1216-2574 / USD 20.00
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CTA URIDICA UNGARICA
47, No. 2, pp. 89–117 (2006)
DOI: 10.1556/AJur.47.2006.2.1

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.

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 *Retfaerd* [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

"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 Torticles. *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 law[53] 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 lawsuites 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] Sigurđur 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 Roomsch-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, logicality and universality[66] 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 him[67]) 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 logicality 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' complaints[68] 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 XVIIIe siècle* [Paris, 1820] 3e 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

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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 irrealistic.[77]

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his *Gesammelte Reden und Abhandlungen* (hrsg. Oertmann, P.). Leipzig–Duncker–Humblot, 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 *Rheinisches 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]

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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

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, perspectivical) presuppositions of our thinking, perhaps not for the last time in our ever-changing world.