

Manlio Bellomo, The *Common Legal Past of Europe*
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National Codifications: Triumph and Crisis

Summary: 1. The Age of Codifications; 2. Precedents: The Experience of Consolidations; 3. The Theoretical Roots of the Codifications; 4. From the French Revolution to the Napoleonic Code Civil; 5. Napoleonic Codes and National Codes in Europe; 6. Code, Interpretation, System; 7. Law, Code, and Juridical System in Germany: Thibaut, Savigny, and the Historical School; 8. From the Historical School to the Pandectists; 9. Critique of the Pandectists: Naturalist and Marxist Opposition; 10. The Triumph of Pandectist Thought and the German Civil Code; 11. Nations and National Codes in Europe: The testo unico as a Model; 12. Italian Codes Today: Signs of Crisis; 13. The Age of Decodification; 14. From Decodification Toward New Forms of Stability?; 15. A Ruins of the Modern Age: The "Codistic" Vision of the Law

1. The Age of Codifications

There is a period in the history of European law that historiography calls "the age of codification" or "codifications," using the plural to stress the nationalistic connotations inherent in the connection between that phenomenon and the constitution or extension of the various European nation states, and using the singular to accentuate the unity of that phenomenon as a point of reference for an ideology and a method.

The time-span is not short: it includes all the last century and a good part of our own. The "Age of Codifications" began in the eighteenth century with a few preliminary projects, left in the planning stage or put into effect. These compilations attempted to extract the most important provisions from the incalculable variety of particular norms of the Ius commune, with the idea that a body of selected precepts would be more useful than a disconnected congeries of sometimes contradictory dispositions. The attempt to bring order from disorder was by no means a new one; it had a famous predecessor, centuries before, in Gratian's Concordia discordantium canonum, or Decretum, of 1140-42. It had a specific and particular historical significance, however, and one that affected the outcome of later initiatives. After the sorting process that led to a "consolidation" in which a number of provisions were collected together, there came a concerted effort to draw up a body of rules articulated within an orderly and carefully crafted outline -- a "code" authoritatively imposed to constitute the precept, mark the limit, and state the guarantee it offered all the citizens of a state. Thus historiography usually shows a period of incubation and of "consolidations" preceding a period of revitalization and "codifications."

Scholars have scoured remote and in some cases insignificant corners of the eighteenth-century scene in search of attempted codifications conceptualized or realized at that time. They have rediscovered some figures with a conscious will for reform operating in a context of a movement for renewal responsibly launched and working within organisms and magistracies that had the authority

to act, but they also encountered professorial dreamers and would-be Philosophes closed within their private worlds fantasizing about a utopian new age and thinking their efforts had helped to bring them about. Even when these movements were conveniently labeled "consolidation" and "codification,"¹ historians have often confused the two phenomena when they studied regions of Europe that did not and could not have experienced them. They have even done so despite a warning: "The code," Tullio Ascarelli wrote in 1945, "is characterized by a claim to construct a 'new,' 'complete,' and 'definitive' legal order that includes among its formulations solutions for all possible cases; it is precisely this characteristic that distinguishes it from the legislative consolidations of the previous epochs, whose only purpose was to reorganize the law in force."²

2. Precedents: The Experience of Consolidations

There were a number of legislative consolidations in Italy and in Europe. In the Kingdom of Sardinia, for example, "constitutions" were promulgated by Victor Amadeus II in 1723 and 1729 and by Charles Emmanuel III in 1770-71, the latter under the title "Laws and Constitutions."³ The terms costituzioni (constitutions) and codici (codes) were used interchangeably to designate the same phenomenon. This meaning persisted, to the point that even in our own century Vittorio Emanuele Orlando observed that "no objective difference exists between constitutional laws and ordinary laws,"⁴ which means that even today "civil code" and "constitution" can be brought within "the broad process of codification,"⁵ since the civil codes have incorporated "constitutions" and the concept of collections of legislative decrees within the meaning of "code."⁶

¹ "Consolidation" and "codification" are useful terms, now widely used for their clarity. They have also provided the title of a book that introduced the first term into juridical historiography and combined it with the second: Mario Viora, Consolidazioni e codificazioni: Considerazioni sulle caratteristiche strutturali delle fonti di cognizione del diritto nei tempi andati, contributo alla storia della codificazione (Bologna: N. Zanichelli, n.d., but in the early 1930s).

² Tullio Ascarelli, "L'idea di codice nel diritto privato e la funzione dell'interpretazione" (1945), now in Ascarelli, Saggi giuridici (Milan: Giuffrè, 1949), 48-49.

³ See Mario Viora, Le costituzioni piemontesi (Leggi e costituzioni di S.M. il Re di Sardegna): 1723-1729-1770 (Turin: Fratelli Bocca, 1828, reprint, Turin, 1986).

⁴ Vittorio Emanuele Orlando, Principii di diritto costituzionale (1889), 4th ed. (Florence: Barbera, 1950), 140.

⁵ Pietro Perlingieri, Profili istituzionali del diritto civile (Naples: Edizioni scientifiche, 1975), 63.

⁶ Michele Giorgianni, "Il diritto privato ed i suoi attuali confini," Rivista trimestrale di diritto e procedura civile 15 (1961): 391-420, quotation p. 399.

There were also early experiments in codification. The Senate of Venice ordered a "Feudal Code," drawn up in 1770 and promulgated in 1780, and another body of laws, the "Code for the Venetian Mercantile Marine," in 1786.

Activity was even more intense in Tuscany, where at least two attempts to draw up a code deserve mention. The first, a project for a civil code (the "Code of the General Legislation of the Grand Duchy of Tuscany") limited by an outdated point of view, was a failure; the second, a penal code, proved a great success. Formally entitled "Reform of Tuscan Criminal Legislation," it is commonly known as the Leopoldine Code because it was sponsored and promulgated (in 1786) by Pietro Leopoldo, grand duke of Tuscany from 1765 to 1790 as Leopold I and after 1790 Holy Roman emperor as Leopold II.

Outside Italy the most important instances of a sovereign using his or her authority to back the idea of codification and make it a reality occurred in Austria and Prussia.

In Austria, after the failure of the Codex Theresianus of Maria Theresa, which was completed in 1766 but never put into effect, Joseph II brought out a "Rules of Civil Procedure" (Civilgerichtsordnung) in 1782, followed by a penal code (Allgemeines Gesetz über Verbrechen und derselben Bestrafung) in 1787 and a Code of Penal Procedure (Kriminalgerichtsordnung) in 1788.

In Prussia, which extended over the greater part of the territories of north-east Germany, jurists steeped in Enlightenment culture (Thomasius, Cocceji, Schwarz, and others) made a number of attempts during the eighteenth century to draw up or give support to a code. A stable, concrete code came only in 1794, when Frederick William II (d. 1797) promulgated the Allgemeines Landrecht für die Preussischen Staaten (General Code for the Prussian States), commonly known as the Prussian Landrecht. It remained in force until 1900.

3. The Theoretical Roots of the Codifications

Codifications crowded the scene during the last decades of the eighteenth century. The motivation behind them varied, but they all belonged within the Enlightenment currents that "yearned for organizational reform"⁷ that attempted utopian elaborations of new models for society or sprang from the sort of prudent reaction that always opposes movements for reform. A common thread ran through the welter of acts, thoughts, reactions, desires for change, and efforts to conserve the old ways that animated the various experiments: it was the notion that one must have "certain" rules; rules that were simple, clear, and in harmony with human "reason" and human "nature." "Rational" demands and "natural" needs were interpreted in ways that were far from uniform, however, and those who appealed to them often ended up in opposing camps, those who wanted

⁷ Or, as Piero Calamandrei, put it, that were "smaniose di riformar ordinamenti": Calamandrei, "Prefazione e Commento" in Cesare Beccaria, Dei delitti e delle pene, 2d ed. rev. (Florence: Le Monnier, 1950), 66-67.

radical and sweeping reform to one side and, on the other, those who wanted to consolidate a society divided into "orders," "estates," or "levels" and to assure stability to each of these groups, guarantee its existence, and guide it in exchange for obedience to a sole and single law (the "code") willed and imposed by a recognized and incontestible sovereign authority.

Thus some supported the idea that it was up to the ruler, and to the ruler alone, to unravel or cut through the knottier problems of jurisprudence. The sovereign appeared, and in fact was, "illuminated" in that he was presented as giving rational order to social relations and "certain" rules for individual actions. In the broader picture, assigning this task to the sovereign implied diminishing the role of jurists, who were still genuinely active, in particular in the realm of judicial procedure. It also implied an increase in the authoritarian centralization of the new sovereign.

One of the most significant theoretical statements in the Italian Settecento, Ludovico Antonio Muratori's Dei difetti della Giurisprudenza, published in 1742,⁸ is shot through with this sort of thinking. Addressing his remarks to the sovereign, Muratori states that confusion and irrationality were altogether too widespread, that jurists, singly and as a group, were too full of vain aspirations, and that they made exaggerated claims, presenting themselves or posing as high priests of justice, even of a justice both human and divine, like priests who defended and divulged the Divine Word.⁹ Muratori appealed to the sovereign to take action to cut through an inextricably snarled system of justice created by the argumentative and quarrelsome verbosity of the jurists.¹⁰ At the end of this work Muratori listed some of the spinier legal questions and the more dubious solutions, calling on the sovereign to provide each of these with a sure law that would oblige the jurists, out of the obedience they owed to the sovereign's commands, to hold their peace.¹¹ As Muratori saw it, the call for a "sure law" covering each of the problems he listed was not yet a proposal for the elaboration of a "code"; the set of laws that he requested of the sovereign would certainly have lacked the completeness, the homogeneity, and the capacity for generating further legislation that were to be typical of the nineteenth-century codes.

Furthermore, throughout the eighteenth century, even when jurists moved from exhortation to action, and even when the labors of learned commissions of jurists led to the elaboration and promulgation of a "code," such codes lacked one

⁸ Ludovico Antonio Muratori, Dei difetti della Giurisprudenza, Trattato (Venetiis 1742).

⁹ Ibid., 1.

¹⁰ Ibid., 2.

¹¹ Ibid., 161-80. Chapter 19 is entitled "Saggio di alcune Conclusioni intorno a certi punti controversi nella Giurisprudenza, proposto all'esame di chi ha l'autorità di far leggi e statuti" (Essay containing some conclusions regarding certain disputed points in jurisprudence proposed for the examination of whoever has the authority to make laws and statutes), 161.

of the characteristics of all modern law codes: the unity and equality of the juridical subject -- the people -- for whom the code was destined. What is more, the figure of the sovereign was still central to these schemes, like a keystone bearing the weight, assuring the equilibrium of the entire construction, and intervening from time to time with specific legislative provisions. In some eighteenth-century law codes -- the Prussian Landrecht of 1794, for example -- the general framework of the law imposed from the top down confirmed an organization of society into three "estates" or "levels" (here, Stände), the nobility, the bourgeoisie, and the peasantry. Each of these sectors had its own laws; legal capacity was not uniform, and there were limitations and prohibitions, privileges and exemptions, free men and slaves and servants. The organization of these codes was indeed "rational" and "natural," but only to the extent that they refrained from challenging the articulation of society and the authority of the prince who ruled and governed the state.

This was one of the limitations of eighteenth-century absolutism. The codifications and attempts at codification were the form and the expression of that absolutism, and since they participated in its nature they shared its fortunes. No group -- neither the nobility, nor the bourgeoisie, nor those who worked the land -- recognized themselves wholly in all the codified norms because these codifications mirrored power and the ways in which power intended to safeguard society. Any line of thought tending toward renewal or reform found little room to maneuver; often the best it could hope to do was merely exist. Yet it was precisely in the existence of such thought that ideas took root that were to bear fruit after the French Revolution.

4. From the French Revolution to the Napoleonic Code Civil

The tumultuous events of 14 July 1789 signaling the beginning of the French Revolution produced a violent break with the past and toppled the previous equilibrium. The decapitation of a king was the decapitation of an image of power, and, by imposed or self-imposed exclusion, it brought with it the fall of the entire "order" or "estate" of the nobility. After the Revolution codes produced a unity of the legal subject that replaced the plurality of legal subjects of the eighteenth-century law codes. Henceforth it was not only possible but mandatory to legislate solely and in unified fashion for the "citizen" rather than for the "noble," the "bourgeois" and the "peasant."¹² The law was now equal for all, even though in reality individuals might have varying levels of wealth or well-being as well as different levels of culture, sensibility, and professional standing.

In 1804 Napoleon Bonaparte promulgated a code destined to enjoy an extraordinary success, the Code Civil, which became the model for many other

¹² This observation recurs repeatedly in Giovanni Tarello, Storia della cultura giuridica moderna (Bologna: Il Mulino, 1976), vol. 1, Assolutismo e codificazione del diritto; see, for example, 37ff.

codes and which followed Napoleon's victorious armies, for some time mingling its destiny with the emperor's.

The vast changes brought on by the French Revolution encouraged the emergence of the bourgeoisie, a class that for some time had been gaining strength within the structures of traditional society. It was the bourgeoisie that bent to its advantage the revolution in which it had participated, but that also held in check and exploited the extreme and intransigent violence that had been loosed for an implacable destruction of the old structures of power and society.

Henceforth the bourgeoisie occupied the army posts gradually abandoned - by constraint or by choice -- by the nobility. The bourgeoisie staffed the administration and the judiciary, a bureaucratic apparatus that had so grown in personnel, functions, and professional specialization (if not in efficiency) that it could endow its office-holders with a respected and coveted noblesse de robe. It was a small but emergent part of the bourgeoisie, unprincipled businessmen, who worked feverishly and garnered immense profits by supplying logistic support to the imperial armies and purveying to the needs of the military.

Thus it was the military apparatus, politics, Napoleon's campaigns, and the creation of an empire that stretched beyond the frontiers of France to expand over much of Europe that consolidated, buttressed, and increased the spiritual and economic strength of the bourgeoisie. The army needed to be backed up by a civil administration ever more open to vast horizons; the professional competence of that administration was in turn challenged to search for practical solutions to the new demands of empire. The merging of the politico-military apparatus with the bureaucratic-administrative and economic-speculative apparatus in imperial France made it possible for the wildest of the bourgeoisie to rise to the top. Such men found fertile terrain in the major state agencies for cultivating their prosperity, and they found a guarantee of security and stability in the social order that the empire had brought to pass.

The judiciary and the more prominent lawyers played an important role in the "era of the triumphant bourgeois."¹³ Often the same bourgeois families used their interlocking relations and fortunate combinations of talent and vocation to place their kin in the army, the administration, and the judiciary.

With the nobility thrust aside or excluded and the common people stripped of political and economic responsibility, the bourgeoisie was on the threshold of its golden age. The Napoleonic Code Civil was the image of its triumph. The simplification brought on by a unified juridical subject and the possibility of an equal status and a sole and identical juridical capacity for all (a capacity that could be blocked only for pathological reasons or by reason of gender or age when it was dynamically configured as a legal capacity to act) signaled the elaboration and imposition of a "model" to which every individual's reality must correspond. For example, either the legal construct of property effectively corresponded to a

¹³ See Eric J. Hobsbawm, The Age of Capital, 1848-1875 (London: Weidenfeld & Nicolson, 1975).

subject who was the owner of something -- much wealth or little, movable or immovable goods -- or it was an empty, abstract construct invoked by those who owned nothing but who moved and acted to have something, even perhaps to acquire a well-being that would enable them to live without having to work a life-style that the new bourgeoisie inherited from a portion of the old nobility.

The "certainty of the law" became, and continued to be, the certainty of a social order. The vocation for justice became, and continued to be, a vocation for legality. For the judge, being a "servant of the law" was more important than being a "servant of the prince": it assured a degree of decorum, dignity, and respectability directly proportional to the abstraction of the law.

In every branch of public administration and throughout the world of the lawyers and the liberal professions new, class-based, and ceremonial attitudes sprang up, borrowed from traditionally aristocratic ideals in decline but never rejected. Some of these -- severity, self-control, detachment, courtesy, authority, paternalism, dignity of gesture and demeanor -- permeated the fabric of daily life in social comportment and in parental and familial relations, affecting even the intimacy of the home in relations between husband and wife and between parents and children.

No institution regulated by the French Code Civil -- the subject, property, legal transactions, obligations, personal and patrimonial relations within the family, succession -- failed to reflect this new world. No silence in the code failed to document the disappearance or neglect of the old aristocracy and the juridical institutions it found congenial, such as primogeniture, fideicommissum, the exclusion from inheritance of dowered daughters, and so forth.

5. Napoleonic Codes and National Codes in Europe

The age of codifications truly began with the Code Civil, which in common parlance became the "Napoleonic Code." In France and in the parts of Europe occupied by Napoleon's armies the picture was enriched with the promulgation of a Code de Procédure in 1806, a Code de Commerce in 1807, a Code Pénal in 1810, and a Code d'instruction criminelle in 1811.

The French may originally have hoped that the Code Civil would be extended throughout Europe, following the fortunes and the victories of Napoleon's armies. If such a hope ever existed, events showed it to be illusory.

On first inspection those initial expectations seemed justified. The Code Civil was translated into Italian, and Napoleon extended it to the Kingdom of Italy in March 1806, to the Principality of Lucca (1806-1813) in May of that same year, to the Kingdom of Naples (1805-1815) in October 1808 (with the exclusion of provisions on divorce), and to the Grand Duchy of Tuscany in 1808.

In two areas, however, the Napoleonic Code met with opposition and resistance. In Prussia the Landrecht of 1794 was still in effect, and it continued in force until 1900, although it should be noted that it lacked the fundamental characteristic of a code, the unity of the juridical subject for whom the code is

destined. In Austria a modern and excellent general civil code (the Allgemeines bürgerliches Gesetzbuch) was promulgated in 1811, a body of laws that enjoyed a success equal to that of the French Code Civil because it too expressed the principle that the law must be equal for all citizens of the state.

In 1814, when the Congress of Vienna ushered in the period of the "Restoration," the Code Civil seemed doomed. In Lombardy and the Veneto it was substituted on 1 January 1816 by the Austrian Civil Code of 1811. In the Kingdom of the Two Sicilies (Naples was once more joined to Sicily) it was replaced by a new series of codes covering civil, penal, and commercial law and civil and penal procedure. All these were promulgated in 1819 under the title of Codice per lo Regno delle Due Sicilie. The Duchy of Parma had a new Codice Civile in 1820. Tuscany turned back the clock to reinstate Roman and canon law and the "laws" of the Grand Duchy that had been passed before 1808. In Piedmont, and more generally in the Kingdom of Sardinia, which included Piedmont, Liguria, and Sardinia, the Code Civil was eliminated (although not in Liguria). On the island of Sardinia itself, after a number of abortive attempts between 1817 and 1827, a body of Leggi civili e criminali pel Regno di Sardegna -- not really a code but materials selected and organized for use in legal practice -- was promulgated in 1827 and put into force on 1 January 1828. In 1837 a true Codice Civile per gli Stati di Sua Maestà il Re di Sardegna, usually referred to as the Codice Albertino, was promulgated by King Charles Albert for the three regions that made up the kingdom of the House of Savoy. For its reinstatement of some institutions that had been eliminated from the French and Austrian codes (for example, the exclusio propter dotem of daughters from paternal succession) the Albertine Code can be considered one of the most important Italian manifestations of the Restoration, even though its incontestable character as a code made a notable contribution to the legislative revival in Europe.

Thus in Italy the French Code Civil lost its value as positive law as the various pre-unification Italian states provided, in various ways, for the codification of their laws. Nonetheless (and this is true not only in Italy), the French code remained a model useful for two distinct but connected reasons. On the one hand, it continued to bear concrete and prestigious witness to the new idea of the code and to the "vocation of the century" for "the codified formulation of the law."¹⁴ It expressed and incorporated a new manner of regulating and ordering society; it reflected and satisfied the triumphant bourgeoisie's need for stability and certitude, a need that it felt and imposed in order to guarantee its own existence, its role, and its political and professional victories. On the other hand, the Code Civil suggested specific contents, definitions of institutions, and normative solutions, which meant that its written precepts could be borrowed for provisions

¹⁴ In the words of the Prime Minister, Giovanni Battista Cassinis, in 1860: see Rosario Nicolò, "Codice civile," in Enciclopedia del Diritto (Milan: Giuffrè, 1958-), vol. 7 (1960), 240-49, esp. 241-42.

to be inserted in the various codes that the European states were drawing up during the first decades of the nineteenth century.

This is what happened in Italy between 1863 and 1865. After the unification of Italy the new kingdom under the House of Savoy thought it necessary to give a civil code to the nation, among other reasons in order to express the new political reality in a uniform juridical discipline and to help standardize procedures that had varied from one region to another under previous legal systems. The commission charged with this difficult task, presided by two successive Ministers of Justice, Giuseppe Pisanelli and Giuseppe Vacca, completed its task in short order. They had an excellent model in the French Code Civil of 1804 (the Napoleonic Code) and followed it. In particular, the commission borrowed from its model the central and structuring idea that it is useful and possible, hence rightful, to promulgate a code valid for all citizens that provides a law that is the same for all; furthermore, that it is rightful to attempt to discipline the society of the nation in order to help it prosper in such a way that the individual within that society can be safeguarded and guided in his clearly codified rights and in every moment of his life and every aspect of his legitimate activities.

The Italian legislators also mined their French model for innumerable specific articles, with the result that entire sectors of Italian civil life came to be regulated by the new Codice Civile Italiano along normative lines broadly similar or identical to those of the French Code Civil of 1804.

The first Codice Civile of a united Italy was promulgated on 25 June 1865 and put into force on 1 January 1866. It was followed in 1883 by a noteworthy Codice di Commercio.

6. Code, Interpretation, System

Codifications were rampant throughout Europe in the nineteenth century. Faith in them was extreme, and the fervor of the commissions and governments that set to work on them was as high as their optimistic expectations. What happened in the realm of legislation was mirrored perfectly in the realm of doctrine. A "code" proposed in both its intent and its operation as a complete body of provisions opened the way to interpretation of a logical and formal nature. In the earliest experience of the use of national codes during the first half of the nineteenth century, this demand for logical and formal comprehensiveness had a connection with the definition of the jurist, the judge in particular, since such men were and felt themselves to be "servants of the law." The jurist, however, had neither the obligation nor the capacity to innovate, nor could he modify, amplify, or limit the dictates of the code or of individual laws, but was expected only to understand them and to enunciate their content and their meaning, retracing the legislator's thoughts and coming to a faithful and "declarative" interpretation of the measure in question. These were the aims of the French school of exegesis, one of the

chief spokesmen of which was Charles Demolombe, and which concentrated exclusively on textual exegesis and refused consideration to the isolated datum.

Totally different methods -- the methods of the sistema iuris -- were also attempted, in particular outside of France. Broader interpretations were used to create norms for cases not expressly provided for in the code; failure to do this, it was argued, would result in an incomplete code.

Analogy, extensive interpretation, and arguments a fortiori, a maiori, and following other modi arguendi in iure served, on the one hand, as aids to a refined intellectual gymnastics and, on the other, as a way to enlarge the existing legislative provisions and to fill in possible lacunae. The idea of a "system" was thus joined to the idea of the "code" because both notions promised completeness, certainty, and definitiveness to codified law and because both notions reinforced the bourgeoisie's self image as the dominant class in the modern national state.

The juridical system displayed its true potential in both the universities in the theoretical training of new jurists and in the forensic world of judges and lawyers. The criteria of juridical hermeneutics and the descriptions of juridical institutions became "dogma" -- that is, "truths" that were indisputable and that indeed went unchallenged in the last century and a great part of our own century and are still accepted and propagandized as "truths" by weary votaries and inexperienced back-country professors. This nineteenth-century method and its results are usually known as "juridical dogmatics." For this school of thought interpretation was divided into literal and substantive. Its object must be the individual norm, considered in isolation. The single norm could be analyzed in relation to the historical circumstances that produced it (the so-called "historical interpretation," which, parenthetically, bore no relation to the problem of the historicization of the law, which is something quite different) or in relation to the end or ends that it hypothesized and pursued. Interpretation must also consider the entire network of the "system" within which the individual provision was inserted. There were two reasons for this: first, each single provision reacted on the system, putting its elasticity to the test (that is, its capacity for including the greatest possible number of precepts), thereby contributing to shape the system; second (and a mirror image of the first reason), the system in turn reacted upon the individual norm to orient the interpreter's selection of possible meanings and his decision to pick one of those possible meanings as his own and as logically "true."

Legal science thus applied a refined capacity for logic to its own self-fashioning, and it produced increasingly analytical and complex results. It used abstraction to separate the "system" from social and political reality because in both the particular method by which that system was constructed and in that system itself, jurisprudence found the image of an order, the order of the hard-won stability of those who founded and shaped the system. When a class is victorious and gains domination over a society, as did the bourgeoisie during the nineteenth century, or when the absolutism of a sovereign or a dictator annuls or conceals social conflicts and the clashes and tensions among the various social groups, the

space available for political action shrinks and the political import of every act and every thought is either passed over in silence, avoided, ignored, or eliminated. Those in power preach the uselessness of politics, while within the dominant social stratum (in the nineteenth century, the bourgeoisie) there develops an analogous but inverse lesson. At the same time the conviction spreads that a complex of social relations, solidly constructed in defense of the role and the spaces that have been conquered, needs only to be "crystallized," consolidated, and made juridically relevant and significant within the symmetry of an organic and complete "system" of thought.

The bourgeoisie expressed and defended itself with the "system" just as it had with the "code." It achieved its most incisive action in the political sphere at the precise moment that it removed society and politics from its intellectual range of observation.

7. Law, Code, and Juridical System in Germany: Thibaut, Savigny, and the Historical School

What happened in Prussia in the realm of the legislative and doctrinal questions that concern us here was truly emblematic because in Prussia we can clearly see, like twin roots of a mighty tree, the two juridical phenomena of codification (which for the entire nineteenth century remained in the improper form of a "code," that is, in the form of the Landrecht of 1794) and of a legal system, which had become dominant by the end of the century.

The year 1814 was important not only for the history of German law but also for legal history throughout Europe. Two famous essays were published in that year, one by Anton Friedrich Justus Thibaut (1772-1840) and the other by Friedrich Carl von Savigny (1779-1861).

In the first of these studies (which was also first in date) Thibaut insists, as the title states, "on the need for a common civil code for Germany."¹⁵ In this work, which shows the clear influence of two great models of recent date, the Napoleonic Code civil of 1804 and the Austrian civil code of 1811, Thibaut predicted swift national unification for a land whose unified legislation must operate as a stabilizing element as well as faithfully reflect national unity.

The second of these works was written in polemical opposition to the first. In it Savigny denied that a unified civil code was desirable and doubted, given the

¹⁵ Anton Friedrich Justus Thibaut, Über die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland (Heidelberg, 1814). This work went through various editions; it is available in Italian translation in Anton Friedrich Justus Thibaut and Friedrich Carl von Savigny, La polemica sulla codificazione, ed. and intro. Giuliano Marini (Naples: Edizioni Scientifiche Italiane, 1982), 51-85; bibliographical references p. 50.

current state of Prussia, that the land could provide jurists capable of the task.¹⁶ Prussia, Savigny stated, ran a serious risk of promulgating "an aggregate of single dispositions" rather than "an organic whole," a course that would have an outcome different from, or even opposite to, the desired one.¹⁷ Single laws aimed at circumscribed sectors, he stated, would better serve the end of regulating and ordering society. Savigny also stressed the irreducible and essential need for a legal science aware of its own strength and capable of organic development.¹⁸ This is precisely why he entitled his study (usually referred to as Beruf, the key word in German) "Of the Vocation of our Age for Legislation and Jurisprudence."

It has been observed that Savigny's thought displays two partially conflicting tendencies that coexist "in a strong intellectual tension." On the one hand, Savigny was "oriented toward juridical theory and the ethics of liberty" and for that reason was sensitive to the cultural and political panorama within which the triumphant bourgeoisie took its place; on the other hand he was "led . . . to support the cause of the historical rights of the Crown, of the Church, of the corporations [guilds], and of the privileged strata."¹⁹ Threading his way between the bourgeoisie, which expressed itself in the codes and fought for national unity (rather, for the various national unities), and the traditional structures that supported the Prussian crown and the church, Savigny chose his own autonomous path, one linked to the demands of theory and connected with solid cultural traditions represented and symbolized above all by the authority of Immanuel Kant. The alternative seemed clearly drawn. On the one hand there were various forms of the apparatus of the modern state, which throughout Europe of the late eighteenth and early nineteenth centuries were constructed, primarily and principally, on the model (if not by the efforts) of the French military, bureaucratic, administrative, and legal structures, and which drew support from the broader circles of economic operators, speculators, and businessmen. On the other hand there were the men of law, from the humblest sorts of lawyers to the respectable thresholds of the major magistracies, who crowded the courts.

¹⁶ Friedrich Carl von Savigny, Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft (Heidelberg: Mohr und Zimmer, 1814), available in English as Of the Vocation of Our Age for Legislation and Jurisprudence (New York: Arno Press, 1975, reprint of London: Littlewood, 1831). For the various editions of Savigny, Vom Beruf, see Thibaut and Savigny, La polemica sulla codificazione, 92; the Italian translation of the essay is on pp. 93-197.

¹⁷ Thibaut and Savigny, La polemica sulla codificazione, 194.

¹⁸ *Ibid.*, 197.

¹⁹ Franz Wieacker, Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung (Göttingen: Vandenhoeck und Ruprecht, 1967), in Italian translation as Storia del diritto privato moderno con particolare riguardo alla Germania, trans. Umberto Santorelli and Sandro Angelo Fusco, 2 vols. (Milan: Giuffrè, 1980), 2:59.

Savigny avoided choosing between the interests and the "vocations" of these two camps to follow his own, autonomous path. The "apparatus" that seemed to him the most important was his own professional group of scholars and academics. The university remained uppermost in his mind, and he benefited from two strokes of good fortune: the first was his appointment at the University of Berlin (just founded), which enabled him to leave the provincial University of Landshut in Bavaria; the second was the presence in Berlin of Wilhelm von Humboldt (d. 1835). Humboldt was a moving force in a vast restructuring of the model of the modern university, and he deserves mention here for a famous essay published in 1809, one year before the University of Berlin opened its doors.²⁰ The basic thrust of this study was that the university must contain, defend, cultivate, and encourage "man's spiritual life" and man's vocation (which was both a duty and a need) for knowledge and study. For that reason the university was the institution best fitted for the formation of a "method" and for teaching or learning that "method." Beyond the undeniable influence these notions had on Savigny, and beyond their historical relevance for their contemporaries, they might well offer matter for meditation even today and still prove pivotal to the life and the structure of universities in all civilized countries.

Undeniably, Savigny's "activity as a reorganizer of universities and academies, placed within the context of intellectual and political circles in Berlin, should not be underrated."²¹ Nor should it be thought episodic, unimportant, or aberrant within Savigny's own thought or within the objectives of that thought.

The kernel of Savigny's Beruf and of his polemic with Thibaut lay in the idea that it was not the task of the institution of the legislative power to elaborate a "general code"; furthermore, it was not realistic to think that a "code" could be imposed on a people exclusively by following rational schemes often remote from the history of the society to which the "code" was attempting to give order. Savigny held instead that the legislator must limit himself to promulgating norms for circumscribed sectors and must make his precepts fit within the determinations of legal doctrine -- that is, he must follow the concrete and specific facts of "jurisprudence," a term that Savigny uses in a broad sense to refer both to the practical activities of judges and lawyers and the theoretical work of jurists. For Savigny, jurisprudence alone was in a position to define and comprehend the "spirit of the people" -- the Volksgeist -- and to give concrete form to that spirit by proposing and even redacting the texts of specific provisions that the legislator would then take responsibility for promulgating in the exercise of his exclusive legislative power. The legislator "will have to" take that responsibility, however: he cannot act arbitrarily, nor can he have "unlimited expectations" for the "realization of absolute perfection" as he claimed when he founded legislative

²⁰ Wilhelm von Humboldt, Über die innere und äussere Organisation der höheren wissenschaftlichen Anstalten in Berlin (Berlin: 1809).

²¹ Wieacker, Privatrechtsgeschichte der Neuzeit; Storia del diritto privato moderno, 2:56.

projects of his own on "reason" alone.²² The legislator must instead adhere to the content that jurisprudence constructed and imposed, interpreting "the spirit of the people" and attributing to himself the monopoly on that interpretation (a monopoly that had clear advantages in terms of prestige and the power).

Thus doctrine, theory elaborated in the universities, became the vehicle for a precise and lucid political option because it was doctrine that took responsibility for discerning the norms that various peoples, operating through custom, had created and respected, and because it was doctrine that took on the burden of interpreting and expressing the "spirit of the people."

What gave Savigny's thought homogeneity and enhanced the function of legal doctrine even more is the importance that he assigned to the Volksgeist. Savigny held that in order to translate "the spirit of the people" into a legal precept, the jurist should not look to the people or to the society in which the people is always the principal actor but rather to the way in which the people had been viewed and represented by the jurists of the past, within the tradition of Western thought in general and German thought in particular. What history had to offer in the way of certain and unchanging fact was not the events in which the people may have played the part of either hero or succubus; it was rather the spirit of the people, as it had been historically configured, consolidated, and structured; it was the spirit of the people reexperienced and comprehended as it had been expressed by a succession of jurists through time, contributing to and shaping tradition by their writings. For Savigny, tradition was the determinant and conditioning historical "given" in the face of which neither the jurist nor, for even greater reason, the apparatus of state -- not even legislative agencies eager to construct a code or the crown itself -- could think or act arbitrarily. These are the reasons that led historians to consider Savigny the founder of the "historical school of law."

The jurist emerged as playing an overwhelmingly important in this view. Not by chance, that role found strong support in both the idea and the structure of the university, conceived and realized (following Humboldt and Savigny) as a center for training in methodology rather than as a professional school and as the focal point for a new elaboration of the law.

8. From the Historical School to the Pandectists

It is almost a corollary to Savigny's approach that although a "people" can live without a code, it cannot live without a legal "system" that serves to define all relations juridically by the guarantee that gives every individual the same legal status. The "norm" -- that is, the specific solution offered by a provision -- is marginal next to the process of legal status. If, for example, a relation between a man and a res is defined as dominium, any precept is marginal that provides in

²² Thibaut and Savigny, La polemica sulla codificazione, 95.

a specific manner, with more or less detail, for the various "faculties" already included in the theoretical figure of dominium in view of proposing all those "faculties" or even of admitting many and excluding some (which is what makes the norm marginal). Juridical "figures" were needed if relations were to be defined, and those figures, Savigny's view, had been created and were readily available, with the clarity and irreducible concision that was the secret of Roman jurisprudence, only in the Roman law -- the law of ancient Rome and that same law as it had been revised and reinterpreted in the Middle Ages (the Ius commune). As Savigny wrote, despite the "blind rage for improvement" of the eighteenth-century Enlightenment one must not lose "all sense and feeling for the greatness characteristic of other times . . . all, consequently, that is wholesome and profitable in history."²³

Thus Savigny moved quite naturally from his "historicist" thought to develop a "systematic" thought, and indeed his longest work, a classic and a monument in European legal science, is entitled System of the Modern Roman Law.²⁴ In this work the roots of an ancient thought -- the thought of the great Roman jurisconsults and of the great jurists of the Middle Ages -- were joined and mingled, thanks to an infusion of new vital fluids, with a new thought that resisted the rampant vogue for codification with a staunch defense of "jurisprudence" and its "function" and "vocation."

Savigny's thought gave rise to a scholarly movement whose members were known as "Pandectists," a name taken from that given to Justinian's Digest (Pandectae). It means a comprehensive legal work. The leading figures in this school were Karl Adolph von Vangerow in Heidelberg (1808-70), Alois von Brinz in Munich (1820-87), Karl Ludwig Arndts von Arneseberg (1803-78), the author of a well-received textbook on Pandects first published in 1852 that went through fourteen editions, Heinrich Dernburg (1829-1907), and, above all, Bernhard Windscheid (1817-92). These nineteenth-century jurists absorbed and interpreted the bourgeois spirit of their age with genius and acute sensitivity.

With the Pandectists the legal "system" crystallized and became the true object of juridical science. Laws became marginal to that science, and they rigorously and absolutely excluded "the moral, social, and political conditions" of the community.²⁵ In this way, the Pandectists gave expression to a rigid formalism operating within a theoretical construction that was at its base ethical

²³ Ibid., quoted from Savigny, On the Vocation of Our Age, 20.

²⁴ Friedrich Carl von Savigny, System des heutigen römischen Rechts (Heidelberg: 1839-40; Berlin: 1851-53). The most complete edition is the third, Heidelberg, 1849. Vol. 1 is available in English as System of the Modern Roman Law, trans. William Holloway (Westport, CT: Hyperion Press, 1979, reprinted from Madras: J. Higginbotham, 1867); vol. 2 is available as Jural Relations: or, The Roman Law of Persons as Subjects of Jural Relations, trans. W. H. Rattigan (Westport, CT: Hyperion Press, 1979, reprinted from London: Wildy & Sons, 1884).

²⁵ Wieacker, Privatrechtsgeschichte der Neuzeit; Storia del diritto privato moderno, 2:135 n.25.

but was empty and neutral in its conformation. Thus the jurist-theorist interpreted and realized the need for "order" and "certainty" of the dominant social strata (the bourgeoisie, first and foremost), assured them "rules of the game" that could be freely utilized by anyone who had the (economic) means to do so, and guaranteed each component part of those strata sufficient liberty so that individuals could choose their own ends, determine their own actions, and satisfy their own needs on the basis of personal "motives" extraneous to the system and therefore held to be extrajudicial. In this way, juridical resources offered only instruments and out of respect for individual liberty did not select the motivations or the ends on the basis of which people acted, assign juridical relevance to those motivations and ends, or indicate what should or must be done.

What emerged was a framework that obliged the jurists only to see to it that the theoretical figures had been respected and to judge whether or not the "rules of the game" had been followed. It also obliged them to take no account of the person who, as an integral being in a specific ethical, social, and economic setting, had performed an act or had been involved in a conflict of interest. "Pouvoir neutre, pouvoir nulle" -- where power is neutral it does not exist -- applied to judges. Thus the judiciary, one of the great branches of the apparatus of state, was seriously confined, limited, and conditioned by another sort of apparatus, the academic. Throughout the nineteenth century and even after, academic and university circles controlled jurisprudence in German-speaking lands, to the point that until as late as 1900 they succeeded in blocking codification of the law, a highly visible phenomenon that had achieved sweeping and lasting successes in other European lands. This explains the lofty dignity and enormous prestige that German and European universities enjoyed throughout the nineteenth century and for a good part of the twentieth century.

The Pandectists thus had an enormous and incisive influence on jurisprudence throughout continental Europe; they were responsible for consequences of fundamental importance in the historical long term. They created a European legal science that proved capable of overcoming the national barriers set up by the various national codes. They connected the new legal science with the old in a redoubtable historical continuum. They returned to the juridical methodology of the ancient Roman jurists and to the refined theoretical elaborations of a medieval jurisprudence that had both enriched European culture and civilization by its rereading of the ancient Roman law and its interpretation of the new canon law and had enhanced that legacy and defended it from the attacks of "enlightened" eighteenth-century utopians.

9. Critique of the Pandectists: Naturalist and Marxist Opposition

Some nineteenth-century thinkers were more cautious about excluding human and social conditions from juristic theory or else openly opposed the Pandectists. Among them a naturalistic school of thought urged jurists to take greater responsibility for examining what "nature" knew and produced.

Rudolf von Jhering (1818-92) was a leading figure in this movement. One of his works was a clever and well-received book made up of the "Confidential Letters of an Anonymous Correspondent on Contemporary Juridical Science," addressed to the editors of the Preussische Gerichtszeitung.²⁶ These letters were published in book form, along with other pieces, under the ironic title "The Serious and the Facetious in Jurisprudence" (Scherz und Ernst in der Jurisprudenz), work that launched a major critical debate on the "dogmas" of the Pandectists.²⁷

An example may perhaps clarify the sense of Jhering's "joke." Jhering imagines a peasant riding on a cart loaded with manure or hay, and he pictures the man's joy as he heads for home. What have we "in nature" here, he asks rhetorically, if not the placid presence of the countryman on the cart and the skilled hand that guides the horses. We have, the jurists reply, revealing their different appreciation of the "serious" and the "facetious," the legal construct of "ownership" or "property" because one must qualify juridically the relation between the man and his cart and the load on his cart, and one must ascertain whether that cart and that manure or that hay are "the peasant's" and in what sense they are "his" -- by ownership, by possession, or by detention. Animus domini is needed in order to establish that they are "his" by possession; otherwise the construct of ownership cannot become embodied in the real situation under examination. At this point the jurist risks losing heart, and Jhering makes his point by treating the question as a "joke": "What would you do, on seeing two carts loaded with manure or hay . . . to discern whether one is guided by a detentor and the other by a possessor?"²⁸ Jhering points out that the question was no joke for "poor Habermaier," who for lack of animus domini lost his lawsuit and "373 thalers and small change."²⁹

The example illustrates the concerns of a theorist with doubts about the "completeness" of the theoretical legal construct and its adequacy to represent facts taken from nature; a theorist who, without renouncing the use of theoretical

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Later renamed Deutsche Gerichtszeitung (1861-66).

²⁷ Four of these pieces were published in 1880 in the Wiener Juristische Blätter as "Plaudereien eines Romanisten" (Chats with a Romanist); two unpublished essays were added, "Im juristischen Begriffshimmel: Ein Phantasiebild" (In the Heaven of Juridical Concepts: A Grotesque) and "Wieder auf erden, wie soll es besser werden?" (Back to Earth: Remedies and Proposals) to form Rudolf Jhering, Scherz und Ernst in der Jurisprudenz, eine weihnachts gabe für das juristischen publikum (Leipzig, 1884), 3d ed. (Leipzig: Breitkopf und Härtel, 1891). I have used the Italian translation of this work, Serio e faceto nella Giurisprudenza, tr. Giuseppe Lavaggi, introduction Filippio Vassalli (Florence: G. C. Sansoni, 1954).

²⁸ Jhering, Scherz und Ernst; Serio e faceto, 79.

²⁹ Jhering, Scherz und Ernst; Serio e faceto, 80.

instruments (or "seriousness"), nonetheless seeks to use irony and facetiousness to comprehend the "nature" that lies beyond theory. Jhering developed this point of view in two weighty tomes written during the same years, Der Kampf um's Recht (The Fight for the Law; 1872) and Der Zweck im Recht (The Purpose of the Law; 1877-84), works that offered "a consideration of the law as an instrument for the affirmation of power and interests" -- a dramatic conclusion if we think of the individual who expected guidance and justice from the law.³⁰

Jhering's critique launched a new way of constructing legal reasoning on the basis of an evaluation of the interests involved, henceforth held worthy of inclusion among the things considered juridically relevant, not as the "goal" of the law but as its "object." The resulting "jurisprudence of interests" became a symbol and a banner for jurists who attempted to give juridical relevance to aspects of reality that the sometimes exaggerated formalism of the Pandectists had excluded from juridical observation.

A reliable hermeneutic criterion for the resolution of problems of interpretation emerged from this new position: beyond the literal dictates of the law and beyond the formal aspects of the legal construct used, one must look to the real interests involved and must evaluate those interests within the context of elements that, because they were juridically relevant, could point the way to a solution.

A second new development was more disruptive because it did not arise from within Pandectist thought and was not an autonomous and critical stage in the development of that thought. As a theoretical position that denied and radically contested the entire panorama of the dominant juridical culture, including both Pandectist thought and the critique of Pandectist thought, it found expression in the Zur Kritik der Politischen Ökonomie (1859) and Das Kapital (1867-72) of Karl Marx (1818-83), the fundamental texts of Marxist thought, which had been preceded (in 1848) by the famous Communist Manifesto of Marx and Friedrich Engels.

Marx stated that the entire sector of private law was destined to dissolve because the state must penetrate and regulate private life, thus blocking the autonomy of the private individual and eliminating the entire network of private-law institutions that typified that autonomy and also eliminating "freedom" of choice and the power connected with freedom of choice. For Marx, liberty and power were mere abstractions, since in reality "liberty" and "power" either had a totally different meaning or had no concrete existence. This was a direct challenge to the legal constructs that were both paradigmatic in the Western tradition and fundamental to the juridical structure willed and defended by the triumphant bourgeoisie in the nineteenth century: private property, the contract and legal transactions in general, obligations entered into voluntarily and by

³⁰ Wieacker, Privatrechtsgeschichte der Neuzeit; Storia del diritto privato moderno, 2:153.

negotiation, the regime and the very idea of succession mortis causa, and the entire field of commercial law.

Anatole France gave a clear illustration of how in Marxist thought "freedom" and "power" (to transact, to exercise real rights, to inherit, and so forth) must be negated conceptually as inadequate to represent reality, and how they must even be considered as dangerous for the dominated classes as they were useful for the dominant class.³¹ He has a revolutionary poet comment sarcastically that the new laws assure "the majestic egalitarianism of the law, which forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal bread" -- a highly ironic statement, given the improbability that any rich man would have the least desire to sleep under even a Paris bridge or beg in the streets for his daily bread.

10. The Triumph of Pandectist Thought and the German Civil Code

Despite the various schools of juridical thought assailing it, criticizing it from within or contesting it critically from without, Pandectist thought continued to hold firm at the center of German jurisprudence, and it had an enormous and lasting influence on all European law. Its idea of "system" -- which was sistema iuris -- had a strong impact not only on legal theorists but also on the judges: not only did it operate in the political, ethical, economic, and social spheres to neutralize the logical operations that led to specific judicial decisions; it also offered legal practitioners a "textbook" that fast became the principal instrument for resolving legal problems.

That textbook was written by Bernard Windscheid and was published in German in 1862 under the title of Pandekten. The title alone was significant and illuminating because by echoing the traditional name for Justinian's Digest it expressed a clear preference for the portion of Justinian's compilation that focused on iura rather than leges, thus reflecting a greater appreciation of jurisprudence than of the laws of the Code. Thus new and old were merged; the sistema iuris of the new jurisprudence emerged as consonant with the iura of the Roman jurists. Windscheid's Lehrbuch des Pandektenrechts had an extraordinarily large circulation in Germany (a seventh edition, revised by the author, was published in 1891) and not only in Germany. The work traveled across every national frontier and, translated into a number of languages, became an essential text throughout continental Europe.

Windscheid's textbook was of fundamental importance not only for its circulation throughout Europe and for the admiration that it inspired and the acceptance it received. In clear prose and enclosed within a reasoned and programmatically exhaustive summary, it set down the problems that the Pandectists had debated and the solutions they had reached. As a result, many of

³¹ Anatole France, Le Lys Rouge (1894), chap. 7; cited in Wieacker, Privatrechtsgeschichte der Neuzeit; Storia del diritto privato moderno, 2:161.

its parts and the entire systematic spirit that animated it were transfused into articles of law in the civil code drawn up for Germany in 1900, the Bürgerliches Gesetzbuch, or B.G.B., as it is commonly known.

Bernard Windscheid himself played a leading role in codification. As a member from 1880 to 1883 of the first commission for the codification of German law, he was able to cast the first draft of the Civil Code in the Pandectist mold and to propose the use, in certain specific areas of legislation, of the expository structure that was both his own and the trademark of the Pandectists. Windscheid's presence on the commission, his personal prestige, and his scholarly activities helped to solder the new Civil Code to the Pandectist "system" that dominated all sectors of jurisprudence, the university, the world of the lawyers, and the administration. As a result, the Code was pivotal for the entire problematic area that concerned the jurist -- although it still did not cover certain aspects of private life such as relations within the reigning family, domestic labor, agricultural labor, subsoil rights, and questions related to mining.

11. Nations and National Codes in Europe: The Testo Unico as a Model

If we turn to the larger European scene we can see that in the early twentieth century it teemed with national codes. What is more, legislation in some sectors rapidly diverged, and it was further complicated (if not confused) by social motives and social demands often expressed in spontaneous riots or planned, organized conflicts. Political circles tended increasingly to seek compromise solutions. A new problem was thus posed, but there was at least a partial return to older ways in collections of norms that were made and that resembled the eighteenth-century consolidations more than the codes. In Italy such a collection was called a testo unico -- a "one text."

The testi unici were not "by nature" as organic and systematic as the codes; unlike the codes, they were not burdened (and for good reason) with the task of proposing new principles, nor could they offer an opportunity to test new hermeneutic criteria.

To take only one example, a "Testo Unico sul lavoro delle donne e dei fanciulli" (Unique Text on the Labor of Women and Children) was drawn up on 10 November 1907 and published on 16 January 1908. The example is an important one, as this testo unico attempted to bring together and to strike a balance between two sets of social problems that were particularly acute in late nineteenth-century and early twentieth-century Italy. On the one hand, it dealt with juridical topics concerning labor that showed the effects of the labor struggles that were rampant (during these same years the first "strike" actions in the newly consolidated industries of northern Italy were taking place). On the other hand, it dealt with the juridical topic of the "protection" of women and children -- a question that jurists still spoke of in terms of "protection," disregarding the more radical demands for equality of the sexes advanced and defended by the feminist movements of the age. In the dominant point of view the preeminent and

essential function of women was childbearing and the raising and guidance of children, which was why the human condition and the health of women deserved special regard in the home and, with even more reason, in the factory.

In the meantime the first rifts began to be apparent in the Italian Codice civile of 1865, and some attempt was made to repair the damage with stopgap legislation in the form of bills. One such attempt was the law of 17 July 1919 (not coincidentally, soon after the end of World War I), which abrogated a number of articles of the civil code (numbers 134, 135, 136, 137, and part of article 1743) on marital authorization. Articles 13, 14, and 15 on the same topic were eliminated from the commercial code as well, and articles 252 and 273 in that same document on the "family council" were modified.

12. Italian Codes Today: Signs of Crisis

In Italy the last triumph of the idea of codification was celebrated during the twenty years of the fascist regime. The leading proponent of the movement was a skilled jurist, Alfredo Rocco, who, in the ministerial post of Keeper of the Seal, launched the last season of the Italian codes. Rocco considered the problem of codification to be an important element in his overall vision of society and the fascist state; to quote Alberto Aquarone, it played a decisive part in the "organization of the totalitarian state."³² The Codice Penale was issued in 1930, at the same time as the Codice di Procedura Penale. Although as minister Rocco ranked well below King Victor Emmanuel III and President of the Council Benito Mussolini, the penal code is (quite properly) known as the "Codice Rocco." It supported the fascist doctrine of the state in two important ways: first, it presented the idea of an organic "code" as the expression of the social predominance of one class -- the bourgeoisie -- in the authoritarian and absolutist interpretation that dictatorship gave of the interests of that class; second, it provided an opportunity to translate the absolutist politics of dictatorship into specific articles of law.

The fascist regime put continuous and intense efforts into codification, which bore fruit in only a few years. The Codice di Procedura Civile was approved in 1940 and came into force in 1942. The Codice Civile, begun in 1938, was promulgated on its completion in 1942, when it replaced the civil code of 1865, absorbing and canceling the old Codice di Commercio of 1883. These were the last flickerings of the codification movement.

13. The Age of Decodification

In more recent history, when Italy, defeated in World War II, overthrew the fascist regime and replaced the monarchy of the House of Savoy with the Republic, the

³² Alberto Aquarone, L'organizzazione dello Stato totalitario, 2d ed. (Turin: G. Einaudi, 1965).

new Italian state needed to derogate or abrogate some of the provisions of the Codice Civile of 1942. Since then much more devastating changes have taken place, profoundly impairing and in part overthrowing the original structure of the nineteenth-century codes and many of the principles embodied in them. The term usually used to describe these events, "decodification," gives a clear notion of their impact.³³ Their effects can be grouped in a few main categories.

First, the decodification movement "got around" the codes, compressing them or bypassing them by means of sweeping supplementary legislation in the form of bills on a vast number of topics. As early as 1933 Italy had laws concerning the bill of exchange (R.D. 14.12.1933, no. 1669) and the bank check (R.D. 21.12.1933, no. 1736) that the code of 1942 neither incorporated nor replaced, but from that date more and more special laws were passed covering broad areas of the law that closed up the gaps in the Codice Civile and cut off its capacity to expand. Among these were a law on bankruptcy (16 March 1942), on cooperatives (1947 and after), "Workers' Statutes" (1970), laws on industrial patents, and more.

Second, there were attempts to refurbish and recast the Codice Civile, either by the elimination of provisions that had been declared contrary to the Constitution of 1848 by the Corte Costituzionale, Italy's highest court, or by the abrogation or replacement of groups of articles. This was the case, for example, concerning provisions on divorce and family law. Third, some articles and some "institutes" of the Codice Civile were "frozen." They were neither abrogated nor declared unconstitutional, but their application was suspended when they were succeeded by special laws. For example, the rental of urban real property and leasing rural properties were placed under special and temporary regimes that contravened the provisions of the Codice Civile.

It would be mistaken to neglect (and worse to ignore) the historical significance of these frequent and highly visible events. They document not only the need for more up-to-date regulation than was offered by the Codice Civile of 1942 but also the fact that the entire idea of a civil code had become outmoded. The civil code remained unmodified and its old text was still applied only where it touched on topics of modest scope and usually of slight economic importance - lighting, the right to a view, the regulation of property boundaries, some questions of inheritance -- or else it showed the influence of the need for new laws, as in the relationship of the classic constructs of societies of persons and of capital to the legal constructs of the cooperative and the consorzio (agricultural or industrial association).

The decodification of national law codes by hemming them in with further legislation, by restoring and revising them, and by "freezing" certain articles affected all the nations of continental Europe. The codes, originally conceived to

³³ See Natalino Irti, L'età della decodificazione (1972). The second edition of this work (Milan: Giuffrè, 1986) includes an article, Natalino Irti, "L'età della decodificazione," that first appeared in Diritto e Società (1978).

bring unity to the various national laws, were submerged by the hundreds of thousands of pieces of legislation that were passed in each country (five hundred thousand in Italy alone, according to a survey made by the Corte Costituzionale). These were upsetting statistics in the literal sense that they overturned the codified system of law. Some scholars with a penchant for serious reflection were led to extreme conclusions. Natalino Irti wrote, "The Codice Civile cannot be recognized as having . . . the value of general law [or being] the seat of principles that are set forth and 'specified' by external laws." The best that could be said, Irti concluded, was that the code "functions henceforth as a 'residual law,' as a discipline for cases not regulated by particular provisions."³⁴

This conclusion probably goes too far, because both the jurist and the citizen, for whom the law was created, have need of principles. Nonetheless, it expresses clearly the malaise and disorientation of the modern jurist. After the rational, reform-minded, and "enlightened" eighteenth century and the age the great nineteenth-century codes, the jurist in continental Europe had been accustomed to thinking of his own times as an epoch of order, unity, and the equality of the citizens before a clear, unambiguous, homogeneous, and knowable law. The modern jurist was persuaded that he had left the age of confusion far behind him and that he had eliminated the "defects of jurisprudence" that had been generated and fueled by a plurality of laws and by the infinite number of ways in which they could be interpreted. He was so sure of this that he gave a pejorative sense to the adjective "medieval," which he applied to the entire period between the ancient and the modern worlds (roughly the period from the sixth to the fifteenth century). For over two centuries -- the eighteenth to the twentieth -- any provision not linked to the order and certitude of a unified code was "medieval." Moreover, although the German "historical school" (Savigny in particular) had warned that there were limits, risks, and dangers in a purely "rational" organization of juridical problems, nonetheless the "Pandectist" sequel to that school had worked, during the latter half of the nineteenth century, to sustain an illusion of order, albeit in the name of a sistema iuris rather than a sistema legis.

Our own decades are living examples of confusion, uncertainties, difficulties, and unforeseen needs. As with all historical ages, even these difficult decades require historical analysis.

14. From Decodification Toward New Forms of Stability?

The fact that civil codes are outmoded and inadequate -- in Italy and throughout Europe -- is, historically speaking, a reflection of a new dimension and a change in the composition of the forces that make up society today -- forces that are diversifying within the old bourgeoisie, that are seeking a new equilibrium, and that are attracting new elements and excluding some of the older ones. This is all

³⁴ Irti, L'età della decodificazione, 2d ed., 27.

taking place within political parties, labor unions, and associations, both public and secret, licit and illicit; within institutions and outside of institutions. At the same time the social and economic distances among entire sectors of the lower middle class and the world of labor are diminishing or disappearing, and power relationships (even economic ones) are being overturned. An emergent bureaucratic proletariat is discontent with its daily tasks but not with its ambiguous social status. It is a proletariat that neutralizes its internal tensions, its ambitions, and its expectations by bending and distorting its sense of the office that it exercises and by projecting the function of that office into the sphere of an abusive power rather than in dutiful fulfillment of institutional obligations; a proletariat that plans and realizes entrepreneurial adventures in a number of directions in crafts, commerce, and light industry.

The state, in face of so many changes, is modifying the very nature of legislative action. It has rightly been observed that we have already shifted from perceiving the law as establishing the "rules of the game" (the forms and procedures of acts, not their ends or their nature) to a law that guides the activities of individuals, offers incentives to entrepreneurship, and prefigures the development of entire sectors of the economy.³⁵ We have passed from a state that proposed no more than a "road map" and that left its citizens full freedom and responsibility to choose their routes, providing they respected certain predetermined road signs, to a state that points to and at times prescribes the road that we must take and toward what preestablished point of arrival.³⁶

We need to "construct" a new manner of being a jurist and define a new role for the jurist. A systematic code, perceived programmatically and experienced as a projection of an arrived-at social order, is now being replaced by laws that chart a course or lay down a plan; laws that can be the result of lacerating, even ruinous, compromises among the social and economic forces that have won a voice in parliamentary debate. The last ripple of the long swell of cultural and academic power is dying out on this shore.

From the point of view of history, then, the age of codification is over. Now when a government manages to promulgate a code, as in Italy in 1988 with the Codice di Procedura Penale, the variety of social and political forces that it reflects, the tensions among them, and the compromises that leave traces coagulated in the code generate defects that soon lead to a need to retouch or recast the code or reshape specific articles, even to revise the overall thrust of the code or the specific provisions in entire sectors of it. We have been in the age of decodification for some years now.

When the legal historians, the admirers of positive law, and even the legal practitioners became aware of this fact, they realized that they had lost a secure

³⁵ Ibid., 14ff.

³⁶ See Franz A. Hayek, The Road to Serfdom (1944) (Chicago: University of Chicago Press, 1976); Irti, L'età della decodificazione, 2d ed., 15.

haven, and with it a faith that had lasted for some two centuries. As late as the 1960s, one lingerer attempted to reconstruct the history of codification as an exemplary story of men who, thanks to their dedication, their instincts, and their political talents, their wisdom and their stability, rescued modern societies from the "discomfort" of a "confused state of legislation" that had been caused "above all by laws reforming local statutes and by princely laws" and by the "deformity of the . . . decisions" of judicial organisms.³⁷ Others have devoted years of study and reflection to "constitutions" and "codifications," and they continue to publish books and articles on these topics with an invincible faith that nothing has changed and that the history of those phenomena still holds the key for evaluating current experience. For them, the disorder and confusion of contemporary legislation and the obvious deformities in the sentences handed down by judges are all to be attributed to human malice, if not to ill will, ignorance, and uncouthness, whereas a model exists -- the dual model of the code and the constitution -- that is adequate per se because it was conceived and put into effect precisely in order to remove confusion, disorder, and malice.³⁸

It is not the historian's task to predict the future or to say what the law will be like in the years to come. What is certain is that a new legal system is being created. Those who are forging it belong to the political, the economic, and the social sphere; they are legal practitioners, judges, and bureaucrats. Behind them one catches glimpses of some of the less somnolent professors in European and North American universities.

15. Ruins of the Modern Age: The "Codistic" Vision of the Law

The historian of the law has an obligation to emphasize certain perspectives and an interest in doing so. First, it is now clear that all rigid and fideistic "codistic" views of the law have lived their allotted span, marked and compromised as they are by exhausting their capacity to respond adequately to the composite social and economic situation today. Similarly, all "systematic" and "dogmatic" representations anchored to the text of a code are equally dated.

Second, it is just as clear that study of the age of codifications cannot take as its point of departure the Enlightenment hope (or utopia) of arriving at the best possible remedy for disorder and confusion in laws, decisions, or doctrines; nor can it rely on the complacent satisfaction that an awareness and contemplation of a phenomenon offers those who seek a safe haven.

Third, it is also clear that continental Europe must begin from the beginning to seek juridical instruments adequate to repair the damage that massive

³⁷ Vincenzo Piano Mortari, "Codice: Premessa storica," in Enciclopedia del Diritto, vol. 8 (1960), 229.

³⁸ For a recent example of this threadbare and reiterative historiography, see Carlo Ghisalberti, Modelli costituzionali e Stato risorgimentale (Rome: Carucci, 1987).

numbers of laws, the difficulty of knowing them, and men's decisions can produce.

In this connection, the increasing curiosity and interest of European jurists and scholars in the juridical experience of Anglo-American lands -- countries of Anglo-American common law -- is an interesting topic that is beyond the scope of the present work but one whose historical relevance deserves more than passing note.

In the same connection, however, there is also historical relevance in a reconstruction of the complex experience of another sort of "common law" -- Ius commune -- in Europe in the twelfth century. In a political and social climate of profound changes, that experience was not only the terrain on which extensive and repeated renovation took place on the European continent but also a secure point of reference in the tumultuous variety of particular systems of law (iura propria). For a number of reasons, reconstruction of this experience is now easier and has greater significance than some years ago. In the first place, the Ius commune no longer bears the weight of the negative views of advocates of the consoling light of the new "codes," who saw nothing in medieval law but confusion and harrowing contradictions and who predicted that the new codes would be strongholds of order and certainty. The lens (which was at times a distorting lens) of the law as code, through which people were "constrained" to regard historical events in the Middle Ages and the early modern period, now lies shattered. What is more, people today recognize much of themselves and their own times, their doubts, and their problems in the concerns, the uncertainty, the violence, and the anxiety connected with justice during the Middle Ages. Thus an age long held to be remote and judged negatively -- even the neutral term "medieval" was used in a pejorative sense -- has now come back into fashion.

In order to clarify and solidify that experience in collective memory, we need to trace the historical conditions of an epoch that had no "jurists" and few written laws -- the long age that began somewhere between the fifth and the sixth century and that ended in the eleventh century. Next we need to trace the changes that in the extremely rapid, intense, and creative crisis of the twelfth century led to faith and trust in the "sacred" texts of the Ius commune, to the everyday practice of written law, and to the emergence of the figure of the "jurist." We also need look at attempts that the same age made to strike a subtle and difficult balance among solutions always sought, with declared or implicit candor, in support of an absolute "Justice," but also defended, out of conviction or as an astute covert tactical move, to safeguard and guarantee the political and economic spheres of operation of individuals, groups, or social strata.