile, possibly for such unsound reasons as that other pile might be tastier. Postmodernists can adopt points of view even though they realize their opinions can be relativized. Thus they end up being pragmatists.

The choice between any of the two heaps of straw, or between systems of law, can also be made on pragmatic grounds. The merit thereof is that such arguments do not claim that a choice for any of the

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<sup>134</sup> Legrand 1997, p. 60.

<sup>135</sup> Legrand 1997, p. 60.

<sup>136</sup> Legrand 1997, p. 60.

civil systems, or the choice for the preservation of several systems, or the choice for harmonisation of systems, *is inherently* better.<sup>137</sup> One can prefer a system above another without making claims of objectivity. Such a pragmatic reason would be that the contract law of the overwhelming majority of EU member states does not even vaguely resemble that of the Common law. It thus can be paradoxically concluded that the pragmatic arguments Legrand mentions against a Civil Code, are more postmodern than the arguments that are based on a postmodern point of view.

Keeping this in mind, it becomes apparent that saying that the civil tradition is so simplistic to assume that codes beget certainty, is easier drawn than upheld. What is simplistic cannot be known, or considered from a neutral point of view. One then also has to acknowledge that there is no neutral point of view possible on what system of law is Best. And then there is neither a neutral point of view possible on the question whether there should be a European Civil Code or not. And neither on the question whether there is a possibility of a neutral point of view and not even on the question of the possibility of neutral points of view *inter se*.

In a recent article, Legrand pointed to the necessity of self-reflection for postmodernists, by the following remark:

“I did not write this afterword with a view to establish the rightness of my argument for to my mind, an argument can only be *persuasive*. What I have sought to do, therefore, is to enhance my argument's persuasive value by dispelling various misapprehensions about it.”<sup>138</sup>

Legrand has two arguments against the Civil Code that directly refer to postmodernism: the arrogance claim and the backwards argument. Both seem to refer to a Rightness that is not there by their presentation. Both arguments of Legrand's 1997 article: Against a European Civil Code, are more persuasive, if the reach of this sentence relevates these arguments as well.

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<sup>137</sup> As Maris and Kennedy concluded, see *infra* 1.2.2, and also as Rorty and Lyotard concluded, see Rorty 1991, p. 211.

<sup>138</sup> Legrand 2002, p. 76.

## **3 Mattei and Postmodernism**

### **3.1 Introduction**

Another philosophically arguing jurist is Ugo Mattei. Unlike Legrand, Mattei argues in favour of a codification of European Private Law. Like Legrand, however, Mattei bases his position on postmodernism. He contrasts deeply with Legrand concerning the evaluation of postmodernism, as Mattei believes that we should not be so postmodern to preserve the differences between European systems of law. Yet both authors endorse a similar concept of postmodernism.

How and why Mattei arrives at the conclusion that there should be a hard code as soon as possible, will be the subject of this third chapter. It will examine Mattei's position on postmodernism and why he refutes this position in paragraph 3.2. Paragraph 3.3 will look at the political-juridical consequences of this idea of postmodernism.

### **3.2 Mattei and Postmodernism**

Mattei states in his article *Hard Code Now!* that several objections against postmodernism lead to the conclusion that we should not be postmodern and that there should be a European civil code as soon as possible. This conclusion refers to the already addressed question what postmodernism is, and how difficult it is to answer that question.

What Mattei considers to be postmodern, differs from the definition and the positions I summed up in the first chapter of this thesis. It is therefore necessary to consider in some detail what Mattei considers to be postmodern. This will be looked at in the first paragraph. The second paragraph will examine in detail what Mattei's objections precisely are. The third paragraph will then examine how Mattei's position can be compared with Legrand on the one hand and the earlier mentioned postmodern philosophers on the other.

#### **3.2.1 Mattei on Postmodernism**

Mattei describes in full detail what he considers to be postmodern in an article he wrote together with Di Robilant: *The art and science of critical scholarship; Post-modernism and International Style in the Legal Architecture of Europe*. There are some preliminary remarks that have to be given that Mattei suggests, concerning postmodernism.

Mattei refers to the difficulties there are in giving a definition of postmodernism.<sup>139</sup> Mattei also necessitates that it is important to view the postmodern discussion in political terms of right and left, as the postmodern condition maintains the collapse of sharp distinctions between the juridical and the

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<sup>139</sup> He does so at Mattei, Di Robilant 2002, p. 30, esp. in note 8 where he refers to Lyotard and Hassan, but also to Jameson, who gave a historical account of postmodernism.

political hemisphere.<sup>140</sup> Mattei is for the purposes of his article interested mostly in the relationship between postmodernism and the Critical Legal Studies movement as that developed in the United States. Yet he first touches upon the use of the term in various other disciplines, amongst which: architecture.

His description of postmodernism begins with the relationship between postmodernism and architecture. Postmodernism there is said to reject the functionalism and uniformity that was endorsed by the modern International Style.<sup>141</sup> “Postmodernism marked the defeat of the universalistic ideal of modernity”<sup>142</sup> Then, Mattei notes, “For the time being, it is sufficient to note that the introduction in Europe of post-modernism as an heuristic category in the law is mostly due to scholars belonging to the American Academic movement known as Critical Legal Studies”.<sup>143</sup> He does not try to pin down a fixed definition in this article on the essence of postmodernism but in the remainder of the article he does make some epistemic claims on the contents of postmodernism, amongst which the following:

“A building that symbolizes Europe has yet to be invented. It is bound to be post-modern. It is bound to reflect different, strong, local political identities and styles. It must contain some Italian, some French and some German style.”<sup>144</sup>

Unlike any of the postmodernists discussed in paragraph 1.1.2 did, Mattei here presents a certain feature as exemplary for postmodernism. Another contrast with any of the postmodern philosophers is that Mattei states what postmodernism aims for, as in the quotation underneath.

“Post-modernism constructs previous movements as an historical past from which present work can freely borrow whatever is needed or liked.”<sup>145</sup>

and also:

“Post-modernism is what remains after noticing the methodological analogies between Sacco and Kennedy and after fully appreciating the political differences between the two schools. Post-modernism questions looking at the comparative project as positivistic science. It suggests a more complex framework, in which a conception of science in accord with present day epistemology allows us to seek parallels between comparative law and a variety of means of expression, including art and architecture”<sup>146</sup>

In spite of the criticism Mattei has against postmodernism and that will be discussed in the following paragraph, Mattei also expresses the value of postmodernism in some respects, as appears from the following quote.

“One of the most important contributions (and perhaps the most original) of the Critics in the United States is the self-consciousness of post-modernism, with its consequent approach to the law as narrative, something fundamentally different from the traditional view of science and objective knowledge”<sup>147</sup>

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<sup>140</sup> Mattei, Di Robilant 2002, p. 31.

<sup>141</sup> Mattei, Di Robilant 2002, p. 33.

<sup>142</sup> Mattei, Di Robilant 2002, p. 34.

<sup>143</sup> Mattei, Di Robilant 2002, p. 34.

<sup>144</sup> Mattei, Di Robilant 2002, p. 42-43.

<sup>145</sup> Mattei, Di Robilant 2002, p. 50.

<sup>146</sup> Mattei, Di Robilant 2002, p. 52-53.

<sup>147</sup> Mattei, Di Robilant 2002, p. 48.

In the part immediately thereafter Mattei expresses his admiration for the role of epistemic and developments induced by Kuhn, Rorty and Feyerabend.<sup>148</sup> Kuhn is mentioned to be on the borderline with postmodernism (Legrand, Vries) while Rorty is considered to be a postmodernist and Feyerabend (by Litowitz and Rorty) It is remarkable that Mattei mentions these three authors and that he does not mention them in the part where Mattei criticises postmodernism.

In the following paragraph is will be considered what Mattei says about the relationship of the Critical Legal Studies-environment and postmodernism, why Mattei rejects postmodernism and what he likes to replace it with.

### **3.2.2 Why postmodernism should be criticised, according to Mattei**

In the paragraph that follows, Mattei shifts his attention to this Critical Legal movement that is left-winged and can be distinct from the rather conservative Law & Economics movement. Mattei's main hypothesis is that what Critical Legal Studies endorses in the United States is, when exported, ideologically transformed into a conservative doctrine.

How this is done, is explained by Mattei via two concepts, identity and tradition. For the sake of brevity I'll consider identity only. "Identity" is a word that is used to "construct the other" in an American left-winged context, in order to serve as an alternative for the failed integration of the black community.<sup>149</sup> Under the same left-winged header the notion is exported to Europe.<sup>150</sup> In Europe, conservative and nationalist leaders, such as Le Pen and Haider, use the word opposed to its original purpose. These leaders are claiming local European identity against integration and rights for immigrants.<sup>151</sup>

The same is held in Mattei's article *hard code now!* Mattei here claims that the soft, postmodern attitude that is imported from the Critical Legal Studies movement, is in Europe turning out to be embracing market participators and thereby appears to be more politically right winged than intended. Referring to Laura Nader, he mentions that:

"The soft cultural attitude, typical of postmodernist scepticism, irony and loss of faith, is functional to a new legal and economic order in which the market governs the law rather than the other way around."<sup>152</sup>

In this article Mattei explains this relationship via developments in America that could be introduced here, if the same soft law strategy is adopted. Mattei complains that such already happened with tort law reform and compulsory ADR.<sup>153</sup>

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<sup>148</sup> Mattei, Di Robilant 2002, p. 48, it is worthy noticing that Rorty describes himself as well as Kuhn, Feierabend and Foucault to be on his side of the discussion, criticized as relativists and endorsing what Putnam calls the internalist conception of philosophy.

<sup>149</sup> Mattei, Di Robilant 2002, p. 41.

<sup>150</sup> Mattei, Di Robilant 2002, p. 41.

<sup>151</sup> Mattei, Di Robilant 2002, p. 42.

<sup>152</sup> Mattei 2002, p. 8.

<sup>153</sup> Mattei 2002, p. 9.

### 3.3 Conclusion

There is a discrepancy between the notion Mattei has of postmodernism and the idea I addressed above to be Rortiesk, Lyotardian and Derrida-ish, and this is related to the criticism I expanded earlier, against Legrand in the concluding section of chapter 2. The discrepancy is that in the Routledge definition I quoted, and in the statements Derrida, Rorty and Lyotard made, there is an inherent self-scepticism embedded, that is absent from the statements about postmodernism Legrand and Mattei made.<sup>154</sup> Mattei is not forced to this self-scepticism, as he does not subscribe to postmodernism, yet Legrand is forced to do so as he otherwise contradicts himself.<sup>155</sup>

The statements Mattei makes about postmodernism that I quoted are in that sense epistemic claims in the sense that every definition is such an epistemic claim. Definitions generally<sup>156</sup> try to describe the factual contents of the object, what the object really *is*. The possibility of such statements as referring to the facts, is denied by many philosophers that are categorized to be postmodern, amongst which those I have mentioned in paragraph 1.1.1. Yet in some pedagogical respect statements about 'what postmodernism is' can still be meaningful.<sup>157</sup>

Mattei does not oppose to what Lyotard, Rorty and Derrida have plead for.<sup>158</sup> In that sense he is as postmodern as any other author that is discussed in this thesis. Mattei opposes the importing of postmodernism-as-positive-doctrine that turned postmodernism into the cultural relativism that lead to the “thank you for not smoking” signs.<sup>159</sup> And he is not opposed to this epigonism for it's own sake, but because a hard code is a barrier for corporate rapacity.<sup>160</sup>

Although it makes sense to criticise postmodern epigonism, we cannot easily side step this problem by thinking into European political terms as left-winged and right-winged. This might circumvent the juridical conflict on whether there should be a code, but the postmodern scepticism of Lyotard, Rorty and Derrida, also eliminated the usefulness of left/right-distinction as an end in itself. It has to be argued for, since the distinction opens the debate on what aspect of civil law is the most moderate-left-winged and thereby politically correct aspect. Consumer protection for instance might be left-winged as it protects consumers from corporate rapacity but it can also be interpreted right-winged when it protects consumers against high fuel prices.

Scholastically introducing another distinction is an unlikely method of conflict resolution. If we want to redevide the world we rather have to do so according to the best, most logically sound or convincing reasons we can think of, whereas old style metaphysics-of-presence might provide an answer that satisfies us, but it will not satisfy our opponents.

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<sup>154</sup> With the exception of Legrand's statement at p. 76 of legrand 2002.

<sup>155</sup> See *infra*, the concluding paragraph of chapter 2.4.

<sup>156</sup> I deliberately say “generally”, in order to introduce my own self-scepticism.

<sup>157</sup> Rorty 1991, p. 79.

<sup>158</sup> Mattei, Di Robilant 2002, p. 48-49, although he does make metaphysical statements such as “postmodernist irony should not hide the facts”, Mattei 2002, p. 14.

<sup>159</sup> Mattei 2002, p. 13.

<sup>160</sup> Mattei 2002, p. 15.

## 4 Final Remarks

### 4.1. Conclusion

There is not much support that can be found in postmodernism when arguing in favour or against a code. The Quine-Duhem statement and the untenability of positivism<sup>161</sup> have squashed the possibility of justifying knowledge on the basis of grand meta-narratives. Thus, as Quine concluded, no statement is immune for revision and any statement can be accepted as true under any circumstance.<sup>162</sup>

A postmodernist can come to the conclusion that we should reject a European code, because it is not very likely that a uniform law will be interpreted uniformly. But then it would also be very postmodern to conclude that such *might* not be a problem if we can solve this institutionally, by letting the European Court of Justice be the highest interpreter. It might also be very postmodern to object to this that this institutional solution *might* not work at all, as the European Court of Justice already since the Solange-cases appeared to not be hierarchically on top in Europe, as its case law was contradicted by the Bundesverfassungsgericht.<sup>163</sup>

And it might be very postmodern to be in favour of a 'hard' European code as this might be a safeguard against corporate rapacity. In response it would be also very postmodern to say that such a 'hard' European code is not the only safeguard that is possible. We might achieve the same result by EU-directives on consumer law.

Any reason might be postmodern if the speaker does not enforce it as a truth in itself. Postmodernism does not tell whether to be in favour or against a code. If it says anything at all, it can be no more than a subtle persuasion into the direction of pragmatism. And once a jurist finds itself to be persuaded into this direction, he still does not know whether this direction leads in favour or against a European Civil Code; though he might temporarily be convinced by the idea that for some pragmatic reason or another a Code is not such a bad/good idea after all.

Though it might be desolating to paradoxically know that nothing can be known, jurists might find great comfort in the unconsoling. Postmodernistically induced pragmatism guarantees workload, as nothing needs to remain uncriticised. It stimulates creativity in the search for new good reasons in favour or against ideas and it provides one with the reluctance that against any apt commentary of an opponent, there might be something that can be thought of in favour of himself.

### 4.2 Disclaimer

As I am myself subjected to Lyotard's postmodern condition, I'm forced to realize that my critical attitude might be subjected to severe criticism. Anything that is said in this paper might be used against me.

But then I have the right to remain silent.

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<sup>161</sup> See infra 1.1.3.

<sup>162</sup> Leezenberg, de Vries p. 70.

<sup>163</sup> *Internationale Handelsgesellschaft (Solange I)* [1974] 2 CMLR 540; *Wunsche Handelsgesellschaft (Solange II)* [1987] 3 CMLR 265.

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