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Codification on the Threshold of the Third Millennium

Abstract. The core of codification is invariably the idea of a system in the law's composition and structuring, doctrinal reflection and conceptual building up, including judicial reference to codal definitions as well. Or, codification is (1) an exclusive body of law (2) implementing unity in its regulatory field (3) with logical coherence and consequentiality. The dream of a common European codification penetrates into the very heart of the law, presupposing the unification of all the intellectuality and underlying approach that has ever distinguished Civil Law and Common Law. The more the advancement of the European unification progresses, the more inverse the assessment of European codification becomes, making us its past trends, values and regulatory techniques reconsidered. That is, as if we on the Continent had not so much become statal national units unified by a sequence of national laws but, being too conceited of our most promising collective heritage within the transitory phase of an infantile disorder, became rather fragmented in national isolation from one another, which now comes eventually to a final end.

Keywords: codification & substitutes; objectification, systemicity, coherence, conceptuality of law; tradition, democratism in law; Civil Law & Common Law convergence; European Union

What are the developments of the past quarter of a century in the field of codification?¹ The practice appears to have been following the already covered paths

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¹ As antecedents, cf., from the author, *Codification as a Socio-historical Phenomenon* [in its original version in Hungarian, 1979]. Budapest, 1991. viii + 391 pp. and *A kodifikáció és határai* [Codification and its limits]. *Állam és Igazgatás XXVIII* (1978) 8–9, 702–718 as well as, in a recent summary, *Codification in The Philosophy of Law* An Encyclopedia (ed. Gray, Ch. B.). New York & London, 1999. 120–122 [Garland Reference Library of the Humanities 1743]. Cf., as reviews on previously published chapters of the monograph, Gérard Conac in *Revue internationale de Droit comparé* 29 (1977) 861–862; M. A. Supataev in *Sovetskoe gossudarstvo i pravo* 1978/12, 148; in *An Overview of Sociological Research in Hungary* (ed. Szentes, T.), Budapest, 1978. 86; in *Strane pravne zivot* [Belgrade] (1978), No. 98, 26–28; Jörgen Dalberg-Larsen in *Retferd* [Copenhagen] (1978), No. 8, 86–93; Braun-Otto Bryde in *Rabels Zeitschrift für ausländisches Privatrecht* 42 (1978) 3, 587–588; Heinz, K. E. in *Archiv für Rechts- und Sozialphilosophie* LXV

undisturbedly, driven by its own impulse. At the same time, setting new targets by re-dreaming thousand-year-old European and commonly shared dreams in response to the present-day policies of the European Union, theory seems to be ready to revise, moreover, reverse earlier perspectives apparently thoroughly established and conventionalised, hoping to beat new paths now. Debating policies and methodologies in terms of codification is fashionable again: it is in the focus of discussions and its dilemmas appear as vital as regards our decisions on the future.

Considering the distinctive episodes of the recent past in terms of mere data, more than fifty codes have been promulgated since the end of the World War Two. The complete re-drafting of the classical civil codes in Portugal (1967), in the Netherlands (1992) and in Quebec (1994),² of the penal codes in Spain (1995),³ in France and in Belgium, as well as the civil law re-codification in Louisiana, in Germany (for the law of contracts) and, in the Central and Eastern

(1979) 1, 146–148; María del Refugio González in *Boletino Mexicano de Derecho Comparado* XII (1979), 300–302; on the monograph in Hungarian, in *Jogtudományi Közlöny* XXXII (1977) 233–240; Rodríguez, F. E. in *Boletino Mexicano de Derecho Comparado* XII (1979) 672–673; Malonyai, P. in *Magyar Nemzet* XXXVI (1980) 199, 4; Visegrády, A. in *Állam- és Jogtudomány* XXIII (1980) 3, 534–539; Majoros, F. in *Revue internationale de Droit comparé* 32 (1980) 4, 873–876; Szabó, J. in *Österreichische Zeitschrift für öffentliches Recht* 32 (1981) 1, 123–128; Bianchi, L. in *Právny Obzor* [Bratislava] 64 (1981) 60–63; Sipos, S. in *Universitate Babeş-Bolyai: Iurisprudentia* [Cluj] 26 (1981) 76–78; in *Referativnyi zhurnal po obshchestvennye nauki Pravo* [Moscow] 1981/4, 26–29; Bónis, Gy. in *Századok* CXV (1981) 1325–1327; Nagy, E. in *Állam és Igazgatás* XXXII (1982) 506–514; Bolgár, V. in *The American Journal of Comparative Law* 30 (1982), 698–703; Brunner, G. in *Rabels Zeitschrift für ausländisches Privatrecht* 46 (1982) 579–580; Szabó, I. in *Magyar Jog* 30 (1983) and in his *Ember és jog* Jogelméleti tanulmányok [Man and law: studies in legal theory] Budapest, 1987. 94–106; on the monograph in English, Tallon, D. in *Revue internationale de Droit comparé* 44 (1992) 740–741 and Legrand, P.: Strange Power of Words: Codification Situated. *Tulane European & Civil Law Forum* 9 (1994), 1–33.

² Cf., e.g., Legrand, P.: De la profonde incivilité du Code Civil de Québec. 1–13 and Parent, S.: Le Code civil de Québec: incivilité ou opportunité. 15–25, both in: *Revue interdisciplinaire d'Études juridiques* (1996), No. 36. The fact that the doctrine, masterly deepened with exemplary accuracy, of the Civil Code was completed in practically the last moment of its effect—*Quebec Civil Law An Introduction to Quebec Private Law* (ed.: Brierley, J. E. C. & Macdonald, R. A.). Toronto, 1993. Iviii + 728 pp.—, just to be replaced by an utterly new concept of codal implementation, indicates the defencelessness of mere theorising at all times.

³ Cf., e.g., Blanco, M. G.: Codification et droit de la postmodernité: La création du nouveau Code pénal espagnol de 1995. *Droit et Société* (1998) 509–534.

European region, in Russia (1996), and in preparation in Poland and Hungary (supplemented also by re-codification of criminal law in the latter), all represent developments of the recent past.⁴

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First, in guise of general observation, a rather striking statement can be made. Notably, as the end of the second millennium was approaching, codification itself started increasingly to lose in purity and in the consistency of its classical ideals that once used to constitute a strict and coherent system. And this holds good of more than one aspects. On the one hand, the *supremacy of statutory law* with its function of exhaustively embodying the law gradually shows the signs of waning.⁵ On the other hand (and in result of the above), the requirement developed half a century ago as a logical perfection of the European ideal of codification, namely that a *codificational determination of the law* be maintained through re-drafting law-codes periodically recurrently, by keeping pace with changing historical, economic and social conditions given at any time, has itself weakened. (As is known, it is socialist codification having set itself the objective of the codal embodiment of the law that realised this requirement in the most principled way, purely and consequently, also as a pattern which later became, upon the pressure of the need for modernization, a model enthusiastically followed by the Afro-Asiatic developing countries as well.)

For practical considerations, this leap into the opposite extreme can be perceived as a pendulum-effect. From now on, it is not re-codification any longer but the utter negation of codification itself (i.e., the abandonment of codifi-

⁴ Cf., e.g., *Renaissance der Idee der Kodifikation* Das neue niederländische Bürgerliche Gesetzbuch 1992. (hrsg.: Bydlinski, F.–Mayer-Maly, Th.–Pichler, J. W.). Wien–Köln–Weimar, 1992. 157 pp. [Schriften zur Rechtspolitik 5]; Sacco, R.: Codificare: mode suprato di legifare? *Rivista di diritto civile* XXIX (1983) 1, 117 et seq., specially at 120; as well as Zweigert, K.–Puttfarcken, H.-J.: Allgemeines und besonderes zur Kodifikation. In *Festschrift für Imre Zajtay* (hrsg. Graveson, R. H.). Tübingen, 1982. 569 et seq.

⁵ According to Kübler, F.: Kodifikation und Demokratie. *Juristenzeitung* (1969), 645 et seq., especially at 651, the crisis of the law in general is “nothing but normal in a democratic industrial society [where] the fragmentary and periodical character of the statute is a part of the ordinary state of affairs”. A similar view can be found in, e.g., Esser, J.: Gesetzesrationalität im Kodifikationszeitalter und heute. In: *100 Jahre oberste deutsche Justizbehörde* Vom Reichjustizamt zum Bundesministerium der Justiz (hrsg. Vogel, H. J.–Esser, J.). Tübingen, 1977. 13 et seq. [Recht und Staat in Geschichte und Gegenwart 470].

cation in order to reach a state of “de-codification”⁶) that comes to the forefront more and more forcefully as a new landmark. More precisely, the emphasis is increasingly shifting from the code itself to the actual filling of one-time codal functions. In other words, the systemic *form of objectivation* of the law suitable to provide a *gapless response* to any question at will within its field of regulation seems to be eventually substituted by the actuality of whatever reply only channelled by the code, maybe by providing nothing but systemic or taxonomic loci to which, conceptually or institutionally, the freely contextualisable judicial stand may refer.⁷ According to the new mainstream opinion, regarded as exclusively justified by the ideologies of postmodernity, the alleged “authoritarianism of codification” of the past will have to yield its place (both as an ideal and as the technique of regulatory practice) to a kind of “*democratic openness*”,⁸ in pursuance to some development typologies mostly rooted in American experience but increasingly generalised so as to include European practices as well.⁹

⁶ Irti, N.: *L'età della decodificazione*. 3rd ed. Milano, 1989. 195.

⁷ According to the expression of Sacco, 125, it is no longer the code-form that is superior but the idea of its (suit)ability to offer a solution: “*Il codice non è [...] superato. È superata l'idea che un codice possa nascere privo di lacune, e che la sua sola lettera possa offrire una buona soluzione per tutti i possibili casi del futuro.*”

⁸ According to Kübler, p. 651, there is a “change of the authoritarian codification state towards a system aiming at democratic openness where legislation has become a political instrument of a permanently required adjustment” in progress. According to Lasserre-Kiesow, V.: La codification en Allemande au XVIII^e siècle: Réflexions sur la codification d’hier et d’aujourd’hui. *Archives de Philosophie du Droit* 42 (1998), 215–231, quotation on 223 and 231, “the future is no longer to be found in the past. [...] [C]odification based on paradigms of statism as well as on perfection of form and contents certainly does not have any future any longer.”

⁹ See, as a first formulation, from the author, Átalakulóban a jog? [Law in transformation?] *Állam- és Jogtudomány* XXIII (1980) 4, 670–680 and Logic of Law and Judicial Activity: A Gap between Ideals, Reality, and Future Perspectives. In: *Legal Development and Comparative Law* (ed. Péteri, Z.–Lamm, V.). Budapest, 1981. 45–76, particularly para. 5, as inspired by Wasserstrom, R. A.: *The Judicial Decision Toward a Theory of Legal Justification*. Stanford, 1961. 122 et seq.; Per Olof Bolding Reliance on Authorities or Open Debate? Two Models of Legal Argumentation. *Scandinavian Studies in Law* 13 (Stockholm, 1969), 65 et seq.; Mangabeira Unger, R.: *Law in Modern Society Toward a Criticism of Social Theory*. New York–London, 1976, ch. II; and, especially, Nonet, Ph.–Selznick, Ph.: *Law and Society in Transition Toward Responsive Law*. New York, 1978.

As a logical consequence to this, present-day legislators tend to leave behind all former endeavours for systemic purity and consistency (as if these were nothing but instances of a kind of doctrinarian atavism), only to make way for the pragmatism of borrowing from just anywhere, and thereby accepting both the partialness and fragmentation of results.¹⁰ In addition to all these, a new kind of localism, transitionalism and pragmatism making headway under the aegis of globalism rapidly gaining ground, explain the attempt at absolutising currently ongoing endeavours with the wish to also re-write the past (a practice far from unfamiliar in France of the earlier days). Notably, a paradigmatic shift is at stake as a tendency becoming more and more general, in terms of which the codification once completed by Napoleon and also its magnificent and lasting type-framing features seem nowadays to be swept out of collective memory and taken notice of, if at all, rather as a historically incidental exception in the birthplace of classical codification, only to relativise the very term ‘codification’ (along with the idea and the historical achievement represented by its one-time realisation), by reducing its meaning to the practice of rationalising one aspect of the mass-scale and all-inclusive management implied by today’s public administration, that is, to the continuous consolidation of its legal normative staff (from statutes to governmental decrees, including also administrative regulations).¹¹

This short-sighted and extreme simplification (forecasting “the end of history” with all the a-historical conceptual misrepresentation inherent in Francis Fukuyama’s contemporary Utopianism)—in addition to its rather controversial nature, as such a ‘codification’, taken as the genuine piece of consolidation,

¹⁰ According to Bergel, J.-L.: *Les méthodes de codification dans les pays de droit mixte*. In *La formation du droit national dans les pays de droit mixte*. Aix-Marseille, 1989. 21–34, “from now on, there is nothing but mixed laws” (34), because “the mixed character grows widespread by becoming the general rule” (35).

¹¹ As a vice-president of the National Committee for Codification, Braibant, G.: Codification. In *Encyclopaedia Universalis* 6, Paris, 1995. 9–42 has visualised today’s practice, drowned in everyday hygiene and poorly lacking any concept, as the great universal achievement of mankind. Because, although “codification has been an ancient dream of mankind” (39), yet its manifestations “hardly have more value than the texts adopted or issued by them”. Namely, “codification itself is nothing else than the operation or policy of the fabrication of codes, through re-arranging former norms or creating new norms” (39). Accordingly, the term ‘codification’ itself has a twofold meaning. True, there was once also “a great work of codification”, the *Code civil*, yet, today also “systematic codes” are available to us. For, as he goes on, “the renaissance [of codification] took place after the [Second World] War” (40).

has to first “transcript”, then “transgress” the positivized legal staff processed by it, tearing this staff out from its original texture, by placing it into another context, and thereby finally “transdict” it¹²—is not only sheer “conceptual abuse”¹³ but is obviously indicative of decline, too.¹⁴ All this slowly starts to characterise our age to an extent that some observers believe to discover exactly opposite, counter-running tendencies among the trends in the United States of America and in the European Union, pointing out that while *there* the re-assertion or the launch of codification, *here*, on our continent, de-codification has been put on the agenda.¹⁵

A kind of scepticism has become general—first, in the form of disillusionment and then, as a general awakening, due to the vanishing of the myths of the European ideal of codification¹⁶—which, as extended also to the past, has gradually but surely been transferred from the loss of confidence placed in the regulatory force of and normative foresight by the law, to the general *disappointment in codification* itself. Some present-day sober explanations

¹² Terms by Timsit, G.: La codification: transcription ou transgression de la loi? In his *Archipel de la norme*. Paris, 1997. ch. V, 145–159, especially at 151, 155 and also 159. Actually, Timsit speaks about consolidation, yet, indicative of uninhibited actualisation, he terms it codification all along [as done also by both Catta, E.: Codification et la loi fétiche. In *Interpréter le droit* Le sens, l’interprète, la machine (dir. Thomasset, C.–Bourcier, D.). Bruxelles, 1997. 63–69 and de Bèchillon, D.: L’imaginaire d’un code. *Droits* (1998), No. 27: La codification 3, 173–184], and blames it basically for “transcendence of the limits of the law” (151) and for “a mummification of the law” (159), that is, for the fact that exactly this false codification, operating with original sources of the law, falsifies them unpronouncedly, because it re-positivates them in a new context and medium.

¹³ This conceptual extension is expressly considered as an abuse by, e.g., Gaurieu, D.: La rédaction des normes juridiques, source de la métamorphose du droit? Quelques repères historiques pour une réflexion contemporaine. *Revue générale de droit* 31 (2001) 1–85.

¹⁴ Having apparently passed the great moments of codification once and for all (accompanied by the gradual erosion of the belief in rational plannability and in any *Gesamtplan*’s logical executability, in addition to the lack of appropriate political and legal circumstances) may perhaps account for the fact that “The importance of codes will decrease, and the drafting of truly new ones—capturing and organizing new realities—will be, at least for the moment, an almost impossible task.” Damaska, M.: On Circumstances Favoring Codification. *Revista Jurídica de la Universidad de Puerto Rico* LII (1983) 355–371, quotation on 370.

¹⁵ Shael H.: The Fate and the Future of Codification in America. In: *Essays on European Law and Israel* (ed. Rabello, A. M.). Jerusalem, 1996. 89–129, especially 124.

¹⁶ E.g., Arnaud, A.-J.: *Pour une pensée juridique européenne*. Paris, 1991. 294 [Les voies du droit] speaks about “reassuring, alleviating myths of the simplicity, permanence and abstract character of the law”.

trace this back to the expectations over-intensified yet puristic (and, in this regard, also doctrinarian), thus excessive all through (and, therefore, impractical, consequently proving unsuitable to stand the test of time), fixed back in the age of the Enlightenment, of the birth of classical codification.¹⁷ This is the recognition from which immediately a consequence is also drawn, according to which only the kind of codification could prove successful with lasting effects and applicable in the long run, where its drafters were the least inclined to over-enthusiasm.¹⁸ We seem to have left behind once and for all, as the one-time children's room of our (post)modernity, the claim for codifying the law with the intent of "establishing a new unified legal system", and we are going only to draw on codification in as much as it is inevitable "to safeguard the interests of the community by restricting, as far as possible, the political aspects and influence of different lobbyists",¹⁹ not excluding out the possibility either that the instrument of classical codification will one day be replaced by artificial intelligence and its new media technicalities.²⁰

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Well, what is codification like and where is it heading at the threshold of the new millennium? Most responses seem to confirm my earlier monographic

¹⁷ E.g., Schmidt, K.: *Die Zukunft der Kodifikationsidee* Rechtsprechung, Wissenschaft und Gesetzgebung vor den Gesetzeswerken des geltenden Rechts. Heidelberg, 1985. 79. [Juristische Studiengesellschaft "Karlsruhe" 167].

¹⁸ "The reason why in Countries with old Civil Codes the courts are still able to find their way lies in the fact that legislators did not attempt too much." Lorenz, W.: On the »Calling« of Our Time for Civil Legislation. In: *Questions of Civil Law Codification* (ed. Harmathy A.–Németh Á.). Budapest, 1990. 128.

¹⁹ Kötz, H.: Schuldrechtsüberarbeitung und Kodifikationsprinzip. In: *Festschrift für Wolfram Müller-Freienfels* (hrsg. Dieckmann, A. et al.). Baden-Baden, 1986. 97 and, for contrasting past and future, cf. also Harmathy, A.: Codification in a Period of Transition. *U[niversity of]C[alifornia] Davis Law Review* 31 (Spring 1998) 783–798, quotation on 789. It is worthwhile to notice the irony inherent in the fact that the image of the past formed by such prominent civilian authors about codification, taken once as a creative power, is nothing else than the image of future major expectations formed within the European Union. Or, this is a proof that even if history does not repeat itself, we do ourselves. Thanks to our urge to adapt, we again and again draw on the past, its experiences and instrumentalities.

²⁰ "The arduous road to new integration will probably be paved by artificial intelligence better able to detect patterns in the complexity of the modern social life." Damaska: *ibid.*

stand,²¹ which is found by certain dreamers of our future as something hopelessly embedded in (as formed by) the ideals of the past, therefore *statist*, and, as to declare what the law is, *authoritarian*; or, and briefly, *atavistic* and, as such, *to be transcended*. In sharp contrast with this, there is only an elastic, wishful image formed about the character of the future European civil code, vaguely sketched with exploratory uncertainty, far from being discernible in any aspect.

According to the theoretical literature (leaving, at the moment, the deconstructive reconstructions of the near future out of account), the core of codification is still the idea of a *system* manifested in both its composition and structuring, doctrinal reflection and conceptual building up, including the judicial practice of referring to codal definitions of institutions, legal constructs and dispositions as well.²²

“Putting an end to the rule of the fuzzy and uncertain, wrongly cut boundaries and of the only approximate classifications, by applying definite cuts and creating sharp boundaries, replacing the former by setting up clear classes.”²³

Or, codification invariably appears (1) as an *exclusive* body of law, (2) implementing *unity* in its regulatory field (3) with logical *coherence and consequentiality*;²⁴ or, showing the features of (1) *completeness*, (2) *freedom*

²¹ Cf., Varga *Codification...*, passim.

²² See, first of all (though tacitly admitting to be unable to comprehend the entire continental approach to law beyond the separation of what is systemic and what is non-systemic), Freeman, M. D. A.: The Concept of Codification. *The Jewish Law Annual* 2 (1979), 168–179, especially at 169. For the development in history of the concepts ‘system’ and ‘legal system’, see, from Sève, R.: Introduction. 1–10, and, for their analysis by example of the *Code civil*, his *Système et code*. 22–86, both in *Archives de Philosophie du Droit* 31: Le système juridique (1986).

²³ Bourdieu, P.: *Habitus, code et codification*. *Actes de la recherche en sciences sociales* (1986), 4–44, quotation on 42, claiming that the “the system is built on [...] cognition as universal, through the inseparably logical and ethical necessity of it” (4).

²⁴ Humbert, H.: *Les XII Tables, une codification?* *Droits* (1998) La codification 3, 87–112, applies the collective incidence of all these characteristics to qualify the *lex duodecim tabularum* as a code (110–111). According to Arnaud, 135, codification is a “coherent and systematic regulation” achieved through “exhaustive totalisation” which, according to R. C. van Caenegem *An Historical Introduction to Private Law*. Cambridge, 1992), especially at 12, denotes “a general, exhaustive regulation of a particular area of law”, by “involving a coherent programme and a consistent logical structure”.

from contradictions and (3) regulatory economy;²⁵ or, furthermore, of a (1) comprehensive and (2) systematic (3) enactment by the legislature,²⁶ (4) promulgated as a code.²⁷ The theoretical attitude is conservative here: once the paths of the mere collection and textual embodiment of laws, once termed by me then as the *quantitative*, and later on, the systemic reshaping of the law according to the logical ideal of a system, termed by me then as the *qualitative*, types of codification have started to diverge, also the notion implied by the terms ‘code’ and ‘codification’ has become reduced to mean just the latter, that is, the qualitative type, carrying, as a *sine qua non*, the criterion of *systemicity* regarding the law processed all through.

Well, it is exactly this differentiation that seems to be disappearing as an outdated past achievement from the postmodernist visions of the political voluntarism of the European Union, not yet equipped with any encouraging practical experience in an all-comprehensive codificatory regulation.

The first guinea pig for experimentation in this immense ongoing endeavour is the effort at elaborating, one way or another, the *codification of private law of the European Union*. For the time being, we know less about the underlying motives and perspectives of common European legislation (including the

²⁵ Ost, F.: Le code et le dictionnaire: Acceptabilité linguistique et validité juridique. *Sociologie et sociétés* XVIII (avril 1986) 59–75.

²⁶ Zimmermann, R.: Codification: History and Present Signification of an Idea. *European Review of Private Law* 8 (1995) 95–120, especially 96–97. van Caenegem, R. C.: *Judges, Legislators & Professors* Chapters in European Legal History [Goodhart Lectures 1984–1985] Cambridge, 1987. on 42 defines the code as a comprehensive and systematic exposition replacing all previous laws in a new text promulgated as a law. Dölemayer, B.: Zivilrechtliche Kodifikationen in Europa im 19. Jahrhundert. In *Evolution of the Judicial Law in XIXth Century* ed. Grzegorz Górski [= *Law in History* [Lublin] 1 (2000)], 117–130, on 118 identifies it simply as the “materially comprehensive, systematic, abstract and rational regulation of an entire area of law summarised in a code (*codex*)” [“*materiell umfassenden, systematischen, abstrakten und rationalen Regelung eines ganzen Rechtsgebiets in einem Gesetzbuch (codex)*”].

²⁷ Of course, there are softer definitions as well. According to Ascarelli, T.: L’idea di codice nel diritto privato e la funzione dell’interpretazione. [1955] In his *Saggi giuridici* (Milano, 1949), 48–49, for instance, “The code is characterised by a claim to construct a »new«, »complete«, and »definitive« legal order that includes amongst its formulations solutions for all possible cases”, and, as stated by Pio Caroni *Lecciones catalanas sobre la historia de la codificación* [Lezioni catalane sulla storia della codificazione] (Madrid, 1996), 177, especially at 22–23 [Publicaciones del Seminario de Historia del Derecho de Barcelona 1], the code is a “written presentation aiming at plenitude, with a unificatory function”.

clarification of the theoretical foundations and necessity of a systematic codification), reminiscent of the classical period of drafting constitutions and law-codes as well, than about the nature of “democratism” characterised by constant hesitation and the easy readiness to launch the bureaucratic machinery of common legislation in motion. No doubt, the dilemmas regarding the legal expression of the foundation of national states in the 18th to 19th centuries will gain new aspects in the current rush for the foundation of a truly inter-national state. Therefore, I still find the lessons drawn two centuries ago invariably remarkable, according to which “codes and constitutions have performed analogous institutional roles” in the legal performance of the *political* and *civil* foundation of a society, as supporting and complementing one another in the historically parallel rush for providing basic chartae and law-books.²⁸

Well, returning to the issues pertaining to the common European codification, all we could experience about its outlines so far is that

- it does not aim at abstract conceptual clarity, consistence or exclusive pursuance of any ideal or actual model:²⁹ it will presumably represent the entire European and even all-Atlantic heritage in the tradition of values and techniques as a *practical whole* in a (perhaps even mosaic-like) new quality. At the same time,

- it does not aim at perfection, nor at any exclusive completeness.³⁰ As the result of a new definition of the law, it will have to openly accept, in the context of constantly changing interests and depending on the institutional moves at any given time, a sheerly *temporary* and *mediatory* role. Therefore, having drawn the lesson from the failures of codification up to now,

- it can be nothing more than just “*creeping*”.³¹ As soon as this figurative expression has reached consensus among the students of law taking part

²⁸ Gambaro, A.: Codes and Constitutions in Civil Law. In: *Italian Studies in Law 2*, (ed.: Pizzorusso, A.). Dordrecht–Boston–London, 1994. 79–104, quotation on 79.

²⁹ Basedow, J.: Codification of Private Law in the European Union: The Making of a Hybrid. *European Review of Private Law* 9 (2001) 35–49.

³⁰ According to Lasserre-Kiesow, what once, in the period of classical codification, embodied “the totalisation of knowledge” (221), is nothing else on the final analysis than “a patriotic and habitual juridical exaggeration [...] which only hinders the ideal of a legal Europe” (223). In a similar sense, see also Wiegand, W.: Back to the Future? *Rechts-historisches Journal* (1993) 283.

³¹ The term ‘to creep’ denoting ‘to develop slowly and steadily [...] in the hope of advancement’ was first used by Klaus Peter Berger *The Creeping Codification of the Lex Mercatoria*. The Hague, 1999.

in the debate (revealing also the poet, dreamer, innovator and/or social revolutionary hidden in each of us even if mostly suppressed by our scholarly discipline), the doctrinal (and maybe dry, yet systematic) reasoning of treatises in jurisprudence has become substituted (in a way unheard of in juridical literature at earlier times) by a rhapsodic subjectivism with lists of desires and the boundlessness (almost reminiscent of the ecstasy of the so-called 'honeymoon-period', characteristic of early modern and modern revolutions), even unrestraint and randomness, of a credo of "Anything is possible, because by virtue of the power of such a giant club, we are in a position to target anything at will!".

Accordingly, some keep day-dreaming hoping that a kind of the desired end-result will after all emerge one way or another, in one form or another, upon the pattern and with the automatism of the '*Volksgeist*' once active in SAVIGNY's thought, due to the emerging clarification of principles through their continuous testing in practice, their unflagging re-consideration and adjustments, combining the effect of scholarship and doctrine with the socialising force of living practice and the educational efforts available through general and vocational training.³² According to other opinions, the desired unity of the European Union can, at most, emerge as the result of endeavours, in which the accumulation of principles (to be further shaped, re-asserted and represented all through by a truly inter-national European legal profession, capable of rising above national fragmentation) will be conceived in the womb of common European professional education and business practice, with a unifying legal scholarship and doctrine in the background. Therefore, it is *practicality* what the new European creed calls for and not pure scientism or self-complacent authorial egoism; for the latter can merely lead to selfishness, yielding only unnecessary complexity and contradiction, i.e., abstract and doctrinaire conceptuality which, as dried-out and lifeless fruits, cannot genuinely respond to the present, truly practical challenge. Or, new Portalises are needed, since only the *humility* of traditions can provide bases for a codification achieved at the level of *foundational principles*.³³ Among the authorial convictions, it seems to be a bit too daring to dream farther about (reminiscently, first of all, of the patterns offered by the American Restatement of the Law and the uniform legislation)

³² Bergerm K. P.: The Principles of European Contract Law and the Concept of »Creeping Codification« of Law. *European Review of Private Law* 9 (2001) 21–34.

³³ Lando, O.: Some Features of the Law of Contract in the Third Millennium. *Scandinavian Studies in Law* 40, Stockholm, 2000. 343–402, especially 361–363.

experimental preparation of such projects as the Principles of European Contract Law or of European Civil Procedure, so as to be able to decide, given the newly acquired practical experience, how to go on (if one will be decided to go further at all);³⁴ or, partly preconceiving the response, leave the consummation of the codifying process to legal practice from the outset, whose result appearing some time in future can, of course, be applied to further refine either the normative material itself or any of its official commentaries.³⁵ No matter how the European legal profession may decide, we have to be aware of the fact that even in case any codification is eventually completed, “It could then take decades before today’s level of predictability and rationality of decisions would be reached again.”³⁶ At the same time and in an evident interrelation with this,

– the question of the future duality and/or eventual convergence of the British *Common Law* and the continental *Civil Law* is still raised as a vital issue.³⁷ This old-new question (earlier only a favourite delicacy for legal

³⁴ Hondius, E.: Towards a European Civil Code. In: *Towards a European Civil Code* ed. Arthur Hartkamp, 2nd ed. Nijmegen–The Hague–Boston, 1998. 3–19.

³⁵ As formulated by Schmid, Ch. U.: Legitimacy Conditions for a European Civil Code. *Maastricht Journal of European and Comparative Law* 8 (2001) 277–298, on 296, there will be an “integrative Restatement with a common European commentary section”, onto which—more and more acceptedly anyway in West-European practice [cf., e.g., Schulze, R.: *Vergleichende Gesetzauslegung und Rechtsangleichung. Zeitschrift für Rechtsvergleichung, internationales Privatrecht und Europarecht* (1997), 183 et seq. and Monateri, G.–Somma, A.: »Alien in Rome«: L’uso del diritto comparato come interpretazione analogica ex art. 12 preleggi. *Il Foro Italiano* (1999), V47]—a so-called comparative interpretation is going to be built. Although this seems to contradict the established practice according to which, from the very beginning, a “Cartesian style” has been dominant in the exclusive European judicial forum properly designed so far, i.e., the European Court of Justice, which is allegedly “inspired by the French tradition, in which judgments are more set up as binding conclusions of a quasi-scientific nature than justified argumentatively” [cf., e.g., Weiler, J. H. H.: The Function and Future of European Law. In: *Function and Future of European Law* (ed. Heiskanen, V.–Kulovesi, K.). Helsinki, 1999. 17 et seq. and Leible, S.: Rolle der Rechtsprechung des EuGH bei der europäischen Privatrechtsentwicklung. In: *Auf dem Wege zu einem Europäischen Zivilgesetzbuch* (hrsg. Martiny, D.–Witzleb, N.). Berlin, 1999. 55 et seq. and 73 et seq. [Schriftenreihe der Juristischen Fakultät der Europa-Universität Viadrina Frankfurt]. This is a practice that will, if not accompanied by a total shift in character, be downright inoperable in a kind of regulation carried out mostly on the level of mere principles.

³⁶ Schmid: *op. cit.* 287.

³⁷ The Clifford Chance Millennium Lectures *The Coming together of the Common Law and the Civil Law* (ed. Markesinis, B. S.). Oxford–Portland, 2000. and, in it, especially

comparatists in generating intellectual pleasures) has now become, from the vague presentiment of the presumable consequences of a political resolution, the *sine qua non* of such a resolution and its feasible future realisation. For the common European administration of justice as practised in Luxembourg, Strasbourg, etc. for a few decades now has only required the commonality of results, with no relevance to the issue how these have been actually reached, with which ways and what procedures resorted to and which sources referred to in the process. However, a common European codification, contemplated now, already penetrates straight into the heart of the law. It presupposes the unification of all the intellectuality and underlying approach, conceptual thinking, subordination to logical and systemic forms (that is, sensitivity, skills and styles) which, on their turn and throughout the sequence of centuries, not only offered our continent a scope of law-positivations diverging in nature from those on the British Isles but, so to say, embodied a route and direction diametrically opposite to the hopes placed in this converging European future, both in the historical experiences and their scholarly reconstruction, in the conceptual and methodological frameworks of political and constitutional thinking, in the stake and nature of philosophising—or, in sum, in taking the choice between the pragmatic reliance on human and social experience or the mere pursuance of the barren logic of preconceived conceptual schemes, and, thereby, also between the empirical (inductive) and the principled and methodical (deductive) ways of construction—from the one-time accomplishment of the entire revolution in natural scientific thought.³⁸

Or, to put it briefly, quite simply and also professionally simplified: those of us who, ready for action, await orders to carry them out, or those who, attending to each other benevolently, hope the diligent acts of the detail work (invisible in the humane everyday responsible practice) to produce

Markesinis, B. S.: Our Debt to Europe: Past, Present, and Future. 37–66; Crosswald Curran, V.: Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union. *The Columbia Journal of European Law* 7 (2001) 63–126. One of the authors [Helmholtz, R. H.: Continental Law and Common Law: Historical Strangers or Companions? *Duke Law Journal* (1990) 1207–1228] remarks in conclusion (on 1228) that “Common lawyers always wished to avoid some aspects of Continental law, but they also habitually regarded it as a companion and resource to be called upon in need, not as a stranger.”

³⁸ For the differing mentality, cf., from the author, *Lectures on the Paradigms of Legal Thinking*. Budapest, 1999. and Összehasonlító jogi kultúrák? [Comparative legal cultures?]. *Jogtudományi Közlöny* LVI (2001) 409–416.

the long desired result one day, can, at the highest, be specialists of *comparative law* in their entrenchment into legal texts, but by no means historically and anthropologically sensitive thinkers who have, at the same time, to bear in mind the essentials of *comparative legal cultures* as well.³⁹ For the latter are those who already know (or, at least presume at the level of hypothesis substantiating their approach and explorations) that law is not simply a mechanism built up of interchangeable parts, according to a product-type and operated as a machine, but an aspect of living human culture, separated relatively and only for professional purposes from the other factors and bearers of the order in making at a community level, only to be able with foreseeable security (as having stepped out from the everyday circulation of interests) to direct, influence and control the practice of conflict-resolution according to ready-made patterns, as the case may be, thereby also rendering it impersonal in the spirit of the ethos of the order itself, that is, an external Order which is, like the veil of *Justitia*, necessarily depersonalised.

(As a matter of fact, we can by far not be sure whether or not at all, and in which sense, the Anglo-American legal mentality may mean indeed 'rule' by 'law'. For instance, the early failure of the reformist effort by the British Law Commission (aimed at considering codification as late as in 1964) was indicative of an utter confusion as to the generalisability of the law as broken into and embodied by a series of concepts, as well as its arrangement and ordination according to abstract logical forms, with the implied possibility of also subordinating (subsuming) facts to rules.⁴⁰ For in

³⁹ For their conceptual and disciplinary separation and the requirements of the new approach, see, from the author, *Comparative Legal Cultures: Attempts at Conceptualization. Acta Juridica Hungarica* 38 (1997) 53–63 and *Comparative Legal Cultures?*, passim, pondering upon the topic covered by *Comparative Legal Cultures* (ed. & introd. Varga, Cs.). Hong Kong–Singapore–Sydney–New York, 1992. [The International Library of Essays in Law and Legal Theory: Legal Cultures 1.] and *European Legal Cultures* (ed. Gessner, V.–Hoeland, A.–Varga, Cs.). Aldershot–Brookfield USA–Singapore–Sydney, 1996) xviii + 567 pp. [Tempus Textbook Series on European Law and European Legal Cultures I].

⁴⁰ The effort of Jeremy Bentham—"The unity of a law will depend upon the unity of the species of the act which is the object of it" [in his *Of Laws in General* (ed. Hart, H. L. A.). London, 1970. 166.]—was reasserted to ordain the proper obligation or empowerment to each and every behavioural situation as a 'law/right' befitting it; Jolowicz' whole venture [*The Division and Classification of the Law* (ed. Jolowicz, J. A.). London, 1970.] set itself the aim of replacing this benthamite dependence on acts by a dependence on social facts; while Julius Stone pointed out, [in his *Legal System and Lawyers' Reasonings*. London, 1964. 269.] that even the most elementary natural facts (like, e.g., the rotting scrap of a

their codificatory thought, the Britons used to maintain that if law were traced back to a (re)posited series of rules at all, that what would be most meaningful of all this settlement for the judges could only be the rather informal reasoning based upon the *travaux préparatoires*, indeed worthy of the human intellect. And this is exactly what the 19th-century British-Indian codifier wanted to express when he remembered as follows: “we added as many illustrations as we thought necessary for the purpose of explaining it”, and, therefore, it would be most beneficial to include these rules’ grounds along with the rules themselves into such codes.⁴¹ Well, they were actually, then and now, trying to beat a path lagging centuries behind Leibniz’ age and recognitions. Actually, the very idea of codification arises from the theoretical understanding that codal law cannot indeed be anything else than a sheer sequence of abstract and general rules, while the underlying understanding of the common law is still related with the idea of something that can exclusively be grasped empirically, placed somewhere between the casual decision and the grounds for decision, equally drawn from tradition.)

Even just a glance through the literature pouring in this topic is enough to see that there are already painstaking case studies about the intensifying “Europeanisation” of the British jurisprudence⁴² and all those “myths of codification”—according to which, to make mention of just one formulation,

“I. A codification can provide an accessible and complete formulation of the law and can enable the development of the law in a planned manner. II. Codal

snail found in the beverage, as referred to in *Donoghue v. Stevenson* [1932] A.C. 562), may mean “dead snails, or any snails, or any noxious physical foreign body, or any noxious foreign element, physical or not, or any noxious element”; as other authors [Twining–O’Donovan–Paliwala: Ernie and the Centipede. In: *The Division...*] have also ventured to prove that “a black female poodle puppy can be classified by colour, sex, species or age”. Freeman: *op. cit.* 172–173.

⁴¹ *Black v. Clawson* [1975] A.C. 591; Macaulay’s letter to Lord Auckland, quoted by Farrar, J.: *Law Reform and the Law Commission*. London, 1974. 58–59; F. Vaughan Hawkins in *Juridical Society Papers* 3 (1865), 110 et seq., especially at 112; as well as Farrar: 159. Quotation by Freeman: *op. cit.* 176–177.

⁴² E.g., Zimmermann, R.: Der europäische Charakter des englischen Rechts: Historische Verbindungen zwischen *civil law and common law*. *Zeitschrift für Europäisches Recht* I (1993), 4 et seq.; Levitsky, J.: The Europeanization of the British Legal Style. *The American Journal of Comparative Law* 42 (1994), 347 et seq.

regimes are rigid and not adaptable. III. The common law's emphasis on case law techniques makes it admirably adaptable to new circumstances."⁴³

–which, of course, as dreams and Utopian expectations, can be justified neither in the domain of Civil Law, nor that of Common Law. It may seem paradoxical, yet it is a truth worth considering that even, for instance, French law is more flexible, more suitable for practical adaptation and fertilising application from many aspects, than case-law directly made by judges. After all, the continental law-applying process steps out from general principles calling, by their nature, for interpretation, and it may initiate debate on the meaning and applicability of rules independently from the question of the very existence and systemically co-ordinated arrangement of the same rules, as opposed to English judge-made law reduced to an amalgam(ate) of casual decisions, which, like “an amorphous mass [...] [in which] there is no organizing principle”,⁴⁴ directly carries on (because of the undifferentiated unity of the rules and their casual application) the legal character and self-identity of the whole, up to its last component as well.⁴⁵ Well, expectations linking positive or negative Utopianism to codification

⁴³ Markesinis: B. A.: The Destructive and Constructive Role of the Comparative Lawyer. [originally in *Rebels Zeitschrift* (1993), 438–448] in his *Foreign Law and Comparative Methodology* A Subject and a Thesis. Oxford, 1997. 36–46, quotation on 37–38.

⁴⁴ Watson, A.: The Importance of »Nutshells«. *The American Journal of Comparative Law* 42 (1994), 1–23, quotation on 11 and 12.

⁴⁵ See Tunc, A.: Codification: The French Experience. In: *Problems of Codification* (ed.: Stoljar, S. J.). Canberra, 1977. 73–74, as well as David, R.: *French Law Its Structure, Sources, and Methodology*. Baton Rouge, 1972. xviii + 222 pp., especially at 80 and 83.

It is to be noted that this is the line by which the question of the general part of civil codes becomes directly a regulatory problem of codification—as it defines, in principle, the upper layer of normative axiomatism (without which the “lawyer at sea in the law like a pilot without a compass” would helplessly roam [cf. Unger *System des österreichischen allgemeinen Privatrechts* I, 5th ed. (1892), 641, as well as Zweigert, K.–Kötz, H.: *Introduction to Comparative Law I: The Framework*, 2nd rev. ed. (trans.: Weir, T.). Oxford, 1987. 167]–, as well as the gap-filling technique of the Swiss *Zivilgesetzbuch*, commissioning the judge to become eventually an accidental substitute to the legislator (§ 1), the specific feature of which lays not only in the fact that it can be traced back via Kant even to Aristotle (*Nicomachean Ethics*, 1137b) but it also reasserts the continental regulatory principle (the judicial empowerment notwithstanding), by eventually declaring that “in order to be legal a decision must be based on a rule which can be formulated as a general one” [Wieacker, F.: *A History of Private Law in Europe With Particular Reference to Germany {Privatrechtsgeschichte der Neuzeit, 1952, 2nd ed. rev. 1967}* (trans. Weir, T.). Oxford, 1995. 391].

mostly appear mixed with manifestations of either the euphoric belief in a Common Europe⁴⁶ or, just to the contrary, an extremist rejection of it.⁴⁷ Any analysis of the signs, steps and events of actual rapprochement (or, at least, of effective interaction and mutual influence) is relatively rare a phenomenon. For instance, in Germany, the jurisprudence of the *Bürgerliches Gesetzbuch* has arrived from the one-time exegesis reached as a “*juristic game of chess*” to a “*case-law revolution*”,⁴⁸ while in the English legal thought, there is emerging an “*increased self-assertion of a kind of doctrinarism*” (as a feature indicating that

⁴⁶ Markesinis, B.: *The Gradual Convergence Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st Century*. Oxford, 1994.; Gordley, J.: *Common Law and Civil Law: Eine überholte Unterscheidung*. *Zeitschrift für Europäisches Privatrecht* I (1993), 498 et seq.

⁴⁷ Cf., e.g., from Legrand, P.: *Legal Tradition in Western Europe: The Limits of Commonality*. In *Transfrontier Mobility of Law* (ed.: Jagtenberg, R.–Örtücü, E.–de Roo, A.). The Hague–London–Boston, 1995. 63–84 and *How to Compare Now*. *Legal Studies* 16 (1996), 232 et seq.; similarly Paasilehto, S.: *Legal Cultural Obstacles to the Harmonisation of European Private Law*. In: *Function and Future of European Law*, 99 and Bussani, M.: »Integrative« *Comparative Law Enterprises and the Inner Stratification of Legal Systems*. In: Feiden, C.–Schmid (ed.): *European Review of Public Law* 8 (2000), 57 et seq., especially at 85.

According to several opinions [e.g., Flume, W.: *Beruf unserer Zeit für Gesetzgebung*. *Zeitschrift für Insolvenz- und Wirtschaftsrecht* (2000), 1427 et seq., especially at 1429, as well as Collins, H.: *European Private Law and the Cultural Identity of States*. *European Review of Public Law* 3 (1955), 353], national legal arrangements with their codal expression are parts of the cultural heritage anyway, whereby they, being cultural monuments, can hardly be relinquished by any state without simultaneously giving up something of own statal identity.

For instance, Mengoni, L.: *L'Europa dei codici o un codice per l'Europa?* (Roma, Centro di studi e ricerche di diritto comparato e straniero, 1993), 3 [Saggi, conferenze e seminari 7] excludes unification through codification from the circle of possible alternatives: “*reconoscere che l'un codice per l'Europa non è un'alternativa realistica*”. Legrand, P.: *Brèves réflexions sur l'utopie unitaire en droit*. *Revue de la common law* 3 (2000) 1–2, 111–125 quotes from the work of P. d'Oribane *Cultures et mondialisation* (Paris, 1998), 324–325, according to which “The reason according to the taste of the French is more noble, more devoted to the beauty of theory, more attached to the pure and gratuitous things, more based on general systems and ideas, more brilliant, more abundant in elegant demonstrations, and more sharing the characteristics of *grandeur* than the English do”.

⁴⁸ Partsch, J.: *Vom Beruf des römischen Rechts in der heutigen Universität*. Bonn, 1920. 50 pp. at 39, as well as Dawson, J. Ph.: *The Oracles of the Law* (Ann Arbor, 1968), 432, quoted, among others, by Zimmermann, R.: *Roman Law, Contemporary Law, European Law The Civilian Tradition Today* (Oxford, 2001) xx + 197 pp.

“these peculiarities and jagged edges, on both sides of the Channel, are in a process of being with away”⁴⁹). Or, what is wanted is a disillusioning cold voice that would neither applaud, nor oppose, just remind us that, given the second millennium elapsed in European history, what has happened until now is not too much and not necessarily new either. Therefore, one can state that

“To conclude on that basis that the common law is being »Europeanised« is probably as rash as to imagine that it was ever isolated in the first place.”⁵⁰

And indeed, we cannot be so oblivious as to forget that, just a few decades ago, the very idea of applying any universal abstract formulation, such as in case of the direct and uniform judicial enforcement of transnational human rights charters, had filled the House of Lords with dread. Similarly, English lawyers have proved to be unable or unwilling to propose (perhaps out of pretension) a means more suitable for the internal division of their own law than factual classification (i.e., the one arranging facts according to the initials of their English names);⁵¹ acknowledging with complacency that human mind has never produced and could probably never produce anything more fitting than the purely alphabetical “chaos with an index”⁵² of the words identifying legal loci and contexts.

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Now, looking back from the coming future to the past, what is codification of the various historical epochs like in the mirror of analyses by recent literature? As far as the early occurrences preceding the Greek and Roman codal forms are concerned, it is ascertained that they were, for the most part, not normative

⁴⁹ Zimmermann, R.: Savigny’s Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science. *The Law Quarterly Review* 112 (October 1996), 576–605, especially at 590 and quotation on 589.

⁵⁰ Lewis, X.: The Europeanisation of the Common Law. In: *Transfrontier Mobility of Law*, 47–61, quotation on 61.

⁵¹ The aim of *The Division and Classification of the Law* (ed.: Jolowicz, J. A.) is admittedly nothing less than “A plea for a factual classification of the law [...] a factual division of the content of the law” (7). The situation has not changed since. As Bernard Rudden states in his *Tortiles. Tulane Civil Law Forum* (1991–1992) 105, “the alphabet is virtually the only instrument of intellectual order of which the common law makes use”.

⁵² The expression of Sir Thomas Holland is quoted by Marsh, N. in *International & Comparative Law Quarterly* 30 (1981), 488.

sources of law⁵³ but “pious hopes and moral resolve rather than effective law,”⁵⁴ or, at times, simply traditional literary compendia used for the official training of clerks,⁵⁵ which could of course serve also as reference manuals for the judges faced with troublesome cases.⁵⁶

It is surprising how early the idea of order arose, so to say contemporarily with Justinian, but thousands of miles further, also in the West.⁵⁷ And in *conceptual arrangement*, substantive regulation is the first to get separated

⁵³ “Neither in the prologues nor in the epilogues nor elsewhere do the law-codes order any one to observe their provisions. Judgments in lawsuits pay no regard to the law-codes.” Walther, A.: *Das altbabylonische Gerichtswesen*. Leipzig, 1917. 227. Also cf., in the same sense, Landsberger, B.: Die babylonischen Termini für Gesetz und Recht. *SDIOP* II, 221–222.

⁵⁴ Finkelstein, J. J.: Ammi-Saduya’s Edict and the Babylonian »Law Codes«. *Journal of Cuneiform Studies* 15 (1961), 91–104. “Their primary purpose was to lay before the public, posterity, future kings, and, above all, the gods, evidence of the king’s execution of his divinely ordained mandate.” (103) Accordingly [as Oppenheim, A. L.: *Ancient Mesopotamia* Portrait of a Dead Civilization, rev. ed. (1977) states], Hammurapi’s code (similarly to all former Accadian and Sumerian codifications) has no connection whatsoever with the legal practice of the age. Its contents can, from several main perspectives, be regarded rather as a traditional literary formulation of the King’s social obligations and as the expression of the King’s awareness of the differences between the existing and the desirable state of affairs. (And it is to be remembered that this edition also remarks in notes—rather thought-provokingly for the understanding of the all-European development—that the fatal approach trying to squeeze reality into a series of formal requirements is unknown in Mesopotamia and probably also in the entire ancient Near East. It was only a later and definitely peripheric development, notably, Judaism [having originated from the desire to generate, due to certain ideological motives, specific social relationships] that managed to bring about such a behavioural pattern.)

⁵⁵ Oppenheim, A. L.: *Ancient Mesopotamia*. Chicago, 1964. 14–21.

⁵⁶ Westbrook, R.: Biblical and Cuneiform Law Codes. [*Revue Biblique* 92 (1985), 247–264] In *Folk Law* Essays in the Theory and Practice of *Lex Non Scripta* (eds. Dundes Renteln, A.–Dundes, A.). New York–London, 1994. 495–511, especially at p. 503. For the entirety of these early forms, see also Sealey, R.: *The Justice of the Greeks* (Ann Arbor, 1994).

⁵⁷ Notably, it appears already as a programme in title 1 of the book II of the version of the unified (Visigothic and Roman) code of Recceswinth (654) as amended by Erwig (681) that the law-book has to provide “a clear and honest meaning, expressing clear precepts for the doubtful [...] in orderly arrangement [...] in ordered titles”. Quoted by Fischer Drew, K.: *The Barbarian Kings as Lawgivers and Judges*, in her *Law and Society in Early Medieval Europe* Studies in Legal History. London, 1988. 7–29 and 15.

from procedural and evidentiary rules in early compilations, so that it can finally be declared:

“all questions for which there is no regulation have to be answered upon the basis of the regulation given in the law. [...] The law becomes, out of something inherent in the things, a kind of order posited above the things, an autonomous power.”⁵⁸

New realisations are now made available about the *substitutes for codification* from antiquity up to the present day. On the one hand, we not only learn how widespread it was for official compilations to enter into effect in form of manuscripts (either due to lack of printing press or to some local custom), but there were even times when they were expressly designed to be made public by way of being deposited (for example, at the Town Hall in case of the *Coutumes de la ville d'Ypres*, 1535) as accessible to anyone to ask for a copy on payment of a certain amount,⁵⁹ just as the Icelandic law-speaker [*lögsögumaður*] centuries earlier (back in the age of the *Konungsbók* [*Codex regius*], 930–1262) could be approached to reassert occasionally for those who looked after justice, what the law was.⁶⁰ On the other hand, not only revealed holy books (like, e.g., the *Bible* for the first founders of the state of Massachusetts) can provide a rudimentary guidance as the law's summation but, at times and for want of anything better,

⁵⁸ [“alle nichtgeregelten Fragen sich aus der im Gesetz gegebenen Regelung beantworten lassen müssen. [...] Das Recht (Gesetz) wird aus einer den Dingen innewohnenden eine über die Dinge gesetzte Ordnung, eine autonome Macht”] Ebel, W.: *Geschichte der Gesetzgebung in Deutschland*. Göttingen, 1958. 107 pp. [Göttinger rechtswissenschaftliche Studien 24], on 75. According to his examples, such is the promulgation of a *Gerichtsordnung und Landrecht*, auch Polizei-, Holz-, Hütten-, Bergordnung und Reformation (1592) on the estate of Wildenburg a. d. Sieg or of a *Rechtsordnung* consisting of 16 titles (1663) as based upon the reformation of the *Bericht über Erbfälle und über etliche Mißbräuch* on the estate of Kurköln (1538) (73); and, as a conceptual systematisation, the issuance of a *Gerichts- und Landordnung* (verf. Joh. Fichard, 1571) in the county Solms and, as parts of it, a *Von den Landrechten* (with 32 titles) and a *Von Gerichten und gerichtlichem Prozeß* (with 40 titles) (74).

⁵⁹ E.g., the *Statutes of the Grand Duchy of Lithuania* (1529), as well as the *Sud'ebniks of the Grand Duchy of Moscow* (1497 & 1550). Cf. Uruszczak, W.: *Les codes de droit en Europe à l'époque de la renaissance*. In: *La codification européenne du Moyen-Age au siècle des Lumières* (éd. Salmonowicz, S.). Warszawa, 1997. 69–102, especially at 101.

⁶⁰ Sigurður L.: *Law and Legislation in the Icelandic Commonwealth*. *Scandinavian Studies in Law* 37 Stockholm, 1993. 55–92.

maybe even practical guidebooks, written originally for didactic purposes to students.⁶¹

Well, especially in case of the great oeuvres marking the emergence of the *classical* type of codification (like, e.g., the *Allgemeines Landrecht*⁶² and the *Code civil*), despite the former's authoritarian and the latter's revolutionary origin,⁶³ their one-time *embeddedness in traditions*⁶⁴ is increasingly re-discovered and emphasised now, especially in the light of today's intellectual and institutional

⁶¹ The *Hexabiblos* (1345), compiled by the Thessalonian learned specialist Constantine Harmenopoulos and usually referred to as the "miserable epitome of epitomes of the epitomes", was applied throughout the late Middle Ages as a substitute source of the law in Greece and the entire Balkans. What is more, it was even confirmed by an order of February 23, 1835, of the Kingdom of Greece so that, in lack of any custom or judicial practice to the contrary, it had to be applied as a general source of the law until a civil code was finally drafted (which was actually done as late as on February 23, 1946). Or, in South-Africa, the Thirty-three Articles that constitutionally established Transvaal had stipulated in section 31 that '*hollandsche wet*' had to be taken as the basis of the law. The new Constitution (*Grondwet*, September 19, 1859) defined, in Annex [*bijlage*] 1, first Johannes van der Linden's *Rechtsgeleerd practicaal en koopmans Handboek*, secondly Simon van Leeuwen's *Het Roomsche-hollandsche recht* and thirdly Grotius *Inleidinge tot de hollandsche Rechtsgeleerdheid* (1631) to serve as its framework. That is, it ordained practical handbooks published in a wide circulation during the 17th century as the basic reference to law in the second half of the 19th century despite the fact that the new civil code of the Netherlands (*Burgerlijk wetboek*, 1838) had by then left the old law for decades behind, as a sheer preliminary. Watson, 20 and 19.

⁶² According to Stein, P.: *Roman Law in European History* (Cambridge, 1999), 112, the main drafter of the *Allgemeines Landrecht* was Carl Gottlieb Suarez who shared the views of Christian Wolff, in terms of which it is the ruler's duty to guide his subjects to lead a perfectly reasonable life. Therefore, the Prussian Code had to have an educational purpose and, as addressed to the public, it had to be comprehensive, clear and definite as well.

⁶³ According to the witty remark of Domenico Corradini *Garantismo e statualismo Le codificazioni civilistiche dell'Ottocento* (Milano, 1971), 12 et seq. [Pubblicazioni della Facoltà di Giurisprudenza della Università di Pisa 39], the classical codes were originally drafted with the purpose of safeguarding either absolutism or basic freedoms. At the same time, Halpérin, J.-L.: *L'impossible Code civil*. Paris, 1992. 309 pp. [Histoires] points out that all the natural law, colouring the French Civil code, only served to conceal the novelty of its wording (289), while "the text finally adopted after struggles of nearly one and a half decade was the longest among all the proposals yet at the same time the least revolutionary." (287)

⁶⁴ Gordley, J.: Myths of the French Civil Code. *The American Journal of Comparative Law* 42 (1994), 459 et seq.

challenges that, as driven by a common “European interest” or under simple pressure of time and out of helplessness, look back rather on Savigny instead of Thibaut.⁶⁵ This is all the more remarkable because it appeared as the practical correction of the cardinal idea of the Enlightenment (namely, the ideals of rationality, logicity and universality⁶⁶ that once resulted in the emergence of the new, quality type of codification and which ideals were once believed to have absolute validity) at a time when all these revolutionary illusions, wish-dreams and incantations had to be put to the test of life by being implemented in practice.

Thus, it is no mere chance that Portalis’ personal contribution to the drafting of the *Code civil* has now (in contrast to the disdainful tone once used when remembering him⁶⁷) come to the limelight with the effect of revelation (revoking his bitter and disillusioned treatise with a non-mainstream picture of his age, once considered worthy of oblivion). Secondly, it is little wonder that it is through the interpretation of the *Code Napoléon* as a sociological phenomenon that we now start collecting the following facts about J. E. M. Portalis (1746–1807) as features determining his personality: He fled to Northern Germany during the Revolution, where he got into contact with Pietists; his attraction to the oeuvres of Pascal and Montesquieu deepened; it was also during that period that he started to castigate the one-time misery of his homeland in an essay only posthumously published. For in Germany, as he wrote, he had seen the materialisation of the good form of what he called *esprit philosophique*: small universities, closed

⁶⁵ Thibaut, A. F. J.: *Über die Nothwendigkeit eines allgemeinen bürgerlichen Rechts in Deutschland* (Heidelberg, 1814) and von Savigny, F. C.: *Von Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg, 1814), both reprinted in *Thibaut und Savigny Ihre programmatische Schriften* (hrsg.: Hattenhauer, H.). München, 1973. 61 et seq. as well as 95 et seq. As to the movement and their debates, cf. Wrobel, H.: *Die Kontroverse Thibaut–Savigny im Jahre 1814 und ihre Deutung in der Gegenwart* [Diss.]. (Bremen, 1975) v + 307 pp.

⁶⁶ “A well conducted government must have a system as coherent as a system of philosophy, so that finance, police, and the army are coordinated to the same end, namely the consolidation of the state and the increase of its power. Such a system can only emanate from a single brain, that of the sovereign.” Andrews, S.: *Eighteenth-century Europe*. London, 1965. 119. And, as Finer, S. E.: *The History of Government From the Earliest Times*, I–III (Oxford, 1997), 1456 continues this line of thought, showing the parallel between the great epochs of governmental bureaucracy and codification (1458), all this preconditions “belief in uniformities in Nature, the logicity of Reason, and correspondingly, the need to rationalize, systematize, and codify the laws under which subjects were to live.”

⁶⁷ E.g., Planiol, M.: *Traité élémentaire de droit civil* I. Paris, 1900. § 80: “n’a point dépassé la médiocrité”.

intellectual circles without any major social or political irradiation, where ideas were not driven by the chance of materialisation, thus being unable to become directly dangerous either. The French Revolution had, on the other hand, originated from the *salons* of Paris, as launched by the “Sophists”. The whole atmosphere of the Enlightenment in France with direct irradiation of ideas and mobilisation of the political elite itself, focussing on the idea of a mentally anticipated conceptual system with the urge of its systemic implementation, was suitable to tempt to both irresponsibility and extreme consistency, and, once inflicted on the Nation as a living practice, it might also elicit the eventual (ill)fortune of a whole country. Well, such a cry in Portalis’ complaints⁶⁸ may remind the reader of present-day criticisms of the wantonly useless, bare intellectualism marking our modernity.⁶⁹ Accordingly,

⁶⁸ “How much we could have benefited since, if the idea of system had not thrown pernicious errors into the most useful truths, and if the wise lessons of experience had not been suffocated by exaggerated and absurd theories!” “It was the men of genius, of character and of vision, and not the Sophists who founded societies, built cities, and taught things to peoples. Sophists always appear at times when morals are corrupted. They are born therefrom and they are hardly suitable to raise, with their miserable influence, those spirits and hearts degraded. As soon as they formulate an idea, they believe to have brought about a kind of institution. But, as the ideas formulated do not, by themselves, capture people, they do neither take roots where they were sown. They just keep multiplying the laws, whereby they exactly achieve the debasement of legislation. And meanwhile everything gets lost: the false philosophical mind is like a deaf shell enclosing everything.” Portalis, J. E. M.: *De l’usage et de l’abus de l’esprit philosophique durant le XVIII^e siècle* [Paris, 1820] 3^e éd. (Paris, 1834), 300–301 and 402–403, with a selected reprint in Portalis, J. E. M.: *Écrits et discours juridique et politique*. (Aix-Marseille: Presses Universitaires d’Aix-Marseille, 1988), 227 and 398–399.

⁶⁹ For present-day stands about intellectualism, see *Kiáltás gyakorlatiasságért a jogállami átmenetben* [A call for practicality in the transition to rule of law] (ed. Varga, Cs.). Budapest, 1998. 122 pp. especially with Kirckpatrick, J. J.: Introduction to her *Dictatorship and Double Standards* Rationalism and Reason in Politics (New York, 1982), 1–18 and, as a stand taken by the author, A racionális jogszemlélet eredendő ambivalenciája: Emberi teljességünk széttörése a fejlődés áraként? [The inherent ambivalence of a rational legal approach: development at the price of the fragmentation of our human integrity?] In: *A jogtudomány és a büntetőjog dogmatikája, filozófiája* Tanulmánykönyv Békés Imre születésének 70. évfordulójára [Philosophy of law and penal law: Festschrift for Professor Imre Békés] (eds. Busch, B.–Belovics, E.–Tóth, D.). Budapest, 2000. 270–277 as well as *Önmagát felemelő ember? Korunk racionalizmusának dilemmái* [Man elevating himself? Dilemmas of rationalism in our age]. In: *Sodródó emberiség* [Mankind adrift: on the work of Nándor Várkonyi’s *The Fifth Man*] ed.: Mezey, K. (Budapest, 2000), 61–93. In a philosophical and socio-theoretical context, cf. also

“Portalis may have arrived at the philosophical conviction of empiricism transformed into philosophy. This knows no system, only adaptation, that is, the adaptability of thought to the different requirements of the moment.”⁷⁰

To recognise again the moment of *tradition* embodied (among others) by the French revolutionary breakthrough in codification, as well as that of experience indispensable beyond reason and logic in the judicial profession, or to reconsider the debates revolving around codification having called to life the historical school of law in Germany from the second half of the 18th century on, well, all this cannot at all be alone attributed to an immanent interest in the history of ideas today. After all, we have to find fixed points that help us identify the paths of the future. More precisely, it is exactly the path to be followed in the near future about which we think we may ascertain that its uniqueness and the unprecedentedness of its venture are nothing but the extension, in European dimensions and with an all-European complexity, of the difficult and risky decision which had already been faced once at a national level in Germany of the 19th century, and for the intellectual dilemma of which perhaps the one-time movement of the German historical school of law can now be taken as the best example.⁷¹

Anyway, the recognition according to which the age of the series of pieces of national codification was limited in a social and political sense as well, as it embodied and emphasised a further stage of universal development, is reflected by the historical reconstruction of the birth of the Austrian *Allgemeines Bürgerliches Gesetzbuch*. For, according to its monographer,

“the codification of civil law was an attempt to reconcile the modern notion of the state as the supreme public authority holding a monopoly of government with the idea of the rule of law as an objective and, indeed, absolute category of social cohesion, and as such not subject to the supreme will of public authority [...]. On the Continent of Europe, codified civil law provided the legal basis for the social and political pattern of the nineteenth

Hayek és a brit felvilágosodás A konstruktivista gondolkodás kritikája [Hayek and the British Enlightenment: criticism of the constructivist thought] ed. Ferenc Horkay Hörcher. Budapest, 2002. [Jogfilozófiák].

⁷⁰ Carbonnier, J.: Le Code Napoléon en tant que phénomène sociologique. *Revue de la Recherche juridique Droit prospectif* (1981) 335.

⁷¹ Cf., especially, Zimmermann: *Roman Law...*, *op. cit.* 14–17.

and early twentieth centuries: the state of absolute sovereignty which yet remained a *Rechtsstaat*”.⁷²

At the time and under the given circumstances, this reconstructive requirement of the codal function had completely fulfilled what I had, in the monograph referred to above, described as the main (socio-legal) function of the national unification of law, on the one hand, and the apparently merely legal-technical function of the centralised state domination over the law, on the other, in terms of which the state may, in turn, control the entire theoretical and practical staff of the law and, thereby, decisively shape its everyday implementation as well.⁷³

How far has the fulfilment of such major vocations and expectations progressed, as assessed by critical retrospection within a present perspective?

“Obviously, some of the high hopes and expectations entertained at the time of the Enlightenment have not been fulfilled: neither have the codifications made the learned lawyer redundant, nor have they led to a lasting consolidation (or, to put it negatively: ossification) of private law. Still, however, they have significantly contributed towards the national fragmentation of the European legal tradition.”⁷⁴

Well, the realisation above may serve as a typical illustration of how certain evaluations can turn into their own opposite, depending on the historical evolution and practical developments, for, in the light of the present-day international process of unification in European proportions, that what once (just one or two centuries ago) was a landmark of the national legal unification is now (and not without any foundation) re-formulated as national fragmentation. Just as paradoxical is the following statement by the same historian of European law, well versed in deepened English legal studies, according to which

“What German arms had achieved on the battlefields of France—political unity—had now also been peacefully accomplished in the area of private law: »One People. One Empire. One Law.«”⁷⁵

⁷² Strakosch, H. E.: *State Absolutism and the Rule of Law* The Struggle for the Codification of Civil Law in Austria, 1753–1811. (Sydney, 1967) vii + 267 pp.

⁷³ See Varga *Codification...*, *op. cit.* passim.

⁷⁴ Zimmermann: *Roman Law...*, *op. cit.* 1.

⁷⁵ *Ibid.*, 53, quoting Zittelmann, E.: Zur Begründung des neuen Gesetzbuches. *Deutsche Juristenzeitung* (1900), 2. Moreover, Windscheid, B.: *Das römische Recht in Deutschland*. In

Indeed, the requirement of both the overall *popular knowledge of the law* and *regulatory completeness* is not any longer featuring amongst the classical dreams and hopes regarding codification, or at least, not in the sense of the law's easy accessibility, cognisability and manageability.⁷⁶ Therefore, the dream originating from the age of the Enlightenment, postulating that society and law have to be established in one consciously planned and realised act around which the real life would revolve as planets of the solar system, turned out to be quite unrealistic.⁷⁷

his *Gesammelte Reden und Abhandlungen* (hrsg. Oertmann, P.). Leipzig–Duncker–Humboldt, 1904. 48 desired the same: to provide “a German law for the German People” by building up “a cathedral of national splendour”, a wish common to Europe as an objective of all the national states from the age of Napoleon. Cf., e.g., von Görres, J. in *Rheinischer Merkur* (April 7, 1815): “*Ein Reich, ein Recht!*” a quote by Gaudemet, J. in his *La codification, ses formes et ses fins. Revue juridique et politique Indépendance et coopération* 40 (Janvier–Juin 1986) 3–4, 239–260, especially 257. It may seem ironic, yet can perhaps be explained by the historical conditions of contemporary criticism that the first draft of the German *Bürgerliches Gesetzbuch* (1888) as characterised by Zimmermann: *ibid.*) “was condemned as being too abstract and pedantic, it was denounced as a pandectist textbook cast in statutory form and thus as being too unGerman; it was attacked as being out of touch with the realities of life and as lacking even a drop of socialist oil.” Cf. also Varga: *Codification...*, *op. cit.* 135, note 84.

⁷⁶ “Today, one has given up all hope that the average citizen can be expected to comprehend the law. [...] A code may or may not be desirable: that it fails to promote general knowledge of the law cannot be regarded as a decisive argument within this debate.” Zimmermann: *Codification...*, *op. cit.* 108.

⁷⁷ The Hegelian parallel—“Never since the sun has stood in the firmament and the planets revolved around it had it been perceived that man's existence centres in his head, i.e. in thought, inspired by which he builds up the world of reality.” Hegel, G. W. F.: *The Philosophy of History (Vorlesungen über die Philosophie der Weltgeschichte [1840] IV* Berlin, 1970–1976. 926), 447, quoted by Varga: *Codification...*, *op. cit.* 302—is translated by Gambaro, 81, into a description of the doctrine of legal sources when he recalls: in the 19th century, “the so-called special statutes [were relegated] to the level of exceptional norms which rotated around the code, just as the planets of the solar system move around the sun”. It is this same sense in which the root of the present decline of codification is seen by Irti, 27: “The *Codice civile* cannot be recognised as having [...] the value of general law, the seat of principles that are set forth and »specified« by external laws [...]. [For it] functions henceforth as a »residual law«, as a discipline for cases not regulated by particular provisions.”

The wish-dream of both *total systemicity*⁷⁸ and *gaplessness*,⁷⁹ effecting comprehensive and exhaustive regulation on principle, has proved to be a similarly vain hope, and even more so the attempt at enforcing this through the prohibition of judicial interpretation.⁸⁰ Well, all these new developments are definitely meant to reaffirm the *trust* to be placed necessarily by the legislator in those who administer justice,⁸¹ as a reminder of the gradual construction of the law and the inevitable *division of law-making contribution*, covering all stages of the entire process of the law's formation, by conceptualising them as "the two-graded process of the law's establishment" (to use the expression of Kelsen having written his second major treatise in 1922),⁸² on the one hand, and they also reaffirm the function of the code which I had earlier characterized (in describing the life, posterior to the Second World War, of the *Code civil* and other classical codes) in a way that, in the process of the gradual building up of jurisprudence through merely referring to the code-text in the everyday practical development of the law, the code's genuine function gets reduced to nothing but *providing and indicating systemic-taxonomic locuses* for the judicial solution of the case, that is, to a most relative guidance by far not unambiguous or excluding alternatives, on the other.⁸³

⁷⁸ "If you read the proceedings, you may be amused at finding the briskest of all the debate took place over the two little words »and hares« in a section relating to damage done by wild animals. Powerful language is used, and, for a moment, the given whole of the mighty project seem to be endangered by the conflicting interests of sport and agriculture. That is the touch of humour, required as a relief for so much civil virtue."—wrote Maitland, F. W.: *The Making of the German Civil Code*. In: his *The Collected Papers* (ed. Fisher, H.) III Cambridge, 1911. 482, declaring thereby that this was nevertheless the victory of the whole over each and all its individual components.

⁷⁹ Cf., e.g., Hübner, H.: *Kodifikation und Entscheidungsfreiheit des Richters* in der Geschichte des Privatrechts. Königstein, 1980. 74. [Beiträge zur neueren Privatrechtsgeschichte 8].

⁸⁰ For Frederick the Great [*Publikationspatent* (1794), art. XVIII], judges are prohibited "to indulge in any arbitrary deviation, however slight, from the clear and express terms of the laws, whether on the grounds of some allegedly logical reasoning or under the pretext of an interpretation based on the supposed aim and purpose of the statutes".

⁸¹ The necessary failure that can be traced back throughout our known history is described by Becker, H.-J.: *Kommentier- und Auslegungsverbot*. In: *Handwörterbuch zur Deutschen Rechtsgeschichte* (hrsg. Erler, A.–Kaufmann, E.–Stammler, W.) II. Berlin, 1978. 963 et seq.

⁸² Kelsen, H.: *Allgemeine Staatslehre*. Wien, 1922.

⁸³ And this was already a total shift, equal to giving up the original function which had once historically brought the phenomenon known as codification, because thereby the code

Thereby, methodologically we have returned to the expectations towards a common European codification of private law, to the possible methodology of its realisation and to the formulation of the main function to be filled by it. Accordingly,

“a codification [...] provides a system that all those who have to apply and interpret the law to see »*varitat[es] inter se connexa[e]*«⁸⁴ to appreciate and pay attention to the normative context within which a specific decision has to be seen, to avoid inconsistencies and to arrive at solutions that are not only fair and equitable per se but also fit in with the solutions found to other problems. [...] It provides a focus which enables him to relate seemingly disparate issues to each other and harmoniously to incorporate new strands of thought.”⁸⁵

Everything considered, what underlies the above statement is nothing else than the replacement of the idea of a system, closed into its axiomatic self, by the idea of a half-open and half-closed *autopoietic* system that shuts itself back and also re-generates itself each time it closes itself, utilising any of its original systemic definitions in any way only when it is closed back in practice and, therefore, changing its definitions and contextualisations any time it operates, depending on its given environment. Methodologically speaking, something similar may have been in mind after the Second World War was over, when the claim for “a natural law with changing contents” (as formulated by Rudolf Stammler after the First World War) became filled with concrete contents. As concluded by a contemporary author,

“The eternal truths to be found in the sphere of the logic of things [...] do not constitute a closed system as once supposed by natural law, but arrive at various aspects through the entire material of the law, connected with powerful linkages to the decisions here and now to be made.”⁸⁶

fell back from the codal role of determining the law to the mere role of indicating the mere systemic loci of the practical (judicial) shaping of the law. Cf. Varga: *Codification...*, *op. cit.* especially ch. V, para. 5.

⁸⁴ Wolff, Ch.: *Institutes juris naturae et gentium*, § 62.

⁸⁵ Zimmermann: *Codification... op. cit.* 110.

⁸⁶ Welzel, H.: *Naturrecht und materielle Gerechtigkeit*. Göttingen, 1951. 198.

With this, one has also formulated the new creed of the judicial profession in the light of the new, present-day conditions of codification. For

“difficult problems can simply be wrongly analysed because, without conceptual discipline, it is not possible to be sure that previous cases were indeed like the one now before the court. The elementary principle of formal justice, that like cases be decided alike, is thus offended. Again, whole areas of the law can be neglected if in the absence of a map nobody can see that they are being insufficiently visited [...]. There is also another kind of damage at a higher level, in that, in the absence of a common conceptual structure, lawyers loose faith in the rationality of their endeavour [...]. It is perhaps the most important feature to be kept in mind: a code has to be brought to life, and has to be kept in tune with the changing demands of time by active and imaginative judicial interpretation and doctrinal elaboration. This requires the legislature to exercise considerable self-restraint.”⁸⁷

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The lesson to be securely drawn is that notwithstanding the untroubled pursuance of domestic practice, we are getting closer to a crossroads. The perspective of the common codification of private law within the European Union not only brings back (breaking through walls of silence of several centuries) memories of accomplishments and expectations of a long and distant past (once made universally valid in continental dimensions) as actual experience, but, at the same time, also refers us back to those points and moments (regarded for centuries as buried by the bygone past) from which, upon the basis of the joint acquisition of the shared Greek-Roman heritage and its differentiating (yet in a way somehow united) re-adaptation, the paths of development characteristic of the Civil Law and the Common Law started once to diverge.

The more the advancement of the European unification progresses, the more inverse the assessment of European codification becomes, reconsidering past trends, values and regulatory techniques. Thus, it is suggested as if we, on the Continent, had not so much become statal national units unified by a sequence

⁸⁷ Zimmermann: *op. cit.* 114. See also in a similar sense Kötz, H.: Taking Civil Codes Less Seriously. *Modern Law Review* 50 (1987), 13 et seq. and Birk, P.: The Need for the Institutes in England. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Romanistische Abteilung*, 108 (1991), 708 et seq.

of national laws but, being too conceited of our most promising collective heritage within the transitory phase of an infantile disorder, became rather fragmented in national isolation from one another. The meaning conveyed by our past and the paths actually covered have thereby become dubious again with open-ending alternatives.

The problem of codification in Europe seemed to be more or less settled for ever a few decades ago. Now, in the light of the new challenges that are coming from the facts of the newest European convergence, we have to resume not only our earlier investigations but, at the same time, also repeatedly re-consider the foundations and the historical (that is, as directed from the past towards the future, perspectival) presuppositions of our thinking, perhaps not for the last time in our ever-changing world.