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Codification: history and present significance of an idea
*À propos the recodification of private law in the Czech Republic**

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Abstract. In his lecture presented at the opening of a symposium on the recodification of Czech Private Law the author first analyses the characteristic features of a codification. He then examines in which ways and for which reasons the idea of a civil code managed, from the late 17th century onwards, to recast the entire civilian tradition. The author argues that, contrary to a widely held view ('decodificazione'), even today codification is not an outdated concept. It constitutes an intellectual effort to look at private law as a systematic whole. In view of the increasing particularization of modern legal science and of the hectic activity of the modern legislator, this kind of focus appears to be even more desirable today than ever before. It is, however, important to beware of exaggerated and unrealistic expectations. More particularly, no codification can ever hope to be comprehensive in a narrow sense of that word. It 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. Sensible draftsmen of a code will therefore exercise considerable self-restraint so as to provide the basis not for confrontation but for an alliance between legislation and legal science. They will also acknowledge the limitations of their power imposed upon them by the tradition within which they operate. The author finally turns his attention to how the actual process of recodification of Czech private law may be organized. He suggests, *inter alia*, that one of the existing European civil codes should serve as a model.

Résumé. Dans sa conférence tenue à l'occasion d'un symposium concernant la nouvelle codification du droit privé tchèque, l'auteur en analyse d'abord les caractéristiques. Ensuite, il continue en examinant de quelle façon et pour quelles raisons la codification des droits, à partir du 17ème siècle, a réorganisé la tradition du droit privé dans toute l'Europe continentale. S'opposant à une opinion répandue ('*decodificazione*'), l'auteur pense que l'idée d'une codification est toujours actuelle. Elle représente un effort intellectuel qui consiste à comprendre le droit privé en un tout systématique. La spécialization croissante du droit et l'augmentation '*fiévreuse*' de activité législative de nos jours exige, selon l'auteur, un effort de codification plus nécessaire que jamais. Cependant, on ne doit pas placer ses espérances trop haut. Notamment, une codification ne peut pas embrasser tous les domaines, elle doit laisser le champ libre à la jurisprudence et la doctrine qui sont tenues de l'adapter perpétuellement à l'évolution des données économiques et sociales. Le nouveau code devra également respecter la tradition juridique dont il fait partie. Enfin, l'auteur porte son attention sur le procès qui est fait actuellement en République tchèque à la recodification du droit privé. Il propose, entre autres, de prendre pour modèle le code civil existant de l'un des pays européens.

Zusammenfassung. In seinem Festvortrag aus Anlaß der geplanten Rekodifikation des tschechischen Privatrechts analysiert der Autor zunächst die charakteristischen Merkmale einer Kodifikation und verfolgt sodann, in welcher Weise und aus welchen Gründen der Kodifikationsgedanke seit dem späten 17. Jahrhundert im kontinentaleuropäischen Privatrecht historisch wirksam geworden ist. Entgegen einer verbreiteten Ansicht ('*decodificazione*') sei die Kodifikationsidee heute keineswegs überholt. Sie beziehe ihre Rechtfertigung vielmehr nach wie vor aus dem Bemühen, das Recht als eine systematische Einheit zu erfassen. Angesichts der zunehmenden Partikularisierung der modernen Rechtswissenschaft und der scheinbar ungehemmten Normenflut bedürfe die Rechtsordnung eines derartigen intellektuellen Brennpunktes heute mehr denn je.

* This paper is based on a report presented at the opening of the XXIVth Colloquy on European Law in Kroměříž (Moravia) in September 1994.

Dabei dürften an eine Kodifikation jedoch keine überspannten Erwartungen gestellt werden. Insbesondere sei zu berücksichtigen, daß Kodifikationen Rechtsprechung und Rechtslehre genügend Raum für eine stetige Fortbildung des Rechts zu lassen hätten. Der kluge Kodifikator erkenne ferner die ihm aus der Tradition der Rechtsentwicklung vorgegebenen Grenzen seiner Macht. Der Verfasser wendet sich schließlich der Frage zu, auf welche Art und Weise der tschechische Gesetzgeber die Aufgabe der Rekodifikation anpacken sollte. Dabei rät er unter anderem, sich an einem der großen europäischen Gesetzbücher zu orientieren.

1.

Codification is a term that can be used in different ways.[1] Literally, it refers to the production ('facere') of a 'codex'; and a 'codex', originally, was a set of wooden tablets covered with material used for writing and bound together in book form.[2] In the late Roman Empire, collections of imperial constitutions were designated 'codices'.[3] The most famous of them was the *Codex Iustinianus*, the third part of the so-called *Corpus Iuris Civilis*. But neither the *Codex Iustinianus*, nor *Justinian's Digest*, nor any other Roman or Byzantine collection of legal texts can be regarded as a codification in the modern technical sense of the word. The *Digest*, for instance, contains a colourful mixture of case decisions, legal opinions and rules, commentary, disputes, and excerpts from textbooks and monographs. Moreover, it does not even attempt to present Roman law as a systematic entity. The *Codex Iustinianus* constitutes a collection of imperial constitutions covering a period of some 400 years. Whilst it is therefore somewhat more homogeneous in nature, it is not intended to be comprehensive. Again, there is no effort to bring the legal material into some kind of systematic order. Justinian's Institutes are different in that respect; but although they were formally elevated to the status of law, they were substantially a legal textbook, providing *cupida legum iuventus* with no more than an outline of Roman law.[4]

Comparative reference to the *Corpus Iuris Civilis* thus provides us with some of the essential elements constituting a modern code.[5] In the first place, it has to be enacted by a legislature. This has several implications. Unlike the European *ius commune*, it is applicable only within the confines of the state for

[1] Cf. PIO CARONI, 'Kodifikation', in *Handwörterbuch zur Deutschen Rechtsgeschichte*, vol. II, 1978, cols. 907 *et seq.*

[2] ADOLF BERGER, *Encyclopedic Dictionary of Roman Law*, 1953, p. 391.

[3] Cf. THEO MAYER-MALY, 'Der kleine Pauly', *Lexikon der Antike*, vol. I, 1979, cols. 1237 *et seq.*

[4] See JENS PETER MEINCKE, 'Die Institutionen Justinians', (1986) *Juristische Schulung* 262 *et seq.*; and see *Justinian's Institutes*, translated with an introduction by Peter Birks and Grant McLeod, 1987; *Corpus Iuris Civilis, Text und Übersetzung*, vol. I, Institutionen, 1990.

[5] Cf. also J. VANDERLINDEN, *Le concept de code en Europe occidentale du XIII^e au XIX^e siècle*, 1967, pp. 67 *et seq.*, 89 *et seq.*, 161 *et seq.*; J.H.A. LOKIN, W.J. ZWALVE, *Hoofdstukken uit de Europese Codificatiegeschiedenis*, 1990, pp. 1 *et seq.*; PIO CARONI, *'Privatrecht': Eine sozialhistorische Einführung*, 1988, pp. 53 *et seq.*; SHAEL HERMAN, 'Schicksal und Zukunft der Kodifikationsidee in Amerika', in Reinhard Zimmermann (ed.), *Amerikanische Rechtskultur und europäisches Privatrecht*, 1995, pp. 50 *et seq.* (with further references).

which that legislature is competent to make laws. Its general application is backed by the authority of that specific state. And, like any other piece of modern legislation, it must contain general legal rules, not case discussions or scholarly disquisitions: '*lex iubeat non disputet*'.[6]

Secondly, a codification must aim at being comprehensive. It has to provide a regulation not only for a number of specific issues but has to cover a field of law in its entirety.[7] Many European countries have codes embracing the whole of private law: France, Austria and Germany provide characteristic examples. The Italian *Codice Civile* and the Dutch *Burgerlijk Wetboek* (among others) even incorporate commercial law. Switzerland, on the other hand, has a separate code for the law of obligations (including commercial law). The German Democratic Republic used to have a codification concerning family law apart from a general civil code. Often the term 'codification' is used for even smaller legal entities: for the statutory regulation of products liability law, of the law concerning unfair contract terms or package holidays. What one wants to indicate by this choice of words is the fact that that specific area has been subjected to a comprehensive regulation. For reasons that will become apparent in a moment, such liberal employment of the term 'codification' is not unproblematic. For our present purposes, we do not have to pursue the matter any further, since what is at issue in the Czech Republic is the project of a codification on a grander scale. If, therefore, we confine our attention to statutes covering the entire private law, or at least one of its constituent parts (property law, law of obligations, family law, law of succession), it is obvious that a codification is not only of fundamental importance for a legal system but also constitutes an enormous intellectual effort that cannot be generated at random. Codifications are therefore destined to last – not for ever but for a considerable period. Both the French and Austrian codes will soon be 200 years old. They have repeatedly been amended but, by and large, they still provide a stable foundation for the administration of private law in these countries. The same is true of the German Civil Code, which will turn 100 on 1 January 2000.

The third characteristic feature of a codification is its systematic nature. It is based on the belief that legal material does not constitute an indigestible and arbitrary mass of individual rules and cases, but that it can be reduced to a rational and organized system. The codification aims at presenting its subject matter as a logically consistent whole of legal rules and institutions. It thus promotes the internal coherence of the law and facilitates its comprehensibility. At the same time, it provides both the conceptual framework and intellectual fulcrum for any further doctrinal refinement and judicial or legislative development of the law.

[6] DETLEF LIEBS, '*Lateinische Rechtsregeln und Rechtssprichwörter*', 5th ed., 1991, p. 109; and see ROLF KNÜTEL, 'Rechtseinheit in Europa und römisches Recht', (1994) *Zeitschrift für Europäisches Privatrecht* 269 *et seq.*

[7] This point is further elaborated below, under Section 6.

2.

Codification, as outlined above, is a specific historical phenomenon that originated in late 17th and 18th century legal science.[8] It was an enormously influential idea that managed, within hardly more than 150 years, to recast the entire civilian tradition. Such was its success that for the modern legal mind civil law and codification have become inseparably linked to each other. In reality, however, there is nothing intrinsically self-evident about that connection. The civilian tradition is based, ultimately, on Roman law, and Roman law itself was never codified. Its most important sources were handed down to us in the form of a compilation, the above-mentioned *Digest*. But the overall character of the Digest was casuistic. The Continental *ius commune*, in turn, was largely judicial law, *jurisprudentia forensis*, developing through lawyers' interpretation and judicial opinions, creating a continuous literary legal tradition and leading towards an authoritative *communis opinio totius orbis, secundum quem usum semper interpretatio fieri debet.*[9] For many centuries, this interpretation was founded, in large measure, upon the Roman law, as imparted by Justinian and scientifically reworked by the lawyers of Bologna. In a way, therefore, the lawyers of the ius commune drew their inspiration from a piece of legislation, but because of the peculiar nature of this piece of legislation, the *ius commune*, as a law in action, retained many characteristics which a modern observer would associate with the English common law rather than the (modern) Continental civil law. It was infinitely rich but had, at the same time, attained such a level of complexity that a reaction was bound to set in sooner or later. Here lie the roots of a movement that was destined, ultimately, to lead to the codification of the civil law.

The earliest criticism against the Roman law, as received in Europe, had been raised by humanist lawyers like Franciscus Hotomannus. They had emphasized the historical relativity of Justinian's *Corpus Iuris Civilis*, they had discovered that the Digest was composed of different layers from various

[8] On the history of codification cf., apart from the works by VANDERLINDEN (pp. 22 *et seq.*), LOKIN/ZWALVE and CARONI already mentioned above, notes 1 and 5, the discussion by FRANZ WIEACKER, 'Aufstieg, Blüte und Krise der Kodifikationsidee', in *Festschrift für Gustav Boehmer*, 1954, pp. 34 *et seq.*; *idem*, *Industriegesellschaft und Privatrechtsordnung*, 1974; *idem*, *Privatrechtsgeschichte der Neuzeit*, 2nd ed., 1967, pp. 322 *et seq.*; HELMUT COING, 'Zur Vorgeschichte der Kodifikation: Die Diskussion um die Kodifikation im 17. und 18. Jahrhundert', in *La formazione storica del diritto moderno in Europa*, vol. II, 1977, pp. 797 *et seq.*; *idem*, 'An Intellectual History of European Codification in the Eighteenth and Nineteenth Centuries', in S.J. Stoljar (ed.), *Problems of Codification*, 1977, pp. 16 *et seq.*; *idem*, *Europäisches Privatrecht*, vol. I, 1985, pp. 67 *et seq.*; *idem*, *Europäisches Privatrecht*, vol. II, 1989, pp. 7 *et seq.*

[9] Cf. HELMUT COING, *Europäisches Privatrecht*, vol. I, *op. cit.*, note 8, pp. 34 *et seq.*, 124 *et seq.*; and see the references in (1993) *Zeitschrift für Europäisches Privatrecht* 8, note 22, and (1992) 66 *Tulane Law Review* 1712, note 169. GINO GORLA's numerous writings on the role of 'giurisprudenza' in the history of European law are listed in GINO GORLA, *Diritto comparato e diritto comune europeo*, 1981, pp. 909 *et seq.* (bibliography prepared by LUIGI MOCCIA).

stages of the Roman legal development and that Justinian had distorted many texts, and they had pointed out the differences between the general conditions of life in Rome or Byzantium and in early modern Europe. Thus, they had started to undermine the authoritativeness of the Roman texts. The Reformation heralded in a school of jurisprudence[10] that was hostile to the Canon law of the Roman Catholic Church; and Canon law, the second great pillar of the European *ius commune*, was intimately associated with Roman law. In the middle of the 17th century, Hermann Conring shattered the Lotharian legend, according to which Roman law had been introduced in Europe by way of a formal imperial enactment. The imperial authority, too, was growing ever weaker before the territorial lords; and soon the old Reich was perceived to be a tattered collection of outdated and highly inefficient institutions. With the Holy 'Roman' Empire the prestige of the imperial, Roman law was bound to decline. It no longer appeared self-evidently right to apply a law that was riddled with contradictions, that had given rise to intricate doctrinal disputes, that was wedded to outdated and rather impractical '*subtilitates*' and that had been enacted by despotic rulers of another age and country. Moreover, it was only applicable *in subsidio*, and countless more specific territorial or local laws could therefore govern a particular dispute. The great number and complexity of legal sources thus contributed to a widespread feeling both of legal uncertainty and inefficiency as far as the administration of justice was concerned.

This was a state of affairs the territorial rulers were bound to find unattractive. The Austrian and Prussian monarchs, in particular, had been raised in the spirit of enlightened absolutism. They perceived themselves to be the first servants of the state, and whilst they were eager to assert their sovereignty they also recognized a duty to use the powers that were vested in them (such as the power to legislate) to promote the public welfare. They attempted to provide their territories with a rational system of administration and they also sought to centralize, to rationalize and to clarify the law. The legal rules according to which justice was to be dispensed had to be made known so that everybody could be expected to adjust his behaviour accordingly; and thus it had to be laid down in an easily comprehensible manner. In order to accomplish this end, the monarchs and their officials could avail themselves of the systems and theories of the new, secularized brand of natural law that had emerged in the course of the 17th century.[11] Roman law was no longer accepted, unquestioningly, as *ratio scripta*, but appeared to be palatable only in so far as it was in conformity with the principles of natural

[10] For an important analysis of the new 16th century Protestant legal science and its contribution to the development of European law cf. HAROLD J. BERMAN, CHARLES REID, JR., 'Römisches Recht in Europa und das ius commune. Ein historischer Überblick unter besonderer Berücksichtigung der Neuen Rechtswissenschaft des 16. Jahrhunderts', (1995) *Zeitschrift für Europäisches Privatrecht* 3 *et seq.*

[11] WIEACKER, *Privatrechtsgeschichte*, *op. cit.*, note 8, pp. 249 *et seq.*

reason. A variety of writers had set out to demonstrate how the solutions to individual cases could be derived from general propositions and how all the rules regulating human behaviour could be fitted into a system that was both internally consistent and consonant with human reason and the nature of man.

It is obvious that these ideas appealed to authorities eager to rationalize the administration of justice; for they enabled them to enact a comprehensive piece of legislation, ousting all rival sources of law and thus emphasizing the crown's monopoly over the legislative process. At the same time, however, an emancipatory element was inherent in the idea of codification: for by making the legal rules both public and certain, it promoted the rule of law. Not only the citizens, but also the government was bound by it, and arbitrary decisions on the part of the executive departing from the provisions of the code were no longer to be tolerated. Codification therefore did not only commend itself to those who ruled; it also suited the interests of the reformers. Furthermore, it appeared to be a natural consequence of contemporary theories of enlightenment philosophers like John Locke who saw the origin of state and law in a kind of contract entered into by individuals in order to ensure liberty, equality and the protection of property.

It is in this spirit that the Prussian General Land Law of 1794 and the Austrian General Civil Code of 1811 were enacted.[12] The French Code Civil of 1804, the most famous and also historically most fertile of the 'natural law codifications', was rooted in the same intellectual soil (although, of course, it was not decreed by an enlightened despot but received its specific élan from the breakdown of the *ancien régime*); for like the Austrian and Prussian codes it was based on the belief that social life can be placed on a rational foundation by restructuring the rules of law according to a comprehensive plan.[13] At the same time, the French Civil Code became a potent symbol of the one and undivided nation that had emerged from the revolutionary upheavals following the storming of the Bastille. The multiplicity of legal systems in the various French provinces had become as annoying to the enlightened mind as the hierarchical structure of society and its subjection to the traditional feudal and religious authorities had become odious. It is not surprising, therefore, that the preparation of a code of civil law common to the whole kingdom and based on the ideas of individual freedom and equality before the law had been, from the very beginning, a revolutionary priority.

The attainment of legal unity was also, of course, an important moving force behind the other two contemporary codifications: both Prussia and Austria, after all, were rather heterogeneous territorial entities constituting a patchwork quilt of historical acquisitions. A codification enacted by the central authority for the entire state thus helped to constitute a sense of political

[12] For a succinct account in English, see KONRAD ZWEIGERT, HEIN KÖTZ, *An Introduction to Comparative Law*, translated by TONY WEIR, 2nd ed., 1992, pp. 141 *et seq.*, 165 *et seq.*

[13] Cf. WIEACKER, *Privatrechtsgeschichte*, *op. cit.*, note 8, pp. 339 *et seq.*; ZWEIGERT/KÖTZ/WEIR, *op. cit.*, note 12, pp. 87 *et seq.*

identity. During the 19th century, this way of thinking became ever more firmly entrenched, and the idea of a codification became intimately linked to the emergence of the modern nation states.[14] This is particularly obvious in Germany,[15] where the preparation of a German civil code immediately became a matter of great – practical as well as symbolic – significance in the years after 1871: it did not seem worthy of a modern united nation state that its citizens, to quote a famous quip of Voltaire, had to change the law as often as they changed their post-horses.

3.

By the time the German Civil Code came into effect (1 January 1900) just about all the other states of central, southern and eastern Europe had codified their law.[16] In most instances, the French *Code Civil* provided the main source of inspiration. It continued to apply in Belgium[17] and became the basis of the Dutch *Burgerlijk Wetboek* of 1838.[18] It provided the point of

[14] Cf., e.g., FRANZ WIEACKER, 'Der Kampf des 19. Jahrhunderts um die Nationalgesetzbücher', in *idem*, *Industriegesellschaft und Privatrechtsordnung*, 1974, pp. 79 *et seq.*; REINER SCHULZE, 'Vom ius commune zum Gemeinschaftsrecht', in *idem* (ed.), *Europäische Rechts- und Verfassungsgeschichte*, 1991, pp. 18 *et seq.* For Switzerland, cf. CARONI, *op. cit.*, note 5, pp. 33 *et seq.* Codification has thus contributed to the nationalization of law and legal science that characterizes our modern European legal landscape. There is, of course, a certain paradox inherent in the fact that this development started to occur at the very moment when the universalist legal theory par excellence (i.e. natural law) experienced a stunning renaissance; cf. e.g. PAUL KOSCHAKER, *Europa und das römische Recht*, 4th ed., 1966, p. 254 and the analysis by STEN GAGNÉR, *Studien zur Ideengeschichte der Gesetzgebung*, 1960, pp. 60 *et seq.* But see, as far as the Austrian General Civil Code is concerned, WILHELM BRAUNEDER, 'Vernünftiges Recht als überregionales Recht: Die Rechtsvereinheitlichung der österreichischen Zivilrechtskodifikationen 1786 – 1797 – 1811', in SCHULZE, above, pp. 121 *et seq.* who draws attention to the fact that the ABGB had been conceived as a code of universal applicability. The same is true of the French *Code Civil*. Another factor to be taken into account is that MONTESQUIEU's theories, as expounded in his *Esprit des Lois*, 1748, provided a bridge between the ideas of the natural lawyers and the actual state of affairs in the various continental monarchies; for MONTESQUIEU had argued that any legislation must be adapted to the specific character of the society for which it is designed. Cf. COING, *Intellectual History*, *op. cit.*, note 8, pp. 18 *et seq.*; CARONI, *op. cit.*, note 5, p. 60; LOKIN/ZWALVE, *op. cit.*, note 5, p. 35; and more generally, ALFREDO MORDECHAI RABELLO, 'Montesquieu and the Codification of Private Law (Code Napoléon), in *idem* (ed.), *European Legal Traditions and Israel*, 1994, pp. 39 *et seq.*

[15] For all details concerning the history of codification in 19th century Germany, see BARBARA DÖLEMEYER, in Helmut Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, vol. III/2, 1982, pp. 1421 *et seq.*; and see MICHAEL JOHN, *Politics and Law in Late Nineteenth-Century Germany*, 1989.

[16] For a general overview, see CARLOS BOLLEN, GERARD-RENÉ DE GROOT, 'The Sources and Backgrounds of European Legal Systems', in: A.S. Hartkamp, M.W. Hesselink *et al.* (eds.), *Towards a European Civil Code*, 1994, pp. 97 *et seq.*

[17] ERNST HOLTHÖFER, in Helmut Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, vol. III/1, 1982, pp. 1069 *et seq.*

[18] ERNST HOLTHÖFER, in Helmut Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, vol. III/1, 1982, pp. 1191 *et seq.*; LOKIN/ZWALVE, *op. cit.*, note 5, pp. 263 *et seq.*

departure for the Italian *Codice Civile* of 1865 (which could thus be enacted a mere four years after the kingdom of Italy had come into being),[19] for the Portuguese *Código Civil* of 1867,[20] the Spanish *Código Civil* of 1888–1889[21] and the Romanian Civil Code of 1865.[22] The Serbian Civil Code of 1844, on the other hand, had been influenced mainly by the Austrian codification. The enactment of the German Civil Code, in turn, stimulated a revision of the Austrian Code (which took effect in three steps during the years of the First World War)[23] and it prompted the Greeks to codify their private law; the Greek Civil Code, promulgated in 1940 but effective only as from 1946, is generally considered to be part of the German legal family.[24] Another member of that family is Switzerland, although both its Civil Code of 1907 and its revised code concerning the law of obligations of 1911 are in many respects highly original and cannot be said to be modelled on the German code.[25] The Swiss experiences influenced the draftsmen of the new Italian Civil Code of 1942 without, however, inducing them radically to break with the French tradition.[26] A wholesale reception of the Swiss codes occurred in Turkey.[27] Apart from the Prussian General Land Law – which had attempted to regulate social life in general and has thus been referred to as the 'basic

[19] FILIPPO RANIERI, in Helmut Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, vol. III/1, 1982, pp. 297 *et seq.*

[20] JOHANNES-MICHAEL SCHOLZ, in Helmut Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, vol. III/1, 1982, pp. 723 *et seq.*

[21] JOHANNES-MICHAEL SCHOLZ, in Helmut Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, vol. III/1, 1982, pp. 486 *et seq.*

[22] RENEE SANILEVICI, *The Romanian Civil Code and its fate under the Communist Regime*, in Alfredo Mordechai Rabello (ed.), *European Legal Traditions and Israel*, 1994, pp. 355 *et seq.* On the reception of the code civil in general, see ZWEIGERT/KÖTZ/WEIR, *op. cit.*, note 12, pp. 100 *et seq.*; and, most recently, the contributions in Reiner Schulze (ed.), *Französisches Zivilrecht in Europa während des 19. Jahrhunderts*, 1994.

[23] Cf. BARBARA DÖLEMEYER, 'Die Teilnovellen zum ABGB', in Herbert Hofmeister (ed.), *Kodifikation als Mittel zur Politik*, 1986, pp. 49 *et seq.*; on the impact of the German Historical School of Jurisprudence on Austrian legal science during the 19th century, see WERNER OGRIS, 'Die Wissenschaft des gemeinen römischen Rechts und das österreichische Allgemeine bürgerliche Gesetzbuch', in Helmut Coing, Walter Wilhelm (eds.), *Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert*, vol. I, 1974, pp. 153 *et seq.*

[24] Cf. ZWEIGERT/KÖTZ/WEIR, *op. cit.*, note 12, pp. 160 *et seq.*

[25] Cf. generally WIEACKER, *Privatrechtsgeschichte*, *op. cit.*, note 8, pp. 488 *et seq.*; BARBARA DÖLEMEYER, in Helmut Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, vol. III/2, 1982, pp. 1961 *et seq.*; PIO CARONI, 'Rechtseinheit in der Schweiz. Zur Geschichte einer späten Verfassungsreform', in Herbert Hofmeister (ed.), *Kodifikation als Mittel der Politik*, 1986, pp. 29 *et seq.*; *idem*, *op. cit.*, note 5, pp. 90 *et seq.*; ZWEIGERT/KÖTZ/WEIR, *op. cit.*, note 12, pp. 173 *et seq.*; and see, more specifically on the relationship between the Swiss and German codes, RUDOLF GMÜR, *Das Schweizerische Zivilgesetzbuch verglichen mit dem Deutschen Bürgerlichen Gesetzbuch*, 1965.

[26] For a recent evaluation, see GIORGIO CIAN, 'Fünfzig Jahre italienischer codice civile', (1993) *Zeitschrift für Europäisches Privatrecht* 120 *et seq.* and the contributions in *I Cinquant' Anni del Codice Civile*, 2 vols., 1993.

[27] Cf. e.g. ERNST E. HIRSCH, 'Das Schweizerische Zivilgesetzbuch in der Türkei', (1954) *Schweizerische Juristenzeitung* 337 *et seq.*

law' of the Prussian state[28] – all these codes are codes of private law. The Swiss legislature introduced the concept of the '*code unique*' combining private and commercial law; the Netherlands (1934) and Italy (1942) have followed suit.[29]

4.

Codification, in the words of Franz Wieacker, is a unique and priceless creation of western and central European legal culture.[30] It shaped the civil law in many countries outside Europe, including regions as diverse as East Asia and Latin America, it managed to gain a foothold even in British India[31] and the United States of America[32], and it asserted itself under radically different social and political conditions such as those prevailing in the former socialist states.[33] More recently, however, influential authors have considered it to be a spent force. Natalino Irti, for instance, has introduced the racy catchword '*decodificazione*' in order to describe the modern trend away from the comprehensive and systematic regulation of private law.[34] Codification, it is contended, was an expression of the *mondo della sicurezza* of the past, of a world of relative stability. The modern world, on the other hand, has experienced an unprecedented acceleration of history where hardly anything appears to be of any permanence. We have become sceptical as to whether in a modern industrialized society, governed by the principle of democracy, it is

[28] But see the important new work of ANDREAS SCHWENNICKE, *Die Entstehung der Einleitung des Preußischen Allgemeinen Landrechts von 1794*, 1993, who argues, convincingly, that the draftsmen of the Prussian General Land Law did not intend to draw up a complete constitution for the Prussian state. For an evaluation, on the occasion of the 200th anniversary of that code, see GERHARD DILCHER, 'Die janusköpfige Kodifikation – das preußische Allgemeine Landrecht (1794) und die europäische Rechtsgeschichte', (1994) *Zeitschrift für Europäisches Privatrecht* 446 *et seq.* Generally on the relationship between code and constitution, see ANTONIO GAMBARO, 'Codes and Constitutions in Civil Law', in Alfredo Mordechai Rabello (ed.), *European Legal Traditions and Israel*, 1994, pp. 157 *et seq.*

[29] For an overview of legal systems that separate private law and commercial law on the one hand and those that follow the model of a 'code unique', on the other, see FRANCESCO GALGANO, 'Diritto civile e diritto commerciale', in Francesco Galgano, Franco Ferrari, *Atlante di diritto privato comparato*, 1992, pp. 35 *et seq.* For an analysis in historical perspective, see CARONI, *op. cit.*, note 5, pp. 157 *et seq.*; WOLFRAM MÜLLER-FREIENFELS, 'The Problem of including Commercial Law and Family Law in a Civil Code', in S.J. Stoljar (ed.), *Problems of Codification*, 1977, pp. 93 *et seq.*

[30] *Festschrift Boehmer*, *op. cit.*, note 8, 34.

[31] BIJAY KISOR ACHARYYA, *Codification in British India*, 1914 (Tagore Law Lectures).

[32] For a recent analysis, see HERMAN, *op. cit.*, note 5, pp. 45 *et seq.*

[33] For an overview, see KONRAD ZWEIGERT/HEIN KÖTZ, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, vol. I, 2nd ed., pp. 355 *et seq.*; ATTILA HARMATHY, 'General Problems of Civil Law Codification in the Law of CMEA Countries', in Attila Harmathy, Agnes Nemeth (eds.), *Questions of Civil Law Codification*, 1990, pp. 52 *et seq.*

[34] *L'età della decodificazione*, 3rd ed., 1989. Cf. also CARONI, *op. cit.*, note 5, pp. 96 *et seq.*; and see WIEACKER, *Festschrift Boehmer*, pp. 47 *et seq.* (who refers to a crisis of the idea of codification).

still possible to determine, once and for all, how to promote the 'public welfare'. Democracy, it is argued, requires openness and flexibility; and the modern welfare state, so it is said, has attained a level of complexity that cannot possibly be dealt with by a set of principles of general applicability.[35] And indeed, it is obvious that we have become inundated with a flood of legislation[36] dealing with specific issues, in a specific light, and for specific situations. We have witnessed the uninhibited growth of ever new specialized disciplines: from medical malpractice to sports law, from motor vehicle to transportation law. These new disciplines have tended to drift away from the general principles of private law. They are developed and further refined by expert lawyers who are all too frequently preoccupied with the particularities of their area of expertise, without carrying responsibility for the legal system as a whole. It has become impossible to keep track, even by way of overview, of the developments in all these disciplines. The disintegration of the *Neue Juristische Wochenschrift*, to mention but one example, reflects, and promotes, the increasing particularization of German legal science. One is reminded of W.B. Yeats (*The Second Coming*): 'Things fall apart; the centre cannot hold ...'.

Apart from that, it is obvious from the experience of countries like France, Austria and Germany that even in the traditional core areas the actual state of the law can no longer be gauged from the codification alone. Its provisions have become enveloped by thick layers of case law which anybody who wishes to apply the law has to be thoroughly familiar with. Drafting mistakes and internal inconsistencies have been discovered in the code. The proper interpretation of the words and phrases used by the draftsmen of the code had to be settled. The details of many rather abstract provisions had to be worked out, atypical situations to be accommodated. Entirely new and unforeseen legal problems had to be solved. Changed societal mores and evaluations had to be accommodated. Areas such as unjustified enrichment, delictual liability, or damages, where most codes only provide some rather general principles, have become pockets of a typical case law jurisprudence. But the courts have done much more. They have introduced entire new legal institutions of which we find, at least, one or two scattered points of departure, sometimes not even the faintest hint, in the code. The recognition of the modern contract in favour of third parties or the *actio de in rem verso* as a general enrichment action *dérivant du principe d'équité qui défend de s'enrichir*

[35] FRIEDRICH KÜBLER, 'Kodifikation und Demokratie', (1969) *Juristenzeitung* 645 *et seq.*; cf. also JOSEF ESSER, 'Gesetzesrationalität im Kodifikationszeitalter und heute', in Hans-Jochen Vogel, Josef Esser, *100 Jahre oberste deutsche Justizbehörde. Vom Reichsjustizamt zum Bundesministerium der Justiz*, 1977, pp. 13 *et seq.*

[36] Cf. e.g. UWE DIEDERICHSEN, *Die Flucht des Gesetzgebers aus der politischen Verantwortung im Zivilrecht*, 1974; HEINRICH HONSELL, *Vom heutigen Stil der Gesetzgebung*, 1979; ANDREAS HELDRICH, 'Normenüberflutung', in *Festschrift für Konrad Zweigert*, 1981, pp. 811 *et seq.*; THEO MAYER-MALY, 'Gesetzesflut und Gesetzesqualität heute', in *Festschrift zum 125jährigen Bestehen der Juristischen Gesellschaft zu Berlin*, 1984, pp. 423 *et seq.*

au détriment d'autrui by the French courts or the development of the doctrine of *culpa in contrahendo* or of the modern version of the *clausula rebus sic stantibus* (*Lehre vom Wegfall der Geschäftsgrundlage*) by German courts and writers are examples in point.[37]

5.

But does all of this justify the conclusion that we have moved past the age of codification? Or that codification is no longer available as a means to put modern social life on a rational foundation? Even the most cursory glance over legal developments since the Second World War belies this kind of codification pessimism. '*Dalla fine della seconda guerra mondiale*', writes Rodolfo Sacco,[38] '*gran parte del mondo sembra incappata in una frenesia di codificare, in una febbre la cui intensità non ha precedenti nella storia*'. More than 50 states have codified their private law since 1945. Even if one leaves aside the formerly socialist countries, one has a very wide geographical and ideological range: Egypt and Jordania, Algeria and the Seychelles, Colombia, Bolivia and Paraguay, to mention just a few.[39] Portugal recodified its private law in 1967. Core parts of the new Dutch Civil Code came into force on 1 January 1992 (book III – patrimonial law in general; book V – property law; book VI – law of obligations general part; and four titles of book VII – special contracts); books I (law of persons and family law), II (legal persons) and VIII (transportation law) had been enacted in 1970, 1976 and 1991 respectively. The new Civil Code of Québec came into force at the beginning of 1994. Louisiana is in the process of revising its civil code.[40] In Germany grand schemes to redraft the entire law of obligations[41] have been abandoned, but a draft commissioned by the Minister of Justice and dealing with two major problem areas (the law of extinctive prescription and breach

[37] Cf. REINHARD ZIMMERMANN, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, 2nd impression, 1993, pp. 44, 884, 12, 582.

[38] 'Codificare: modo superato di legiferare?', (1983) *Rivista di diritto civile* 117 *et seq.*; cf. also EWOUD HONDIUS, 'Das Neue Niederländische Zivilgesetzbuch. Allgemeiner Teil', in Franz Bydlinski, Theo Mayer-Maly, Johannes W. Pichler (eds.), *Renaissance der Idee der Kodifikation*, 1992, pp. 52 sq. and KONRAD ZWEIGERT, HANS-JÜRGEN PUTTFARKEN, 'Allgemeines und Besonderes zur Kodifikation', in *Festschrift für Imre Zajtay*, 1982, pp. 569 *et seq.* (referring to the phenomenon of 're-codification').

[39] Israel is in the process of codifying its private law; cf. the contributions in Alfredo Mordechai Rabello (ed.), *European Legal Traditions and Israel*, 1994, pp. 471 *et seq.*

[40] For details, see JOACHIM ZEKOLL, 'Zwischen den Welten – Das Privatrecht von Louisiana als europäisch-amerikanische Mischrechtsordnung', in Reinhard Zimmermann (ed.), *Amerikanische Rechtskultur und europäisches Privatrecht*, 1995, pp. 11 *et seq.*

[41] Cf. BUNDESMINISTER DER JUSTIZ (ed.), *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*, vols. I and II 1981, vol. III 1983. For an evaluation in the light of the codification idea, see HEIN KÖTZ, 'Schuldrechtsüberarbeitung und Kodifikationsprinzip', in *Festschrift für Wolfram Müller-Freienfels*, 1986, pp. 395 *et seq.*

of contract) was published in 1992 and awaits discussion and enactment by the legislature.[42] On an international level we have the Convention on Contracts for the International Sale of Goods, concluded in Vienna in 1980, which provides a codification of a particularly important area of international trade law and has, to date, been adopted by more than 30 states.[43] And as far as the 'approximation' of the laws of the member states of the European Union in terms of the EC Treaty is concerned, the European Parliament in a rather surprising resolution dating from May 1989 has called for the preparation of a codification of the entire European private law.[44] Whether or not, at the present moment, such a step is realistic or even desirable,[45] it shows that, at least in Strasbourg, the faith in codification as a more satisfactory means of achieving legal unity than the present *ad hoc* legislation is still unbroken.

6.

Moreover, modern disillusionment with codification can, to a considerable degree, be ascribed to exaggerated and unrealistic expectations.[46] Thus, it is usually said that a codification must be (or must at least aim to be) comprehensive.[47] Does this mean that a codification has to be considered a failure if it turns out to contain 'gaps'? If it does not contain specific solutions

[42] BUNDESMINISTER DER JUSTIZ (ed.), *Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts*, 1992.

[43] Cf. the list published in (1993) *Zeitschrift für Europäisches Privatrecht* 163 *et seq.*; and see ULRICH MAGNUS, 'Aktuelle Fragen des UN-Kaufrechts', (1993) *Zeitschrift für Europäisches Privatrecht* 79 *et seq.*; *idem* 'Stand und Entwicklung des UN-Kaufrechts', (1995) *Zeitschrift für Europäisches Privatrecht* 202 *et seq.*

[44] Cf. (1993) *Zeitschrift für Europäisches Privatrecht* 613 *et seq.*; cf. also WINFRIED TILMANN, 'Eine Privatrechtskodifikation für die Europäische Gemeinschaft?', in Peter-Christian Müller-Graff (ed.), *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, 1993, pp. 485 *et seq.*; and see the contributions in A.S. HARTKAMP, M.W. HESSELINK *et al.* (eds.), *Towards a European Civil Code*, 1994.

[45] Cf. LUIGI MENGONI, *L'Europa dei codici o un codice per l'Europa?*, 1993; REINHARD ZIMMERMANN, 'Civil Code and Civil Law – The Europeanization of Private Law Within the European Community and the Re-emergence of a European Legal Science', (1994/95) 1 *Columbia Journal of European Law* 63 *et seq.*

[46] This point has been made very forcefully by KARSTEN SCHMIDT, *Die Zukunft der Kodifikationsidee: Rechtsprechung, Wissenschaft und Gesetzgebung vor den Gesetzeswerken des geltenden Rechts*, 1985. As far as the American experience is concerned, cf. the interesting observations by HERMAN, *op. cit.*, note 5, pp. 45 *et seq.* He suggests that American lawyers guaranteed the defeat of 19th century codification by imposing on it the impossible task of regulating all conceivable situations.

[47] Cf. CARONI, *op. cit.*, note 1, col. 914; *Vanderlinden*, *op. cit.*, note 5, pp. 189 *et seq.* (referring, specifically, to Bentham's notion that a code must be 'all comprehensive'); for the ideological background, see HEINZ HÜBNER, *Kodifikation und Entscheidungsfreiheit des Richters in der Geschichte des Privatrechts*, 1980, pp. 11 *et seq.*, 24 *et seq.*

for all imaginable past and future problems? And if it thus leaves considerable leeway for those who have to apply and interpret the law? This may have been the view of enlightenment philosophers or rulers like Friedrich Wilhelm II of Prussia who expressly forbade judges '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'.[48] The *ratio legis*, in other words, was merely a matter for the legislator. If there was any doubt about the meaning of a provision, the judges were to call on the Legislative Commission; opinions of legal writers and previous decisions were declared to be irrelevant.[49] This was one of the most determined attempts to reduce the role of the judiciary to that of a legal calculating machine and to assert the monopoly of the crown over the process of law-making and legal interpretation. To us today, this extreme form of positivism appears to be absurd or even monstrous.[50] No code has ever been 'comprehensive', or exhaustive, in such a narrow sense of the word,[51] not even the Prussian General Land Law with its close on 20,000 sections. What the draftsmen of a codification can (and have to!) aim for, however, is a regulation based on the recognition, and intellectual penetration, of an area of the law as a systematic entity, or, in the words of Savigny, as an 'organic whole'.[52] They thus provide the only imaginable vantage point for recognizing (and, of course, filling) legal 'gaps'.

Publicity of the law was another rather admirable philosophical and educational idea espoused and energetically promoted by 18th century enlightened authoritarianism: the comprehensive and systematic reorganization of law (and society) along the lines of natural reason and in the form of a codification aimed at making the law accessible, at instructing all subjects (and thus, indirectly, promoting their welfare) and at informing them about their rights, their duties and their position within society. Hence, for instance, the enthusiasm with which both the Prussian and the Austrian legislatures adopted

[48] *Publikationspatent* of 1794, art. XVIII (English translation according to ZWEIGERT/KÖTZ/WEIR, *op. cit.*, note 12, p. 91).

[49] On the history of princely attempts to prohibit further development of the law by way of interpretation or commentary, see HANS-JÜRGEN BECKER, 'Kommentier- und Auslegungsverbot', in *Handwörterbuch zur Deutschen Rechtsgeschichte*, vol. II, 1978, cols. 963 *et seq.*

[50] WOLFGANG KUNKEL, (1954) 71 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanistische Abteilung)* 534.

[51] Cf. also SACCO, (1983) *Rivista di diritto civile* 125: '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'.

[52] FRIEDRICH CARL VON SAVIGNY, 'Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft', in *Thibaut und Savigny, Ihre programmatischen Schriften*, 1973, p. 189. Generally on SAVIGNY and codification, see PIO CARONI, (1969) 86 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Germanistische Abteilung)* 97 *et seq.* (155).

the ancient maxim of '*error iuris nocet*'.[53] As it turned out, however, the general public could not be induced to use the General Land Law for bedside reading to any greater degree than had been the case with Justinian's *Digest*. Apart from that, of course, there was an inherent conflict between the attempt to draft a code that was easily comprehensible, and the desire to leave as little room as possible for judicial construction and development of the law. Today, one has given up all hope that the average citizen can be expected to comprehend the law. Even lawyers are in great danger of drowning in the unprecedented outpouring of legislation emanating from our modern parliaments. But this is hardly an argument against codification. 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.

Does a codification tend to ossify the law? It may be argued that modern society requires more flexibility than can be provided by a far-reaching piece of legislation intended to last for a considerable period of time. Yet France and Austria are still governed, today, by codes that will celebrate their 200th anniversaries in the not too distant future. Even the German Civil Code, although much younger, dates from a world that was in many respects radically different from our own.[54] Have these codifications thus become outdated? Napoleon is said to have expressed the view that a recodification has to occur every 30 years. This prediction has not been borne out by the experiences in Austria, France or Germany.[55] If, by way of example, we look at the German Civil Code,[56] we see that the law of real property has remained virtually unchanged. As far as the actual wording of the code is concerned, the same is true of the law of obligations, of movable property and of dispositions *mortis causa*. Courts and legal writers have, however, adapted, expanded and developed the law in innumerable ways in order to meet new challenges and to accommodate changed circumstances. They have thus managed to keep the codification *à jour*. Family law alone has been fundamentally reshaped by the legislature. More than 30 major amendments have left hardly a single aspect of it unchanged. Family law is probably more intimately linked to norms and

[53] § 12 Einleitung PrALR; § 2 ABGB. For an overview of the historical development, see THEO MAYER-MALY, 'Rechtsirrtum', in *Handwörterbuch zur Deutschen Rechtsgeschichte*, vol. IV, 1990, cols. 302 *et seq.*; for a general analysis of the problem see *eundem, Rechtsirrtum und Rechtsunkenntnis als Probleme des Privatrechts*, (1970) 170 *Archiv für die civilistische Praxis* 133 *et seq.*

[54] PAUL JOHNSON's *History of the Modern World*, 1983, begins in 1919. BARBARA TUCHMAN, *The Proud Tower. A Portrait of the World Before the War*, 1966, describes the Great War of 1914-18 as a 'band of scorched earth dividing [the world before the war] from ours'.

[55] For a general overview, see WERNER LORENZ, 'On the "Calling" of Our Time for Civil Legislation', in Attila Harmathy, Agnes Nemeth (eds.), *Questions of Civil Law Codification*, 1990, pp. 120 *et seq.*; as far as French contract law is concerned, see DENIS TALLON, 'La codification en matière de droit du contrat', in the same volume, pp. 168 *et seq.*

[56] For an overview, see HELMUT COING, 'Erfahrungen mit einer bürgerlich-rechtlichen Kodifikation in Deutschland', (1982) 81 *Zeitschrift für Vergleichende Rechtswissenschaft* 1 *et seq.*

premises of a specific period and society than any other of the core areas of private law, and the Christian (Protestant) and rather patriarchal views still prevailing in the second half of the 19th century have given way to more permissive sentiments. This, obviously, was such a fundamental change of perception that it could not be accommodated by judge-made law. The situation does not appear to be fundamentally different in other codified legal systems. What we can learn from these developments[57] is: (1) that radical transformations of the prevailing ethical perceptions do indeed render the code obsolete and thus require legislative intervention; (2) that a set of legal rules surrounding a well thought-out technical instrument like the land register can continue to function for a long period without major adjustment; and (3) that, as far as the general patrimonial law is concerned, a codification can weather the storms, provided its rules are sufficiently abstract and flexible to allow courts and legal writers to effect the necessary adjustments. Occasionally, of course, the legislature has enacted special statutes in order to deal with new problem areas, to accommodate specific interests or, more recently, to implement European Community Directives; the Standard Contract Terms Act of 1976, the Product Liability Act of 1989 and the Consumer Credit Act of 1990 are but three examples. In many instances, however, these special statutes have merely restated, and thus endorsed, legal rules worked out by courts and legal writers long before and under the aegis of the general provisions of the code. Moreover, these statutes usually rely on the conceptual tools and the doctrinal framework provided by the code. And whilst one may regret, and criticize, the proliferation of special statutes enveloping the code it is not, *per se*, a sombre sign of its becoming obsolescent.[58] Even when, towards the end of the 19th century, enthusiasm for codification had reached its apogee, there were important special statutes which the draftsmen of the BGB chose not to integrate into the code.[59] Similarly, the new Dutch Civil Code is not comprehensive in that it would have absorbed, or made redundant, all special statutes in the field of private law.[60]

7.

It must have become obvious, by now, that codifications are rather imperfect tools. Many expectations that were once entertained have remained

[57] COING, (1982) 81 *Zeitschrift für Vergleichende Rechtswissenschaft* 12 *et seq.*

[58] Cf. e.g. FRANZ BYDLINSKI, 'Civil Law Codification and Special Legislation', in Attila Harmathy, Agnes Nemeth (eds.), *Questions of Civil Law Codification*, 1990, pp. 25 *et seq.* On the problem of certain subjects not yet being ready for codification, or still in search of a codificatory focus, see KARSTEN SCHMIDT, *op. cit.*, note 46, pp. 54 *et seq.*

[59] The Instalment Sales Act came into effect in 1894 and was in force until it was replaced by the Consumer Credit Act in 1990; the Imperial Liability Act of 1871 is still in force today, albeit under another name and in a substantially expanded form.

[60] Cf. HONDIUS, *op. cit.*, note 38, pp. 40, 44 *et seq.*

unfulfilled. Nevertheless, the idea of codification has not yet lost its appeal. Nor has it lost its justification. For a codification constitutes an intellectual effort to look at private law as a systematic entity.[61] It thus provides a system that allows those who have to apply and interpret the law to see '*veritat[es] inter se connexa[e]*',[62] 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. A codification thus helps to render the legal system intellectually accessible[63] – not for the general public but for the academically trained lawyer. It provides a focus[64] which enables him to relate seemingly disparate issues to each other and harmoniously to incorporate new strands of thought. In view of the increasing particularization of legal science and the seemingly uninhibited development of ever new specialized disciplines, this kind of focus appears today to be even more desirable than ever before.[65]

Of course, a codification is not an indispensable tool for organizing a legal system. The *ius commune* as well as the English common law provide examples to the contrary. Both of them, however, depended, or continue to depend, on specific conditions and traditions that cannot arbitrarily be recreated. Thus, among the factors buttressing the common law are a centuries-old tradition of case law and the specific process of socialization and authority of the English judge. The English experience, incidentally, also shows the disadvantages flowing from indifference to system. '[D]ifficult problems can simply be wrongly analysed', writes Peter Birks,[66]

[61] KARSTEN SCHMIDT, *op. cit.*, note 46, pp. 39 *et seq.*; SACCO, (1983) *Rivista di diritto civile* 121 *et seq.*; KÖTZ, *Festschrift Müller-Freienfels*, *op. cit.*, note 41, pp. 395 *et seq.*; *idem*, 'Taking Civil Codes Less Seriously', (1987) 50 *Modern Law Review* 13 *et seq.*; CARONI, *op. cit.*, note 5, pp. 55 *et seq.*; FRITZ RITTNER, *Festschrift für Walter Oppenhoff*, 1985, pp. 331 *et seq.*

[62] CHRISTIAN WOLFF, *Institutiones juris naturae et gentium*, § 62.

[63] See, too, JAN HELLNER, 'Problems of Codification in Commercial Contract Law', in Attila Harmathy, Agnes-Nemeth (eds.), *Questions of Civil Law Codification*, 1990, pp. 74 *et seq.*; and, on the clarity provided by a code, ANDRÉ TUNC, 'Codification: The French Experience', in S.J. Stoljar (ed.), *Problems of Codification*, 1977, pp. 63 *et seq.*

[64] Cf. SACCO, (1983) *Rivista di diritto civile* 120: 'Non si può fare un codice senza un'idea centrale'.

[65] Cf. SACCO, (1983) *Rivista di diritto civile* 119: 'Codificare significa rinnegare il particolarismo giuridico'; see also the remarks by KÖTZ, (1987) 50 *Modern Law Review* 14; BYDLINSKI, *op. cit.*, note 58, pp. 25 *et seq.* As far as Italy is concerned, see SALVATORE MAZZAMUTO, LUCA NIVARRA, 'General Principles and Special Legislation: Toward a New Role for the Italian Civil Code', in Alfredo Mordechai Rabello (ed.), *European Legal Traditions and Israel*, 1994, pp. 303 *et seq.*

[66] 'The Need for the Institutes in England', (1991) 108 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (*Romanistische Abteilung*) 708 *et seq.* On the question of a system of European Private Law, see BRUNO SCHMILIN, 'Gibt es ein gemeineuropäisches System des Privatrechts?', in *idem* (ed.), *Vers un droit privé européen commun? – Skizzen zum gemeineuropäischen Privatrecht*, 1994, pp. 33 *et seq.*; cf. also BERTHOLD KUPISCH, 'Institutionensystem und Pandektensystem: Zur Geschichte des res-Begriffs', (1990–1992) 25–27 *The Irish Jurist* 293 *et seq.* On the system of the new Dutch Civil Code, see ELTJO SCHRAGE, 'Das System des neuen niederländischen Zivilgesetzbuches', (1994) *Juristische Blätter* 501 *et seq.*

> 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 lose faith in the rationality of their endeavour ....

The absence of systematic overview is thus apt to damage the intellectual integrity of the law.

8.

Apart from these more general considerations, there are a variety of specific reasons commending recodification of the private law of the Czech Republic. The Czech Republic is historically part and parcel of the central and western European community of nations that has been welded together by its Latin heritage, including the reception of Roman law.[67] Since all the other countries of that community possess a national codification it would appear to be natural for the Czech Republic to follow suit. The national codifications may well turn out, one day, to be a transitional stage on the way towards a European private law;[68] but at the same time they will form an important part of its substratum.[69] Secondly, the Czech Republic has a tradition of codified private law.[70] As long as the Czech countries formed part of the Austro-Hungarian Empire, the Austrian General Civil Code applied.[71] By virtue of a 'Reception Act' of 28 October 1918 it was even retained after the independent Czechoslovak state had been created.[72] In 1950 it was subjected to a

[67] Cf., most recently, RADIM SELTENREICH, 'Das römische Recht in Böhmen', (1993) 110 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Germanistische Abteilung)* 496 *et seq.*

[68] Cf. REINHARD ZIMMERMAN, 'Das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit', (1992) *Juristenzeitung* 8 *et seq.*; *idem*, (1994/95) 1 *Columbia Journal of European Law* 63 *et seq.*

[69] This point is also emphasized by A.S. HARTKAMP, 'International Unification and National Codification and Recodification of Civil Law: The Dutch Experience', in Attila Harmathy, Agnes Nemeth (eds.), *Questions of Civil Law Codification*, 1990, pp. 67 *et seq.*

[70] For an overview, see VIKTOR KNAPP, 'Czechoslovakia', in *International Encyclopedia of Comparative Law*, vol. I, C-111.

[71] Generally on the range of application and the multi-cultural character of the ABGB, see WERNER OGRIS, 'Zur Geschichte und Bedeutung des österreichischen Allgemeinen bürgerlichen Gesetzbuches (ABGB)', in *Liber Memorialis François Laurent*, 1989, pp. 376 *et seq.*; HELMUT SLAPNICKA, *Österreichs Recht außerhalb Österreichs*, 1973, pp. 47 *et seq.*

[72] SLAPNICKA, *op. cit.*, note 71, pp. 11 *et seq.*

substantial revision, to be replaced in 1964 by a Czechoslovak Civil Code.[73] The latter largely abandoned the traditional principles and institutions and was founded on the theory that private law 'regulates only the economic relations arising between socialist organizations and citizens and between citizens in the process of satisfying their own needs.'[74] It was a code in the socialist mould. Though substantially amended in 1992, it is still in force today.

This leads us to the third point. The transition from a socialist system to one that is based on freedom and the rule of law has entailed such a significant change of the ethical foundations of society that courts and legal doctrine alone cannot achieve the necessary adjustment of private law. New legislation is required, and it should be in the nature of recodification rather than piecemeal reform. In a situation where the entire legal system has to be reconstituted, a systematic focus for these reforms appears to be even more necessary than under more normal circumstances. And finally: the legislature has acted already. A new Commercial Code came into effect in 1992. It constitutes a *lex specialis* in relation to the Civil Code. It appears hardly imaginable to have a modern commercial code and not to have a civil code at all or a civil code based on outdated ideological foundations.

9.

Before embarking upon such a project of recodification, it might not be inapposite to contemplate some further lessons from successful codes such as the German, French or Austrian ones. Unlike the fathers of the Prussian General Land Law,[75] their draftsmen were no longer obsessed with the idea that they had to provide an exhaustive regulation – from first principles down to the finest details – for every imaginable set of facts. As the matter was put by Portalis:

> *L'office de la loi est de fixer, par de grandes vues, les maximes générales du droit; d'établir des principes féconds en conséquences, et non de descendre dans le détail des questions qui peuvent naître sur chaque matière. C'est au*

[73] At the same time, an 'Economic Code' was introduced; for criticism, see VICTOR KNAPP, 'Zur Auffassung des Zivilgesetzbuches in der Tschechoslowakei', in Attila Harmathy, Agnes Nemeth (eds.), *Questions of Civil Law Codification*, 1990, pp. 107 *et seq.*

[74] KNAPP, *op. cit.*, note 70, C-115.

[75] Cf. JAN SCHRÖDER, 'Das Verhältnis von Rechtsdogmatik und Gesetzgebung in der neuzeitlichen Rechtsgeschichte (am Beispiel des Privatrechts)', in Okko Behrends, Wolfram Henkel (eds.), *Gesetzgebung und Dogmatik, Abhandlungen der Akademie der Wissenschaften in Göttingen, Philologisch-historische Klasse, Dritte Folge*, n. 178, 1989, pp. 43 *et seq.*

magistrat et au jurisconsulte, pénétré de l'esprit général des lois, à en diriger l'application.[76]

Nor did these draftsmen contemplate the abolition of legal science. They were keenly aware of the distinction between what may be referred to as the 'political' and the 'technical' element of private law – a distinction drawn by Savigny in order to mark off the province of legislation from that of legal science.[77] Time and again, if we look into the travaux préparatoires for the BGB, we find statements to the effect that a particular problem should be left to legal science rather than be resolved by the code itself.[78] And the Empress Maria Theresia instructed the draftsmen of the Austrian General Civil Code expressly not to confuse statute and textbook: 'Definitions and divisions and such other matters as smack more of the lecture-room than the legislative chamber should be left out of the code'.[79]

There are, of course, considerable differences as to how these precepts have been carried out in the various codes. If I may use the German Civil Code as an example, we encounter indeed a notable restraint in defining and regulating purely doctrinal questions – central as they might be.[80] Thus, we find neither definition nor explanation of basic concepts like legal capacity, contract, declaration of intention, damage, causation or unlawfulness; freedom of contract is not even mentioned anywhere. Matters of legal construction (is performance merely a factual act or is it a contract?) are avoided, as far as possible. Many basic propositions have not been included in the code as being self-evident. Thus, for instance, the BGB merely sets out the three different types of error that it regards as operative, but it does not mention the basic proposition that a mere error in motive cannot give rise to a right of rescission.[81] The BGB, in this as in many other cases, marks certain fixed points but does not attempt to prescribe the details of a comprehensive doctrine. Moreover, it is characterized by a considerable degree of abstraction,

[76] Cf. FENET, *Recueil complet de travaux préparatoires du Code civil*, 1836, vol. I, p. 470. For comment, see HERMAN, *op. cit.*, note 5, pp. 52 *et seq.*.

[77] Cf., in particular, HORST HEINRICH JAKOBS, *Wissenschaft und Gesetzgebung im bürgerlichen Recht nach der Rechtsquellenlehre des 19. Jahrhunderts*, 1983; OKKO BEHRENDS, 'Geschichte, Politik und Jurisprudenz in F.C. v. Savignys System des heutigen römischen Rechts', in *Römisches Recht in der europäischen Tradition, Symposion aus Anlaß des 75. Geburtstages von Franz Wieacker*, 1985, pp. 25 *et seq.*; *idem*, 'Das Bündnis zwischen Gesetz und Dogmatik und die Frage der dogmatischen Rangstufen', in Behrends/Henkel, *op. cit.*, note 75, pp. 9 *et seq.*; HANS HERMANN SEILER, 'Rechtsgeschichte und Rechtsdogmatik', in Karsten Schmidt (ed.), *Rechtsdogmatik und Rechtspolitik*, 1990, pp. 117 *et seq.*

[78] Cf. the references compiled by JAKOBS, *op. cit.*, note 77, pp. 136 *et seq.*

[79] English translation according to ZWEIGERT/KÖTZ/WEIR, *op. cit.*, note 12, pp. 164 *et seq.*

[80] Cf. SCHRÖDER, *op. cit.*, note 75, pp. 52 *et seq.*; SEILER, *op. cit.*, note 77, pp. 121 *et seq.*

[81] § 119 BGB; for background information, see *Law of Obligations*, *op. cit.*, note 37, pp. 614 *et seq.*

both as far as style and content are concerned.[82] It refrains from a case-by-case regulation of the individual problems encountered in real life but rather provides abstract conceptual tools which can usefully be employed for a whole variety of new and unforeseen situations. In fact, the BGB has turned out to be conspicuously weak and outdated where it, exceptionally, departs from this approach: where it deals with individual concerns like the law of the flight of the bees (§§ 961 *et seq.*) or where it takes us into the 19th century world of cab drivers and messengers, of domestic servants, day labourers and journeymen (§ 196 BGB). The language, too, in which the BGB is drafted, usually maintains a level of abstraction that leaves much room for interpretation and scientific refinement. All of this contributes to a considerable built-in flexibility which immediately set the scene not for confrontation but for an alliance between legislation and legal science.[83] The same is true of the French and Austrian codes,[84] and 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.[85] This requires the legislature to exercise considerable self-restraint.[86]

10.

Sensible draftsmen of a new code will also acknowledge another kind of limitation of their power. The number of reasonable solutions to a given legal

[82] FOLKE SCHMIDT, 'The German Abstract Approach to Law', (1965) 9 *Scandinavian Studies in Law* 133 *et seq.*; KONRAD ZWEIGERT, HARTMUT DIETRICH, 'System and Language of the German Civil Code 1900', in S.J. Stoljar (ed.), *Problems of Codification*, 1977, pp. 34 *et seq.*; WIEACKER, *Privatrechtsgeschichte*, *op. cit.*, note 8, pp. 477 *et seq.*; ZWEIGERT/KÖTZ/WEIR, *op. cit.*, note 12, pp. 150 *et seq.*

[83] Cf. the programmatic title of OKKO BEHRENDS, *Das Bündnis zwischen Gesetz und Dogmatik etc.*, *op. cit.*, note 77. Cf. also BRUCE W. FRIER, 'Interpreting Codes', (1991) 89 *Michigan Law Review* 2205.

[84] Particularly famous are art. 4 Code Civil and § 7 ABGB; for details concerning the relationship between the code and judicial development of the law in France and Austria, see HÜBNER, *op. cit.*, note 47, pp. 33 *et seq.*; ZWEIGERT/KÖTZ/WEIR, *op. cit.*, note 12, pp. 91 *et seq.*, 164 *et seq.* The Swiss code has, from the beginning, been renowned for its 'deliberate reliance ... on judicial amplification' (ZWEIGERT/KÖTZ/WEIR, *op. cit.*, note 12, p. 181). The draftsmen of the Swiss code have made extensive use of 'general clauses'; cf. e.g., GMÜR, *op. cit.*, note 25, pp. 50 *et seq.* On the use of general clauses in the BGB, see, e.g., JOHN P. DAWSON, 'The General Clauses, Viewed from A Distance', (1977) 41 *RabelsZ* 441 *et seq.* Significantly, the new Dutch Civil Code relies more widely on general clauses than the old one; cf. HARTKAMP, 'Diskussionsbeitrag', in Bydlinski/Mayer-Maly/Pichler, *op. cit.*, note 38, p. 63. On the use of 'reference-rules' within the German code, see KARSTEN SCHMIDT, *op. cit.*, note 46, pp. 43 *et seq.*

[85] The point is also emphasized and further elaborated by KARSTEN SCHMIDT, *op. cit.*, note 46, pp. 67 *et seq.*

[86] Cf. also LORENZ, *op. cit.*, note 55, p. 128: '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'.

problem is not unlimited. In the traditional core areas of our private law they are very likely to have been discussed, or even tried, at some stage within the past centuries. Thus, a vast stock of experiences, of concepts, rules and principles is at hand that cannot simply be disregarded. Not accidentally our codes, specifically in the field of patrimonial law, contain the fruits of many hundreds of years of discussion and doctrinal refinement of Roman law. It is well known that those who drafted the BGB did not, by and large, intend their code to constitute a fresh start, a break with the past. On the contrary: they generally aimed at consolidating the contemporary version of the Roman common law: pandectist legal doctrine. Not inaptly, therefore, the BGB has been referred to as the 'statute book of the historical school of jurisprudence'.[87] But even the French Code Civil, carried by the élan of a revolutionary movement, subscribed to traditional conceptions of private law that were, as James Gordley[88] puts it very pointedly, almost old-fashioned when the code was enacted.[89] The draftsmen found them in the 17th and 18th century treatise writers like Domat and Pothier. Thus, it can be said that Roman law constitutes, to this day, one of the most important intellectual links between the modern national legal systems of western and central Europe.[90] This remains true also of the most recent European recodification, the new Dutch Civil Code. Interestingly, it even contains a whole variety of instances where its draftsmen, consciously or unconsciously, have reverted to principles of Roman law even though the old code had departed from them.[91]

The German experience, incidentally, demonstrates that it does not require the legislature to effect such reassertion of tradition. German courts and legal writers have found ways and means to wear away certain jagged edges and time-bound eccentricities of the civil code; and they have thus been able to cope with situations where the code, in retrospect, appears to be somewhat one-sided and unbalanced, rather idiosyncratic or too firmly rooted in

[87] PAUL KOSCHAKER, *Europa und das römische Recht*, 4th ed., 1966, p. 291. More generally CARONI, *op. cit.*, note 5, p. 73.

[88] 'Myths of the French Civil Code', (1994) 42 *American Journal of Comparative Law* 459 *et seq.*

[89] Nor did the Prussian General Land Law either aim at, or indeed effect, a 'revolutionäre Umgestaltung' (WIEACKER) of the existing order. ANDREAS SCHWENNICKE, *op. cit.*, note 28, *passim*, has emphasized the extent to which its draftsmen followed (and merely rationalized) traditional patterns of the ius commune. As far as the Austrian ABGB is concerned, see the evaluation by OGRIS, *Liber Memorialis François Laurent*, *op. cit.*, note 71, pp. 381 *et seq.*

[90] The common heritage may thus provide a basis for designing a new *ius commune Europaeum* for a political, economic and cultural union transcending the European nation states; cf. ZIMMERMANN, (1992) *Juristenzeitung* 8 *et seq.*; *idem*, 'Heard melodies are sweet, but those unheard are sweeter ...', (1993) 193 *Archiv für die civilistische Praxis* 121 *et seq.*; KNÜTEL, (1994) *Zeitschrift für Europäisches Privatrecht* 244 *et seq.*; and the contributions of EUGEN BUCHER and BRUNO SCHMIDLIN, in Bruno Schmidlin (ed.), *Vers un droit privé européen commun? – Skizzen zum gemeineuropäischen Privatrecht*, 1994, pp. 7 *et seq.*, 33 *et seq.*

[91] HANS ANKUM, *Principles of Roman Law Absorbed in the New Civil Code*, lecture delivered at the International Conference on European Legal Traditions and Israel in Jerusalem (April 1994) and to be published in the proceedings of that conference (ed. A.M. Rabello).

contemporary ideological premises.[92] 'It is not wise', one may quote the title of André Tunc's contribution to the Essays in Memory of F.H. Lawson, 'to take the Civil Codes too seriously'.[93] Tradition significantly curtails the codifier's sovereignty.

11.

The Czech Republic is a relatively small jurisdiction with limited resources. Many of them are tied up with projects that are at least as important as the codification of private law. At the same time, however, the introduction of a new civil code is particularly urgent. For, unlike in the Netherlands, or in Québec, there is not, for the period of transition, a code in force that is based, essentially, on the same political, ideological, ethical and economic premises as the one envisaged. Thus, the Czech Republic will not want to spend 26, 39 or even 45 years on the preparation of her code: the time-spans that it took to codify or recodify German, Québecois and Dutch private law. The only viable proposition, under these circumstances, appears to be the use of one of the existing codes as a model.[94] A strong contender, obviously, is the Dutch Civil Code. It is more modern than any of the other European codes, it is based on thorough comparative research[95] and has thus been able to absorb the experiences of other countries.[96] On the other hand, it has not yet been in force long enough in order to tell whether it is an unqualified success. Also, it has to be remembered that a code cannot flourish if it is cut off from judicial interpretation and doctrinal elaboration.[97] Dutch legal literature[98] and court decisions would thus have to be available. Yet, language appears to constitute an insurmountable barrier. More convenient, from the point of view of language, are the Austrian and German codes. Tradition would appear to tip

[92] For a more detailed discussion, and for examples illustrating this assertion, see ZIMMERMANN, (1994/95) 1 *Columbia Journal of European Law* 101 *et seq.*

[93] Cf. also KÖTZ, (1987) 50 *Modern Law Review* 1 *et seq.*

[94] Cf. also JAN LAZAR, in Bydlinski/Mayer-Maly/Pichler, *op. cit.*, note 38, p. 144 according to whom the Czechoslovak Civil Code of 1950 is going to be used as a basis.

[95] For details, see HARTKAMP, *op. cit.*, note 69, pp. 67 *et seq.*

[96] Thus, it can no longer be said to belong to the 'Romanistic legal family' but occupies an intermediate position between French and German law. Cf. e.g. J.H.A. LOKIN, 'Het NBW en de pandektistiek', in *Historisch vooruitzicht, BW-krant jaarboek 1994*, pp. 125 *et seq.* The same claim can be made about the Italian *Codice Civile* of 1942. It has therefore been argued that the latter codification could provide a basis for a European private law; cf. GUISEPPE GANDOLFI, 'Pour un code européen des contrats', (1992) *Revue trimestrielle de droit civil* 707 *et seq.* (726); and see the conference report by FRITZ STURM, (1991) *Juristenzeitung* 555. Cf. also the contributions in Peter Stein (ed.) *Incontro di studio su il futuro Codice europeo dei contratti*, 1993.

[97] Cf. also SACCO, (1983) *Rivista di diritto civile* 126, 131.

[98] For a recent overview, see OLIVER REMIEN, 'Das neue Burgerlijk Wetboek der Niederlande und seine Erschließung durch die Rechtsliteratur', (1994) *Zeitschrift für Europäisches Privatrecht* 187 *et seq.*

the scale in favour of the Austrian one; after all, it has already been in force for a considerable period of time. The German code, on the other hand, is not only more modern (and has been able to take account of the Austrian experiences), it is also of a more abstract and technical nature: an advantage in view of the fact that a modern code is no longer addressed to the general public but to a qualified lawyer. The impending reform of the law of obligations[99] will bring German law into line with the system of remedies provided by the uniform law for international sales.[100]

Obviously, whichever of the existing codes will be chosen as a starting point for the deliberations in the Czech Republic, it should not be slavishly received. Modern comparative research will have to be taken into account. Thus, for instance, among the various systems available to regulate the transfer of ownership of movable property, the extreme solutions adopted in France on the one hand and in Germany on the other, appear to be predominantly rejected today in favour of the causal system that used to prevail under the ius commune and has been adopted by the Austrian Code.[101] As far as general contract law is concerned, the Principles of European Contract Law, the first part of which is to be published later this year,[102] will also serve as a source of inspiration.[103]

Furthermore, it may be prudent not to undertake too much at one and the same time. Particularly urgent, in view of the requirements of commerce, is the codification of contract law.[104] Contract law, however, is part of a larger entity usually referred to as the law of obligations. There is such a considerable degree of interdependence between delict, unjustified enrichment and contract

[99] Cf. above, note 42.

[100] Cf. PETER SCHLECHTRIEM, 'Rechtsvereinheitlichung und Schuldrechtsreform' (1993) *Zeitschrift für Europäisches Privatrecht* 217 *et seq.*

[101] FRANCO FERRARI, 'Vom Abstraktionsprinzip und Konsensualprinzip zum Traditionsprinzip – Zu den Möglichkeiten der Rechtsangleichung im Mobiliarsachenrecht' (1993) *Zeitschrift für Europäisches Privatrecht* 52 *et seq.*; ULRICH DROBNIG, 'Transfer of Property', in A.S. Hartkamp, M.W. Hesselink *et al.* (eds.), *Towards a European Civil Code*, 1994, pp. 345 *et seq.*; see also ANDREAS ROTH, 'Abstraktions- und Konsensprinzip und ihre Auswirkungen auf die Rechtsstellung der Kaufvertragsparteien', (1993) 92 *Zeitschrift für Vergleichende Rechtswissenschaft* 371 *et seq.*

[102] The proposed rules (relating to performance and non-performance of contracts) without comments and notes have already been published in A.S. Hartkamp, M.W. Hesselink *et al.* (eds.), *Towards a European Civil Code*, 1994, pp. 405 *et seq.* For comment, see REINHARD ZIMMERMANN, 'Konturen eines Europäischen Vertragsrechts', (1995) *Juristenzeitung* 477 *et seq.*

[103] Cf. also the *Unidroit Principles for International Commercial Contracts*; on which see MICHAEL JOACHIM BONELL, 'Das UNIDROIT-Projekt für die Ausarbeitung von Regeln für internationale Handelsverträge', (1992) 56 *RabelsZ* 274 *et seq.*; *idem*, 'Unification of Law by Non-Legislative Means: the UNIDROIT Draft Principles for International Commercial Contracts', (1992) 40 *American Journal of Comparative Law* 617 *et seq.* (and the other contributions in that volume); cf. also ARTHUR HARTKAMP, 'Principles of Contract Law', in A.S. Hartkamp, M.W. Hesselink *et al.* (eds.), *Towards a European Civil Code*, 1994, pp. 36 *et seq.*

[104] On the role of commercial law and trade-related areas like contract law as pacemakers for codification, see the references in (1992) *Juristenzeitung*, notes 1 and 2; and HARTKAMP, *op. cit.*, note 69, pp. 67 *et seq.*

that it appears to be problematic to single out for separate treatment one of these fields. The same is true of the relationship between the law of obligations and property law, at least as far as the law of movable property is concerned. It may therefore be advisable, as a first step, to codify the entire patrimonial law. Family law and succession may then be tackled at a later stage. Alternatively, another commission could be charged with the preparation of these two areas of the law.

12.

This, finally, raises the question of how the actual codification process should be organized. Apart from the fact that ultimately, of course, parliament will have to enact the code, no general statements seem to be possible.[105] It is well known that the Swiss Civil Code is largely the work of a single person for:

> ... from the beginning right through to the successful outcome, [Eugen] Huber was closely involved in all stages of legislation; not only did he draft the Code but he also piloted it with great deftness through all the procedures of Parliament, of which he was himself to become a member. His experience as a journalist ... also helped him to win public support for the Code by means of newspaper articles and public lectures.[106]

The Dutch authorities, too,[107] had initially charged one person, E.M. Meijers, a famous professor of the University of Leiden, with the preparation of a revised civil code. Seven years later, however, Meijers died. His place was taken by a number of government commissioners who divided the work up between themselves. It soon became apparent that the parliamentary discussion took much more time, and was more controversial than had originally been anticipated. Thus, it was decided to abandon the idea of introducing the new code in one step. Instead, one started with the recodification of family law and the law of persons. That was in 1970. Twenty-two years later the new property law as well as the most significant parts of the law of obligations have come into force. When the remainder of the code (particularly the law of succession) will be enacted, is not yet known. Over the years, the entire project has several times been in grave danger of being abandoned. Would it all be worth the trouble? And what about the expense? It

[105] Cf. also COING, in Stoljar, *op. cit.*, note 8, p. 20 who draws attention to the views of Jeremy Bentham (drafting of a code is best entrusted to one person, if possible a foreigner) and Filangeri (it is more helpful to set up committees).

[106] ZWEIGERT/KÖTZ/WEIR, *op. cit.*, note 12, p. 176.

[107] See DIK VAN DIJK, 'Der politische Werdegang des Niederländischen Gesetzbuches 1992', in Bydlinski/Mayer-Maly/Pichler, *op. cit.*, note 38, pp. 23 *et seq.*; cf. also HONDIUS, *op. cit.*, note 38, pp. 35 *et seq.*; LOKIN/ZWALVE, *op. cit.*, note 5, pp. 287 *et seq.*

has been estimated that the costs involved in introducing the new code amounted to at least five billion Dutch guilders within the five-year period before 1992.[108]

Recodification in Québec, on the other hand,[109] was entrusted, in 1965, to a Civil Code Revision Office which brought together close on 200 members of the local legal community. They sat in various committees, each entrusted with a specific part of the code to consider. After a process of extensive consultations by means of the publication and wide circulation of nearly 50 interim reports, the Revision Office submitted a final report, containing a draft civil code, to the Government. The Government did not, however, decide to put the draft civil code before parliament but reopened the consultation process: the draft code was parcelled up and then, bit by bit, subjected to parliamentary hearings. That was the end of any possibility of enacting a new civil code *en bloc*. In 1981, family law was eventually reformed, six years later the books relating to persons, succession and property came into force. It took another seven years to complete the code. The final product appears to bear little resemblance to the draft civil code submitted by the Revision Office. The long drawn-out proceedings since 1978 have not improved the quality of the code. The introduction of the new code piece by piece has also thrown up a host of difficulties concerning the co-ordination between the new and the old law and the transition from the one to the other. The Québec experience seems to confirm Theo Mayer-Maly's scepticism as to whether a modern multiparty parliament provides a suitable forum for the dispassionate deliberation of private law codifications.[110]

One hundred years ago, matters were still somewhat easier. The German Civil Code[111] originated in the work of a commission consisting of 11 judges, officials and professors. For each of the five books of which the code was to consist, one member of the commission was charged with the task of preparing a preliminary draft. The five preliminary drafts (all of them based on extensive comparative research) were then consolidated and published as a first draft. It aroused a vigorous public debate and encountered sharp criticism. A second commission (this time containing some non-lawyers) was thereupon appointed and prepared a revised draft that did not, however, substantially differ from the original one. The Imperial German Parliament debated the code in 1896. It did its work in six months. 'If you read the proceedings', reported a contemporary English observer:[112]

[108] Cf. HONDIUS, *op. cit.*, note 38, p. 43.

[109] As to what follows, see PIERRE LEGRAND, jr., 'Codification in Québec', (1993) *Zeitschrift für Europäisches Privatrecht* 574 *et seq.*

[110] 'Diskussionsbeitrag' in Bydlinski/Mayer-Maly/Pichler, *op. cit.*, note 38, p. 65.

[111] For details, see HELMUT COING, in Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch*, 12th ed., 1980, Einl. note 74 *et seq.*

[112] 'The Making of the German Civil Code', in H.A.L. Fisher (ed.), *The Collected Papers of Frederic William Maitland*, vol. III, 1911, pp. 482 *et seq.*

> ... you may be amused at finding that the briskest of all the debates 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 whole of the mighty project seems to be endangered by the conflicting interests of sport and agriculture. That is the touch of humour required as a relief for so much civic virtue.

The observer was Frederic William Maitland and what he admired about the German codification effort when comparing it with the rather messy situation in England, was the turn from focusing on bits and pieces of the legal system to the system as such. He saw in it an attempt to present the law as a single, coherent, homogeneous entity – as an intellectually appealing, organic whole. This, indeed, is still today the main argument in favour of codification.

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