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STRANGE POWER OF WORDS: CODIFICATION SITUATED*

PIERRE LEGRAND†

“[H]istory has a value; its teachings are useful for human life; simply because the rhythm of its changes is likely to repeat itself, similar antecedents leading to similar consequents; the history of notable events is worth remembering in order to serve as a basis for prognostic judgements, not demonstrable but probable, laying down not what will happen but what is likely to happen, indicating the points of danger in rhythms now going on.”

The words are Collingwood's,¹ but there seems no doubt that Varga would largely endorse this statement, for it is his aim, in the book under review, to examine all phenomena having resembled codification, or having acted as substitutes for it, in an attempt to offer his reader a *theory* of codification. For Varga, “[t]he pursuit of universality in historical analysis . . . [is] indispensable [for an appreciation of] codification in our own age” (p. 20). His erudite study, therefore, extends much beyond a consideration of the eighteenth and nineteenth-century codes that sought to unify national law and overcome feudal absolutism in Prussia, Austria, France, and Germany. It offers a discussion on codification ranging from the earliest forms to have arisen in Antiquity to the twentieth-century socialist codes which originated in the former Soviet Union or in

* A review of CSABA VARGA, *CODIFICATION AS A SOCIO-HISTORICAL PHENOMENON* (Sándor Eszenyi et al. trans., 1991). The original version of this book appeared in Hungarian as CSABA VARGA, *A KODIFIKÁCIÓ MINT TÁRSADALMI-TÖRTÉNELMI JELENSÉG* (1979). Excerpts from the original version were subsequently translated in languages more readily accessible to the majority of Western legal scholars. The author notes that the data and the argumentation have not been revised since the Hungarian edition.

I am grateful to my colleague Geoffrey Samuel, of Lancaster University, for sharing with me his encyclopaedic knowledge of English cases. I have inserted all references to the book under review in the body of the text. Translations are mine.

† Professor of Comparative Legal Culture, Tilburg University, The Netherlands.

1. ROBIN GEORGE COLLINGWOOD, *THE IDEA OF HISTORY* 23 (1946).

Soviet-patterned satellite regimes. Varga also addresses the destiny of codification in Anglo-American and Afro-Asian societies.

I

One of the earliest, and possibly most fundamental, points made by Varga in his book concerns his insistence on *codification-as-form*. Having noted that the concept of codification has tended to develop into a social phenomenon being “taken for granted,” “both in [the] public opinion and in the literature on law” (p. 13), Varga emphasizes that “codification [is] in itself a neutral form, an instrument to bring about a transformation of the structure and content of the law” (p. 14). The author’s assertion is apposite. It may be that a “code,” *qua* legal form, is the consummate legislative achievement. It may be, as was Weber’s view,² that codification represents that stage of legal development at which law comes to maturity, or, to borrow from Blanché, that axiomatic stage which (legal) science reaches upon emerging from its obligatory passage through its descriptive, inductive, and deductive phases.³ Such constataions, says Varga, must not be allowed to obscure the fact that codification remains, first and foremost, a method or, more accurately, a *form*. Thus, it does not reflect in any way, for instance, on the merits or demerits of its substantive contents: the intrinsic quality of the law that is codified remains unaffected by the fact that it is codified. This observation is not undermined by the realization, acknowledged by Varga, “that there were always very definite economic and political aspirations behind the codification attempts of feudal absolutism or those of the rising bourgeoisie” in the nineteenth century (p. 15). The author’s point is that “codification [is] only one of the many forms in which political struggles are expressed” (pp. 14–15). From a social and legal point of view, codification is, therefore, “an open question, offering even chances to the most contradictory approaches” (p. 15). This naturally leads Varga to suggest that codification is to be understood in functional terms. The student of codes should be asking: what are the forces “that influence legal development in the direction of the objectivation of law in the form of codes” (p. 19)?

2. 20TH CENTURY LEGAL PHILOSOPHY SERIES: MAX WEBER ON LAW IN ECONOMY AND SOCIETY 256-87 (Max Rheinstein ed., 1954).

3. R. BLANCHÉ, L’ÉPISTÉMOLOGIE 65 (3d ed. 1983).

For his part, Varga seeks to answer this fundamental question by ascertaining the roles that various manifestations of the idea of codification have played in the social development of the law (p. 20).

While the author bases his examination of codification models on a most impressive database, seemingly drawn from all eras and areas, he confines the bulk of his more detailed analysis to the better-known codifications from the civil law tradition, that is, those associated with France, Germany, Austria, and Switzerland. Moreover, in his consideration of the process of codification in these various legal systems, Varga clearly emphasizes civil law *stricto sensu*. He is largely unconcerned with commercial and penal codes or codes of civil or penal procedure. This insistence on civil law ought not, however, to come as a surprise. Because the Roman Emperor Justinian's compilation in the sixth century focuses on what has come to be known as "private law," and since the *exempla Romanorum* subsequently inspired the great European codifications and the derivative codes they in turn fostered,⁴ it is a fact that much of the civilian jurist's attention over the last two thousand years has been turned towards private law. Indeed, since Roman times, scholars, judges, and legislators alike have focused nearly exclusively on private law. It is, for instance, on this part of the law that civilian scholars have glossed, and it is this part of the law that they have sought to organize through many private codifications. Within the category of "private law" itself, "civil law" *stricto sensu* has consistently shown a marked ascendancy over "commercial law" in the eyes of scholars, presumably on account of its status as *droit commun* or *gemeines Recht*.

It remains a very distinctive feature of civil law jurisdictions that civil law *stricto sensu* (*droit civil*; *Zivilrecht*) lies at the heart of their legal system. In France, an "*Introduction au droit*" ("Introduction to Law") or an "*Introduction générale au droit*"

4. See, e.g., RICHARD H. KILBOURNE, JR., A HISTORY OF THE LOUISIANA CIVIL CODE [.] THE FORMATIVE YEARS, 1803-1839 (1987). These derivative codes have themselves occasionally generated derivative codes of their own. Thus, in 1879, St. Lucia adopted a civil code closely modeled on the English version of Quebec's *Civil Code of Lower Canada* of 1866. See ESSAYS ON THE CIVIL CODES OF QUÉBEC AND ST. LUCIA (Raymond A. Landry et al. eds., 1984). See also, generally, for an account of the influence of the Spanish *Código civil* of 1889 on South American codifications, J.M. CASTAN VAZQUEZ, LA INFLUENCIA DE LA LITERATURA JURIDICA ESPAÑOLA EN LAS CODIFICACIONES AMERICANAS (1984).

(“General Introduction to Law”), whether it be the title of a book or the designation of a course of lectures offered at a university is, first and foremost, an introduction to private law or civil law *stricto sensu*. Indeed, such “*Introductions*” are usually found in multi-volume “*Traité de droit civil*” (civil law treatises). Although their “public law” is not codified, the French will readily say that they live in a codified legal system. The cardinal role of civil law for French society is perhaps most clearly illustrated by the fact that, while France has faithfully adhered to the civil code it adopted at the beginning of the nineteenth century, nearly two hundred years ago, it has experienced, over the same period, fifteen different constitutions,⁵ possibly more than any other country.⁶ Thus, it becomes apparent that, for a civil law jurisdiction, a civil code is itself a charter, a constitution (of private law).⁷ A civil code is the grammar of the law. Indeed, it is now acknowledged, in France, that many principles of French *droit civil* have constitutional value.⁸ That the *Code civil* alone, of the six Napoleonic codes of the early nineteenth century, later became officially known as the “*Code Napoléon*” attests to its particular significance in the eyes of the French.⁹ Against such an

5. Bernard Rudden, *Soviet Civil Law*, 15 REV. OF SOCIALIST L. 31, 33 (1989).

6. JACQUES GODECHOT, *LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789*, at 5 (1979).

7. Ripert, one of the most authoritative voices of French legal scholarship in the twentieth century, writes that “le Code civil est dans sa majeure partie la présentation, sous la forme de lois de l’État, de règles qu’une longue tradition a élaborées et qui sont les règles constitutives des sociétés civiles dans l’Occident chrétien.” GEORGES RIPERT, *LE RÉGIME DÉMOCRATIQUE ET LE DROIT CIVIL MODERNE*, No. 223, 413 (2d ed. 1948) [“the *Code civil* is largely the presentation, in the guise of state laws, of rules that have been elaborated by a long tradition and that are the constitutive rules of civil societies in Western Christianity”].

In Quebec, the *Civil Code of Lower Canada* of 1866 was entrenched as early as 1868. Thus, *Quebec’s Interpretation Act*, S.Q. 1868, c.7, s.10 states that “no act or provision of the legislature in any way affects any article of either of the said codes [the *Civil Code of Lower Canada* and the *Code of Civil Procedure of Lower Canada*], unless such article is expressly designated for that purpose.” While it remains on the statute book, this section has been rendered meaningless by the express assertion of legislative supremacy found in *Quebec’s Charter of Human Rights and Freedoms*, R.S.Q. (1977), c.C-12, s.52. See John E.C. Brierley, *Quebec’s “Common Laws” (droits communs): How Many Are There?, in MÉLANGES LOUIS-PHILIPPE PIGEON 124-26* (Ernest Caparros et al. eds., 1989).

8. See François Luchaire, *Les fondements constitutionnels du droit civil*, in *REVUE TRIMESTRIELLE DE DROIT CIVIL* 245 (1982). On French constitutional law, see generally ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE* [.] *THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* (1992); JOHN BELL, *FRENCH CONSTITUTIONAL LAW* (1992).

9. Although this designation long ago fell into disuse, the *Décret* of March 27-30, 1852, D.1852.IV.92, art. 1, which instituted the *Code civil*, never having been repealed,

historical background, it is readily understandable why, amongst the various codes to be found in a given civil law jurisdiction, the civil code should still be unanimously regarded as the code *par excellence*—a status which is accurately reflected by the privileged consideration given to civil law codifications in Varga's book.

II

What, then, is a civil code? Curiously, perhaps, Varga has little to say by way of description of what constitutes the main object of his study. But, the contents of the typical civil code have been admirably described elsewhere by Rudden:

Essentially there are the same four things which have been pondered, debated and refined for the last 2,000 years: persons, property, obligations and liability. Private law recognizes human beings as bearers of rights, assists them to create other "juridical" persons such as companies, and deals with the relations between them. These persons may own property either for its own sake (to occupy, use, sell and so on) or as investment. They may create obligations by their agreements (and the legislator provides a handy stock of nominate contracts which they may use if they wish) and are obliged to make good any damage unlawfully caused to others. The whole system is completed by provisions for liability under which these persons' property may be taken to discharge their obligations.

Such are, in Rudden's words, the "elements [that] lie at the heart of all modern systems."¹⁰

The word "code" is derived from the latin "*codex*," originally spelt "*caudex*," which meant, first, "[t]he trunk or stem of a tree" and, second, "[a] 'book' formed of wooden tablets, or later, other

remains in force. On the impossibility of French legislation being "repealed" by the mere passage of time, see JEAN-LOUIS BERGEL, *THÉORIE GÉNÉRALE DU DROIT*, No. 110, 119-20 (2d ed. 1989).

10. Bernard Rudden, *From Customs to Civil Codes*, in *TIMES LITERARY SUPPLEMENT*, July 10, 1992, at 27. For helpful observations on civil law codification, see also John E.C. Brierley, *The Renewal of Quebec's Distinct Legal Culture: The New Civil Code of Québec*, 42 U. TORONTO L.J. 484, 488-94 (1992).

materials.”¹¹ As Goodrich remarks, “code” thus connotes both the idea of a “table or tablet” and that of a “structure or support.”¹² While the great codifications of the nineteenth century were to prove that legislation *can* structure and sustain the most radical changes in the law—in other words, that legislation *can* be programmatic—statutes had traditionally played a very restricted role in the development of the civil law. Indeed, a consideration of the gradual appropriation by the state, over many centuries, of the process of production of law is capital to the history of codification. During the long era of feudalism, the power of the lords had been strong, and they had successfully fought against the kings for the preservation of customs which favoured local particularism. These customs allowed the lords, through their seigniorial courts, to exert authority over their serfs. The governing maxim of the times was well expressed in de Beaumanoir’s *Coutumes de Beauvaisis*: “chascuns barons est souverains en sa baronie.”¹³

In Spain, for instance, following the introduction of Alfonso X’s 1272 law known as the *Siete Partidas* of Castilla and León, the lords were able to force an amendment which resulted in the law’s status being relegated from that of an expressly valid and authoritative “*Libro de Leyes*” to that of a mere doctrinal collection. This situation prevailed until the *Ordenamiento de Alcalá* of Alfonso XI, in 1348, restored the authority of the *Siete Partidas* as an old (albeit subsidiary) source of law (p. 60, not. 53).¹⁴ Another example of resistance by the nobility preventing a royal statute from coming into

11. OXFORD LATIN DICTIONARY 287 (P.G.W. Glare ed., 1982); see also DICTIONNAIRE ÉTYMOLOGIQUE DE LA LANGUE LATINE [.] HISTOIRE DES MOTS (A. Ernout & A. Meillet eds., 4th ed. 1967); DICTIONNAIRE HISTORIQUE DE LA LANGUE FRANÇAISE (Alain Rey ed., 1992).

12. PETER GOODRICH, LANGUAGES OF LAW 228 n.1 (1990).

13. PHILIPPE DE BEAUMANOIR, 2 COUTUMES DE BEAUVAISIS, No. 1043, 23 (Am. Salmon ed., 1900) [completed in 1283] (“every lord is sovereign on his domain”). The editor notes that the exact title reads as *Coutumes du Comté de Clermont en Beauvaisis: Id.* at xiv. For a celebrated historian of French law, de Beaumanoir’s work is “l’oeuvre juridique la plus originale, la plus remarquable de tout le moyen âge français.” PAUL VIOLLET, HISTOIRE DU DROIT CIVIL FRANÇAIS, No. 185, 200–01 (3d ed. 1905) [“the most original and remarkable legal work of the whole French Middle Ages”].

14. On the *Siete Partidas*, see generally 1 JOSE MANUEL PÉREZ-PRENDES, CURSO DE HISTORIA DEL DERECHO ESPAÑOL 716-34 (1989); 1 A. IGLESIA FERREIRÓS, LA CREACIÓN DEL DERECHO [.] UNA HISTORIA DE LA FORMACIÓN DE UN DERECHO ESTATAL ESPAÑOL 15-20 (1992); FRANCISCO LÓPEZ ESTRADA, ALFONSO X EL SABIO [.] LAS SIETE PARTIDAS [.] ANTOLOGÍA 9-56, esp. p. 41 (1992).

force is offered by the *Tripartitum Opus Juris Consuetudinarii Incltyi Regni Hungariae* of 1514 (p. 59, not. 48), which also subsequently achieved the authoritative status that had initially been denied it, although once again succeeding *imperii rationis* rather than *ratione imperii*.¹⁵

It is only with the ascent of royal power in Europe as of the eighteenth century that customs, many of which had by then already been privately written, started to be replaced by statute law. For Varga, the “statutorization” of customs marks the passage over “the dividing line separating legal pre–history from its history proper” (p. 285). Yet, for all its significance, this development did not immediately resolve what the author identifies as the tension between the particularism of substance (that is, the retention by local customs of their often distinctive substantive features) and the uniformisation of form resulting from customs being systematically put in writing over a period of time (p. 73).¹⁶ In other words, the fact that local customs were now being subjected to a common formal treatment did not prevent them from remaining local, and thus particularized, customs. But, as Varga acknowledges, the form/substance dichotomy suggests an unduly simplistic differentiation in this case, for wherever it has taken place, the statutory writing of customs has operated, at the substantive level itself, in a paradoxical way. It has fostered both a preservation and a perversion of customs (p. 57).

It is certain that the advent of the statute enshrined the immortality of customs even more emphatically than any private writings had been able to accomplish when they had taken over from oral traditions. But, the phenomenon of nationalization that accompanied “statutorization” marked an aspiration towards homogeneity and meant that the custom was to be severed from its regional roots. It would become freely modifiable and revocable by

15. On the *Tripartitum*, see generally IMRE ZAJTAY, INTRODUCTION À L'ÉTUDE DU DROIT HONGROIS, Nos. 77–86, at 87–95 (1953).

16. It is worth underlining that, although the writing and publication of French customs occurred for the most part in the sixteenth century, there is at least one example of a custom being written as late as 1788. See John P. Dawson, *The Codification of the French Customs*, 38 MICH. L. REV. 765 (1940); J. Coudert, *La dernière rédaction de coutume avant la Révolution: la difficile réformation des usages de Hattonchâtel (1784–1788)*, 67 REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 237 (1989).

the king, a point that did not escape Montesquieu.¹⁷ To a decentralized and proteiform law was thus progressively substituted the unique formulation of a sovereign proceeding from a will imposing itself hierarchically to all other law-producing agents. Allen's "two antithetic conceptions of the growth of law" are here clearly apparent: on the one hand, as is the case with customs before their metamorphosis into written law, "law is spontaneous, growing *upwards*, independently of any dominant will"; on the other hand, in contrast to this hayekian image, customs having been transmuted into *jus scriptum* establish how "law is artificial: the picture is that of an omnipotent authority standing high above society, and issuing *downwards* its behests."¹⁸

No reference to the history of codification and the broader process of nationalization of the law can afford to omit a mention of the role played by key political figures. In this sense, the history of codification is often an intensely personalized history. It is a history inextricably linked to the *personae* of Justinian, of Frederick the Great, of Napoleon; even in common law jurisdictions like England and the United States where codification, as understood by civilian jurists, has not taken hold, it evokes the names of Bentham and Field. For Varga, it is apparent that there is a historical coincidence between strong movements towards codification and the consolidation of political power (p. 376). It is striking how influential codifications have been produced for, or demanded by, national heroes, despots, and military leaders—a realization that was at the root of much of Montesquieu's opposition to codes.¹⁹ Thus, Varga remarks that:

the local points of codification development frequently coincided with the progress of administrative organization. Whether we look at the ancient Eastern despotisms, classical Roman development, the coming of the bourgeoisie to power in Europe or the experiments of socialist transformations: in each instance we see that the development of the administrative structure went hand in hand with [that]

17. Montesquieu, *De l'esprit des lois*, in 2 OEUVRES COMPLÈTES, pt. VIII, bk. XXVIII, ch. 45, at 862 (Roger Caillois ed., 1951) [originally published in 1748].

18. See CARLETON KEMP ALLEN, *LAW IN THE MAKING* 1 (7th ed. 1964).

19. Montesquieu, *supra* note 17, bk XXIX, chs. 17-19, at 881-83.

of the codificational organization of the law. . . . What all of [these historical formations] had in common is the fact that—compared to the period prior to codification—they realized a more efficient, more comprehensive and deeper political dominance (pp. 335–36).

Varga's opinion that there is much historical evidence to suggest that a code derives its real authority from the political power that institutes it is alluring. Through the inherent virtues of the particular form adopted for its self-assertion, suggesting such attractive values as clarity and logic, the political authority would then find itself *amplified*. The intrinsic powers of amplification of codes have been considered by Bourdieu, who writes of “[l]a force de la forme” or “*vis formae*.”²⁰ He adds that “l'énonciation dans le langage *formal*, officiel, contrôlé, conforme aux formes imposées, qui convient aux occasions officielles, a par soi un effet de consécration et de licitation.”²¹ At the root, as Varga concludes, codification, however, remains an essentially political phenomenon (p. 340). Support for this case is perhaps best given by Napoleon himself who made unabashed use of his civil code as a vehicle for the exportation of national law. During his exile at St. Helena, the Emperor told one of the few partisans who had been allowed to accompany him:

Ma gloire n'est pas d'avoir gagné quarante batailles et d'avoir fait la loi aux rois qui osèrent défendre au peuple français de changer la forme de son gouvernement. Waterloo effacera le souvenir de tant de victoires; c'est comme le dernier acte qui fait oublier les premiers. Mais ce que rien n'effacera, ce qui vivra éternellement, c'est mon code civil²²

20. Pierre Bourdieu, *Habitus, code et codification*, ACTES DE LA RECHERCHE EN SCIENCES SOCIALES No. 64, 43 (1986), *reprinted in* CHOSES DITES 103 (1987) [“the power of form”].

21. *Id.* [“the enunciation in the *formal* language, official, controlled, in conformity with imposed forms, appropriate to official events, has by itself an effect of consecration and legitimation”]; *see also* PIERRE BOURDIEU, LEÇON SUR LA LEÇON *passim* (1982).

22. [C.] Montholon, 1 RÉCITS DE LA CAPTIVITÉ DE L'EMPEREUR NAPOLEON À SAINTE-HÉLÈNE (1847), 401 [26 September 1816] (“My glory is not to have won forty battles and to have ruled the kings who had dared prevent the French people from changing the form of its government. Waterloo will erase the memory of so many victories; it is like the last act that makes one forget the first ones. But what nothing shall erase, what will live eternally, is my

Earlier, in a letter to his elder brother, the King of Naples, on 5 June 1806, Napoleon had written: “Etablissez le Code civil à Naples; tout ce qui ne vous est pas attaché va se détruire alors en peu d’années, et ce que vous voudrez conserver se consolidera. Voilà le grand avantage du Code civil. . . . [I]l faut établir le Code civil chez vous; il consolide votre puissance C’est ce qui m’a fait prêcher un code civil et m’a porté à l’établir.”²³

But, it is a paradoxical feature of codification that, at the same time as it appears as an instrument serving to consolidate autocratic regimes, it purports to mark a democratization of the law through ensuring direct and equal access to legal information for all. Codification does away with the monopoly of memory (p. 28). Varga shows that as early as the time of the laws of Hammurabi, the work of the ruler of Babylon through which he crowned the unification of Mesopotamia in 1728 B.C.,²⁴ the authors of codes displayed very clearly expressed concern for the dissemination of their work (p. 36, not. 31). Indeed, their preoccupation with the integrity of their codes regularly went so far as to ensure that they would not be disputed in the scholarly community. Thus, Varga notes that the *Breviarum Alarici* (506 A.D.), one of the early Germanic-Roman codes, prohibited any reference to Roman law outside the code, on pain of death (p. 63, not. 4). Similar prohibitions on scholarly commentary are documented at various times in history. Most notable, perhaps, are those enacted by Justinian²⁵ and by Pussort in his memorandum to

civil code . . .”). This passage apparently exercises considerable ascendancy over the minds of contemporary French civilians for it is everywhere quoted (although never in its entirety and always without proper bibliographical reference); a typical illustration is J.-M. PUGHON, *LE CODE CIVIL* 3 (1992). See also Montholon, *supra*, t. II, at 374: “La constitution de l’an XIII, le code civil, sont mes oeuvres” [March 1820] (“The constitution of An XIII, the civil code, are my achievements”).

23. CORRESPONDANCE DE NAPOLÉON IER, vol. XII, 527-29 (1862) [“Do establish the *Code civil* in Naples; everything that you do not care for will then destroy itself in a few years, and what you want to preserve will consolidate itself. This is the great advantage of the *Code civil*. . . . [Y]ou must establish the *Code civil* at home; it consolidates your power This is what made me preach for a civil code and led me to establish it”].

24. See generally THE BABYLONIAN LAWS: LEGAL COMMENTARY XXIV-XV (G.R. Driver & J.C. Miles eds., 1956). There is confusion over the dates of Hammurabi’s reign. Driver and Miles, having surveyed at least eleven different sets of dates, adopt a forty-three-year reign from 2067 to 2025 B.C.

25. See generally F. Pringsheim, *Justinian’s Prohibition of Commentaries to the Digest*, in 2 GESAMMELTE ABHANDLUNGEN 86 (1961).

Louis XIV in 1665.²⁶ That another prohibition of this kind was to surface in von Cocceji's draft *Corpus Juris Fridericianum* of 1749²⁷ is hardly surprising in the light of a later royal cabinet order, dated 14 April 1780, in which Frederick the Great would refer in the same breath to "*Rechtsgelehrten*" (learned law) and "*Subtilitätenkram*" (junk full of subtleties).²⁸ Indeed, the apotheosis of Frederick's casuistic enterprise, the *Allgemeines Landrecht für die preußischen Staaten* of 1794, made it clear that doctrine remained out of favor.²⁹ Although I have been unable to find any reference to support the claim, Napoleon is reputed, upon the appearance, but a few years later, of the first scholarly commentary on the French *Code civil* by Maleville, to have exclaimed "Mon code est perdu." What is clear, according to Las Cases, one of Napoleon's companions on St. Helena, is that the Emperor was less than enthusiastic towards the whole idea of scholarly commentaries:

A peine le code eut paru, qu'il fut suivi presque aussitôt, et comme en supplément, de commentaires, d'explications, de développemens [sic], d'interpré-

26. See J. VANDERLINDEN, *LE CONCEPT DE CODE EN EUROPE OCCIDENTALE DU XIII^e AU XIX^e SIÈCLE* 360 (1967) ("Défendre de citer aucune loi ou ordonnance autre que la nouvelle après sa publication; de faire aucune note, commentaire, ni recueil d'arrests, à peine de punition") ["To prohibit the reference to any statute or ordinance other than the new one after its publication; the making of any annotation, commentary or collection of cases, under pain of punishment"].

27. 1 *CODE FRÉDÉRIC*, trans. from the German by A.A. de C.[ampagne] (1751), pt. I, bk. I, tit. II, art. 10. An English translation, based on the French text, was also published as 1 *THE FRIDERICIAN CODE; OR, A BODY OF LAW FOR THE DOMINIONS OF THE KING OF PRUSSIA*, pt. I, bk. I, tit. II, art. 10, at 16-17 (1761) ("We prohibit the making [sic] commentaries or dissertations on the whole body of law, or on any part of it. For most commentators, ignorant of the spirit and reason of the law, only occasion useless disputes.") Diderot devotes a long and favorable entry to the "Code Frederic" [sic] in his *Encyclopédie* under "Code." Undoubtedly thinking of France, he concludes in these words: "il serait à souhaiter que l'on fit la même chose dans les autres états où les lois ne sont point réduites en un corps de droit." *ENCYCLOPÉDIE OU DICTIONNAIRE RAISONNÉ DES SCIENCES, DES ARTS ET DES MÉTIERS*, *vbo* code ["one would wish that we did the same thing in other states where the laws are not reduced to a body of law"], t. III ([D.] Diderot & [J.L.R.] d'Alembert eds., 1753).

28. *CORPUS JURIS FRIDERICIANUM* xii (1781).

29. C.J. KOCH, *Einleitung [Introduction]*, in *ALLGEMEINES LANDRECHT FÜR DIE PREUßISCHE STAATEN*, t. I, art. 6 [old art. 8], 22 (1878) ("Auf Meinungen der Rechtslehrer, oder ältere Aussprüche der Richter soll, bei künftigen Entscheidungen, keine Rücksicht genommen werden") ["Of the opinions of scholars, or of the old remarks of judges, no consideration shall be taken for future decisions"] [hereinafter: *Koch-ALR*].

tations, que sais-je? Et j'avais coutume de m'écrier:
Eh! Messieurs, nous avons nettoyé l'écurie d'Augias,
pour Dieu ne l'encombrons pas de nouveau.³⁰

In a world where entire legal communities in civil law jurisdictions steadfastly refuse to be concerned with what arbitrariness and artificiality there is behind a construction which they like to see as natural and as preserving some intemporal order, Varga's instrumentalist views on codes and codification fulfill the essential role of probing some of the all too comfortable certainties in which so many civilian jurists like to ensconce themselves. As the author underlines, this lack of self-introspection points to common denominators between different manifestations of the idea of codification. Varga analyses what he terms "[t]he common core of codification phenomena" (p. 334) by noting that "the establishment of a minimum of formal rationality and its reinforcement at increasingly high levels is a general motive force behind the development of codification" (p. 334). Moreover, "[i]n respect of its ultimate effect, codification is nothing but a means for the state to assert its domination by shaping and controlling the law" (p. 334). Yet, such common features cannot hide the fact that throughout history identical codification methods have been developed as responses to different socio-legal challenges.

Varga observes, for instance, that the Roman imperial codification of Justinian, tailored to the conditions of slavery, alien to the spirit of Christianity, and aimed at political conservation, was later to be adopted by the Byzantine and European systems of medieval feudalism, which themselves professed the domination of Christianity. In the same vein, he remarks on the influence of the

30. [E.] de Las Cases, 3 *Mémorial de Sainte-Hélène* [.] *Journal de la vie privée et des conversations de l'empereur Napoléon à Sainte Hélène* (1823), pt. VI, at 235 ["No sooner had the code appeared that it was followed almost immediately, as if by way of supplement, by commentaries, explanations, developments, interpretations, and what not! And I used to exclaim: Sirs, we have cleansed the Augean stables, in the name of God let us not fill them once again!"]. These words stand in contrast to the views expressed by Portalis, one of the four architects of the French *Code civil* and the man responsible for its presentation to the *Conseil d'Etat*, who wished to see "des compilations, des recueils, des traités, de nombreux volumes de recherches et de dissertations." See Discours préliminaire prononcé lors de la présentation du Projet de la commission du gouvernement, in 1 RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 469-72, esp. 471 (P.A. Fenet ed., 1827) ["compilations, collections, treatises, many books of research and dissertations"].

French *Code civil*, which had achieved the bourgeois renewal and national unification sought by the French Revolution, in various countries and cultures, including a number of jurisdictions in Europe, Latin America, Asia, and Africa, standing on various levels of development and indeed ranging from primitive societies totally foreign to European standards to countries whose “progress” had not reached much beyond an early level of capitalism. Conversely, Varga shows that different codification methods have been adumbrated as solutions to identical socio–legal conditions. He notes, for example, the different responses offered by the Twelve Tables of the Romans and the early Chinese codes to a common problem concerning the dissemination of legal knowledge (p. 250). He also addresses the diversity of the codification methods used on the African continent in search of the common goal of modernization through the means of law (pp. 249–50).

Against this background, Varga proceeds to consider potential groupings of codifications on the basis of criteria that would account both for the similarity and the diversity that have been highlighted (pp. 319–22). In this respect, Varga reaches the conclusion that “[c]odification is such a complex historical phenomenon that it can at best only be described, but not classified exhaustively, by tracing it back to a few basic variations” (p. 322). The most that can be attempted, according to the author, is a historical *description* which will show variations in degree, and which will necessarily fall short of any integrated *classification* (p. 322). In my opinion, the use of the word “description” in this context is liable to prove misleading. To be sure, Varga does not seek to eschew the systematization of his thoughts that the reader expects from the author towards the end of his study. Rather, he appears to mean that he cannot offer a single, all–embracing classification that would account for all historical manifestations of the idea of codification (and of its substitutes). Varga, nonetheless, proceeds to present a variety of these “descriptions” which highlight many aspects of the multi–faceted nature of the enterprise of codification. In the end, I confess that these various “descriptions” strike me as consisting of genuine, if circumscribed, “classifications” in all but designation. I am, therefore, led to believe that a subjective element colours the author’s arrangement of his historical material even more than he is apparently prepared to acknowledge. Some of Varga’s “classifications” deserve

to be summarized as they emphasize particularly arresting features of codification.

Focusing on what he calls the “dialectics of change and preservation” (p. 322), Varga suggests that the history of codification offers an initial differentiation based on two fundamental types of codes: a first type, which tends to correspond to the early forms of codification and couples a change of contents with formal change; and a second type, which reflects a later type of codification and combines a change of contents with preservation of form as it refers to “the use of codification for the mere recording of necessary changes of contents or for the systematic arrangement of already introduced changes” (p. 323). A third type, the coupling of preservation of contents with formal changes, is only transitional.

A second approach, if one is to try and “describe” codifications throughout history, is to insist on what Varga calls the “processing” of the texts of the law through codification. This perspective suggests the following types of codifications, each transcending and encompassing the previous one: codes serving to record, to compile, to order, or to organize the law as a system (pp. 323–24). In other words, codification initially contented itself with mere quantitative reduction of legal sources to a legal compendium. It simply sought to eliminate “normatively irrelevant wordings” such as “ceremonial formulae, quotations, reiterations, verbosities, tautologies.” Later, it extended to the resolution of uncertainties in the text, that is, the elimination of vague and ambiguous passages. Finally, around the sixteenth century, codifications began to repeal obsolescent laws and to record or enact the necessary modifications that the law required (pp. 262–63).

Varga’s third typology centers around the political orientation of codification. As the author notes, codification has been used in turn to support centralization, the particularization of political forces, the consolidation of domestic law, and political expansion through the export or import of the law (p. 327). More “descriptions” are offered by the author (pp. 324–27) which point to other interesting features of codification through the ages.

III

One of the many questions readily prompted by Varga's analysis concerns the future of codes. While it was obviously the author's deliberate intention to confine his work in the way he did and to focus on the many pasts of codification, I would have welcomed a more detailed prognosis: whither codification as *per* Varga? If, as he says, a universal history of codification teaches us that the two main forces behind codification have traditionally consisted of an ambition for centralized state control over the law and a desire for formal rationalization of the law, it is apt to ask whether codification has a future. Whether the same needs assert themselves again, or whether different needs are seen to emerge, will codification be tomorrow's answer to tomorrow's challenges?

As a prelude to the consideration of the future of codification, one must assess what it means for a given jurisdiction to codify its civil law. Briefly, to codify is to gather in a single text the largest possible quantity of legal provisions, to improve upon a previous situation, found to be regrettable, of dispersion of legal sources. There are, therefore, collected and ordered, whether by their source or by their object, the most diverse rules. The idea of a "code," as Bourdieu has emphasized,³¹ implies notions of clarity, communicability, order, and rationality. While "logic" (or, better still, a "logic") organizes these rules systematically, the stamp of the prince gives them obligatory force. Through the code, the whole of the law becomes legislated.

A code thus conveys the idea of exhaustivity, though usually not in the sense of "complete regulation"—which ambition the Prussian emperor Frederick the Great foolishly tried to satisfy, imbued with an excessive faith in natural law and the conviction that, in a "corps de lois parfaites," "tout serait prévu, tout serait combiné, et rien ne serait sujet à des inconvénients,"³² and which resulted in an ineffectual code of approximately 19,000 articles,³³ making provision

31. Bourdieu, *supra* notes 20-21.

32. FREDERICK THE GREAT, *Dissertation sur les raisons d'établir ou d'abroger les lois*, in 9 OEUUVRES DE FRÉDÉRIC LE GRAND 27 (1848) [originally published in 1750] ("[in a] body of perfect laws," "everything would be foreseen, everything would be combined, and nothing would be subject to absurdities").

33. H. Hattenhauer, *Vorwort [Foreword]*, in ALLGEMEINES LANDRECHT FÜR DIE PREUßISCHEN STAATEN VON 1794 [.] REGISTER (Frankfurt am Main: Alfred Metzner, 1973).

for anything from breastfeeding,³⁴ wills in times of plague,³⁵ and proselytism,³⁶ to the use of rivers by cattle for bathing and drinking.³⁷ Rather, "exhaustivity," in the particular context of codification, is to be understood mainly as referring to the idea of a systematic and systemic compilation of rules and principles suggesting that each solution to a legal problem must be, directly or indirectly, derived from the text of the code itself.³⁸ As Eörsi writes, "[t]he code is regarded as a closed system in which the judge, after a due logical process, will find an answer to everything."³⁹ Varga perspicaciously notes that this understanding remains true even of an open-textured codification such as Switzerland's which allows the judge to move beyond the code thereby effectively ensuring that he *never* leaves it (p. 112).⁴⁰ This perception of the code as a self-contained and self-referential system illustrates, possibly better than anything, the deep-seated conviction of civilian jurists that law can be reduced to propositional knowledge and that it is useful to organize the law in this way. The civilian jurist's allegiance to the trappings of cognitive objectivity accounts for the fact that the law is (and has been for over two thousand years!), in all civil law jurisdictions, a law of the book.⁴¹ One appreciates more readily how, within five weeks of the

34. *Koch-ALR, supra* note 29, vol. 3, bk. 2, tit. II, art. 67, at 305, provides: "Eine gesunde Mutter ist ihr Kind selbst zu säugen verpflichtet" ["A healthy mother is obliged to breastfeed her child herself"].

35. *Koch-ALR, supra* note 29, vol. 2, bk. 1, tit. XII, art. 198, at 48-49 [subsequently deleted].

36. *Koch-ALR, supra* note 29, vol. 4, bk. 2, tit. XI, art. 43, at 171, which states that proselytism is prohibited "durch Zwang oder listige Überredungen" ["through force or cunning persuasion"].

37. *Koch-ALR, supra* note 29, vol. 4, bk. 2, tit. XV, art. 44, at 814.

38. A clear illustration of this understanding appears in the work of Proudhon, one of the early French "*Exégètes*," who published his *Cours de droit français* in 1809. See E. GAUDEMET, *L'INTERPRÉTATION DU CODE CIVIL EN FRANCE DEPUIS 1804*, at 24 (1935).

39. GYULA EÖRSI, *COMPARATIVE CIVIL (PRIVATE) LAW* No. 308, 526 (1979). See, e.g., NORBERT ROULAND, *ANTHROPOLOGIE JURIDIQUE* No. 210, at 357 (1988).

40. *CODE CIVIL SUISSE OF 1912*, art. 1, which states: "A défaut d'une disposition légale applicable, le juge prononce selon le droit coutumier et, à défaut d'une coutume, selon les règles qu'il établirait s'il avait à faire acte de législateur. Il s'inspire des solutions consacrées par la doctrine et la jurisprudence." ["Failing an applicable legal provision, the judge decides according to customary law and, failing a custom, according to the rules he would institute if he had to act as legislator. He draws inspiration from the solutions received by the doctrine and judicial decisions."].

41. Predictably, such pre-eminence of the book has led to positivistic excesses epitomized in the works of a group of nineteenth-century French scholars collectively known

1789 Revolution, it was advanced that French judges should be made to refer themselves to the *Corps législatif* if an interpretation became necessary due to gaps in the law, a suggestion enacted into law in August 1790 (p. 102).⁴² It is also on the ground of “exhaustivity” that civil codes have traditionally engaged in a denial of their pasts and invalidated their anterior sources, although the Spanish *Código civil* of 1889, substantially revised in 1975, stands as a noteworthy exception to the rule.⁴³ One is here concerned, however, with a plain

as “*l’Ecole de l’Exégèse*” [“the Exegetical School”]. As the designation suggests, these scholars took the view that the task of the interpreter of the law was defined—and constrained—by the language of the *Code civil* itself. Classical studies of the work of the various “*Exégètes*” include 1 FRANÇOIS GÉNY, *MÉTHODE D’INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF*, Nos. 8-19, 21-40 (2d ed. 1954); 1 JULIEN BONNECASE, *LA PENSÉE JURIDIQUE FRANÇAISE*, Nos. 144-57, 288-303 (1933). More recent and stimulating studies are offered by LÉON HUSSON, *Examen critique des assises doctrinales de la méthode de l’exégèse*, 75 *REVUE TRIMESTRIELLE DE DROIT CIVIL* 431 (1976); P. Rémy, *Eloge de l’exégèse*, 1 *DROITS* 115 (1985).

42. In a speech delivered to the *Assemblée Nationale* on November 9, 1790, Robespierre said: “Si le pouvoir judiciaire pouvait s’élever impunément contre l’autorité et la décision des Législateurs, s’ils pouvaient interpréter à leur gré toutes les Lois, les Juges seraient eux-mêmes les Législateurs; les Loix ne seraient plus que de vaines formalités dont ils se joueraient à leur gré.” 6 *OEUVRES DE MAXIMILIEN ROBESPIERRE* [:] *DISCOURS: 1789-90*, at 574 (Marc Bouloiseau et al. eds., 1950) [“If the judicial power could rise with impunity against the authority and the decision of the legislators, if they could interpret as they wished all the laws, the judges would themselves be legislators; the laws would only be vain formalities that they could play with as they wished”]. On the *référé législatif* [“the reference to the legislative body”], see generally E. SERVERIN, *DE LA JURISPRUDENCE EN DROIT PRIVÉ* 68-79 (1985); FRBDBERIC ZENATI, *LA JURISPRUDENCE* 49-55 (1991); M. Verpeaux, *La notion révolutionnaire de juridiction*, 9 *DROITS* 33 (1989).

43. *CÓDIGO CIVIL*, art. 13(2) states: “. . . con pleno respeto a los derechos especiales o forales de las provincias o territorios en que están vigentes, regirá el Código Civil como derecho supletario” [“. . . with full respect for the special laws or customs of the provinces or territories in which they are in force, the *Código Civil* will rule as supplementary law”]. See, on the interaction between the code and the local legislation, A. IGLESIA FERREIRÓS, *El Código civil (español) y el (llamado) derecho (foral) gallego*, in *DERECHO PRIVADO Y REVOLUCIÓN BURGUESA* 271-359 (Carlos Petit ed., 1990). I am indebted to my colleague José Enrique Bustos Pueche, of the Universidad Alcalá de Henares, for a helpful discussion on this point.

Another exception, of more limited ambit, is Quebec’s *CIVIL CODE OF LOWER CANADA* OF 1866, art. 2613 [repealed in 1976 and re-enacted as art. 2712] which states:

The laws in force at the time of the coming into force of this code are abrogated in all cases;

In which there is a provision herein having expressly or impliedly that effect;

In which such laws are contrary to or inconsistent with any provision herein contained;

case of cognitive dissonance as it is clear that civil codes have borrowed their system, if not their contents, mainly from the experiences of one of the legal pasts of the legal system they purport to organize.

Hegel once wrote that “[n]o greater insult could be offered to a civilized people or to its lawyers than to deny them ability to codify their law.”⁴⁴ Whether this exalted view of the advantages of codification should still hold true is debatable. To the extent that a code suggests that the whole of the law governing the daily lives of citizens can be reduced to a set of neatly-organized rules, it may be said that codification runs against the view, fortunately professed by an ever-increasing majority of jurists, that law simply cannot be captured by a set of rules, that “the law” and “the written rules” do not coexist, and that there is indeed much “law” to be found beyond the rules. It could be, therefore, that by adhering to a “law-as-rules” representation of the legal world, a code has become an epistemological barrier to legal knowledge.⁴⁵ In other words, it could be that a code leads the jurist astray by suggesting that to have knowledge of the law is to have knowledge of the rules (and that to have knowledge of the rules is to have knowledge of the law!). It could also be that, in its quest for rationality, foreseeability, certainty, coherence, and clarity, a civil code strikes a profoundly anti-humanist note. Indeed, it is not at all clear that a code is more rational than the customs which it succeeds: one may see in a code the advent of a new logic rather than the progress of reason.

In which express provision is herein made upon the particular matter to which such laws relate;

Except always that as regards transactions, matters and things anterior to the coming into force of this code, and to which its provisions could not apply without having a retroactive effect, the provisions of law which without this code would apply to such transactions, matters and things remain in force and apply to them, and this code applies to them only so far as it coincides with such provisions.

See generally BRIERLEY, *supra* note 7, at 109.

44. HEGEL'S PHILOSOPHY OF RIGHT, No. 211, 136 (T.M. Knox trans., 1942).

45. On the concept of “obstacle épistémologique” [“epistemological barrier”], see GASTON BACHELARD, *LA FORMATION DE L'ESPRIT SCIENTIFIQUE passim* (14th ed. 1989). See generally, for an application to law, MICHEL MIAILLE, *UNE INTRODUCTION CRITIQUE AU DROIT* 37-68 (1976).

Codification has not escaped criticism on other grounds. In its claim to completeness, a code like the French *Code civil* of 1804 “supposed some sort of privileged, perfect adequacy to social reality” (p. 119). Moreover, it professed a claim to “intangibility.” Thus, Cambacères, the author of the early drafts, had said that “l’immuabilité est le premier caractère d’une bonne législation.”⁴⁶ While, paradoxically, a code written for perpetuity may act as a way to limit the authority of the sovereign—a point underlined by Diderot in one of his less famous works⁴⁷—it is bound to lead to a *décalage* between law and fact, what Foucault would have referred to as a chasm between “les mots et les choses.”⁴⁸ As Varga notes, what adequacy to social reality the French *Code civil* purported to have was to prove largely illusory: “the ‘socialization’ of the law . . . proceeded without, in fact, in spite of the Code, at the expense of its practical disintegration.”⁴⁹

The dislocation underlined by Varga (p. 120) was to make judicial practice into an independent instrument for the development of the law, with judges going as far as negating the formal meaning of articles of the code.⁵⁰ Eörsi, borrowing from German terminology, refers to the “contradiction [between] the law in the books and the law in action—or *Idealordnung* and *Realordnung*.”⁵¹ In Varga’s words, “from being master of establishing the law, the code became degraded primarily to a conceptual–referential framework of the everyday practice of shaping the law. It is no longer the embodiment, but rather a mere reference–basis of the living law” (p. 120). He adds:

46. CAMBACÈRES, *Rapport fait à la Convention Nationale sur le deuxième projet de Code civil*, in FENET, *supra* note 30, at 107 [“immunity is the first characteristic of good legislation”].

47. DIDEROT, OBSERVATIONS SUR L’INSTRUCTION DE S.M.I. [CATHERINE II] AUX DÉPUTÉS POUR LA CONFECTION DES LOIS (1774)-10 (P. Ledieu ed., 1921) states: “Peuples, si vous avez toute autorité sur vos Souverains, faites un code: si votre Souverain a toute autorité sur vous, laissez là votre code; vous ne forgeriez des Chaînes que pour vous” [“People, if you have full authority over your Sovereign, make a code: if your Sovereign has full authority over you, leave your code; you would be forging chains for yourself only”].

48. MICHEL FOUCAULT, *LES MOTS ET LES CHOSES* (1966).

49. A similar point has been made by Ewald with specific reference to work-related accidents. See FRANÇOIS EWALD, *L’ÉTAT PROVIDENCE* (1986).

50. Konrad Zweigert & Hans-Jürgen Puttfarcken, *Statutory Interpretation—Civilian Style*, 44 *TUL. L. REV.* 704, 715 (1970).

51. EÖRSI, *supra* note 39, No. 321, at 544.

The code remains . . . an organizing centre of law, despite being socially antiquated. It has remained the framework for legal movements as their formal initiating and precipitation point Instead of providing a pattern for decision, its task is merely to indicate the direction of finding the solution, and to define its conceptual–referential place. Points, which were earlier the final outcomes of legal control by the force of the wording of the code, now appear to be the points of initiation (p. 121).

To be sure, judicial practice does not eliminate the code. Indeed, it must work through the conceptual structure and the system developed by the code. In the celebrated words of Saleilles, the operative formula reads: “Par le Code civil, mais au-delà du Code civil.”⁵² Yet, the code, having once dominated judicial practice, is now being dominated by it (p. 123). For Ferdinand Stone, that the code should be “struck off at a single time in a single age by men who are necessarily products of that age” is, therefore, “the principal defect of codification as a method.”⁵³ Eörsi well highlights the paradox to which codification appears to be doomed: “Taken in isolation, codification is a complete adaptational possibility, yet the code is a ready and definite text, the extreme case of stability and unchangeability.”⁵⁴ This must lead one to conclude that the idea that a code will somehow bring law closer to the lay community is largely a myth: how can one truly present as clear and certain that which acquires meaning only through judicial interpretation which is at once technical and essentially discretionary? The problem is compounded by the danger that lay persons, encouraged by the apparent accessibility of the code’s language, will *think* that they understand the law.⁵⁵ As Lord Scarman writes, “[s]implification is, of course, a relative term: the law cannot be simpler than its subject–matter

52. R. SALEILLES, *Préface*, in GÉNY, *supra* note 41, at xxv [“Through the *Code civil*, but beyond the *Code civil*”].

53. Ferdinand Fairfax Stone, *A Primer on Codification*, 29 TUL. L. REV. 303, 309 (1955).

54. EÖRSI, *supra* note 39, No. 307, at 525.

55. This concern is the source of Terré’s reservations: F. TERRÉ, in CODIFICATION: VALEURS ET LANGAGE 40 (1985).

allows.”⁵⁶ Yet, the desire to make the law accessible, no matter how imperfect the achievement, remains at the heart of the civilian *mentalité* (perhaps in a somewhat paradoxical way, given that the civil law tradition has historically developed itself as a *droit savant* or *Juristenrecht* or, in the words of Koschaker, a *Professorenrecht*⁵⁷). What stark contrast with the English legal *mentalité* which takes the view that laypersons are simply not made to understand the law and that no attempt whatsoever need therefore be undertaken to render it accessible; the law is to be kept away from the people and reserved for the exclusive use of legal “experts.” It is, therefore, couched in incomprehensible terms, which a comparison with continental codes makes look rightly ludicrous.⁵⁸

But, codes have not only come under attack for their “rule-based” approach and for their incrustation in time. More fundamentally, perhaps, it has been said that codification is simply no longer a realistic option for our times. As Viandier writes, a codification assumes common principles.⁵⁹ Yet, one has witnessed the development of what Irti calls “una pluralità di micro-sistemi” (“a plurality of micro-systems”), such as consumer law, labour law, and housing law, to name only a few.⁶⁰ Sacco makes it clear that any statute nowadays invariably represents a transaction between the economic, social, political, and religious interests at a particular point in time, each pressure group having, of course, its own political agenda.⁶¹ It is only natural, therefore, that each statute should have its own specific foundations and be giving effect to its own specific set of principles. As Irti writes, “ciascuno dotato di una propria logica e

56. Lecture delivered by Lord Scarman, Chairman of the Law Commission, to the Faculty of Law of the University of Birmingham on the subject of *Codification and Judge-Made Law* [:] *A Problem of Co-Existence* 3 (1966).

57. PAUL KOSCHAKER, *EUROPA UND RÖMISCHE RECHT* 211-12 (4th ed. 1966) [originally published in 1947].

58. See TONY HONORÉ, *THE QUEST FOR SECURITY: EMPLOYEES, TENANTS, WIVES* 118-24 (1982). In this regard, the English legal *mentalité* is, of course, but a reflection of the English *mentalité*'s obsession with secrecy. See generally *Special Issue* [:] *The Uses of Secrecy*, *FRANCO-BRITISH STUDIES* No. 13 *passim* (1992).

59. ALAIN VIANDIER, *RECHERCHE DE LÉGISTIQUE COMPARÉE* 37 (1988).

60. NATALINO IRTI, *L'ETÀ DELLA DECODIFICAZIONE* 65 (1979).

61. Rodolfo Sacco, *Codificare: Modo superato di legiferare?*, *RIVISTA DI DIRITTO CIVILE* 117, 119 (1983).

di un proprio ritmo di sviluppo.”⁶² There are no general principles any more. In this way, the legal norm is transformed. No longer abstract and general, it becomes particularistic and specific. Sacco’s conclusion is uncompromising: “La rinascita del particolarismo giuridico è incompatibile con l’idea di codificazione.”⁶³ The situation becomes even more complex in countries like Belgium or Spain which, in certain areas of law, have moved towards quasi-federalism. National codification where power is thus decentralized has become (legally) impracticable.⁶⁴

The legal monolithism that characterized nineteenth-century civil codes was only possible because the bourgeoisie was then in a position to impose its ideas and to turn them into the general principles upon which the new legislation would be based. In that way, the codes of this era represent the signal achievement of the legal and rational legitimacy of bourgeois democracy. How can the minimum consensus required for the drafting of a coherent code be achieved in a complex era, that of the so-called “post-modern” society?⁶⁵ How can the concerns of groups with diametrically opposed interests be coordinated in a way that would make it possible for a code to be seen to be acting as a common expression of the interests of a given society? The search for the elusive answers to these questions may account for the fact that the Netherlands and Quebec, two jurisdictions having undertaken a wholesale revision of their civil codes, have been at work since 1947 in the first case and since 1955 in the second. And, because the socio-economic changes occurring as the code is being transacted happen ever faster, the *décalage* between law and fact grows progressively and inevitably wider. Before it has even been promulgated into force, the code is fundamentally and inescapably removed from the social reality it purports to embody. Moreover, it lacks internal coherence. As

62. IRTI, *supra* note 60, at 65 [“each (micro-system) has its own logic and its own rhythm of development”].

63. SACCO, *supra* note 61, at 119 [“The renascence of legal particularism is incompatible with the idea of codification”].

64. VIANDIER, *supra* note 59, at 49.

65. See, on complexity and post-modernity, MICHEL VAN DE KERCHOVE & FRANÇOIS OST, *LE DROIT OU LES PARADOXES DU JEU* 7-15 (1992).

Lorenz puts it, “[r]eform work lasting for more than [forty] years will not produce a uniform code.”⁶⁶

While many jurisdictions in the Western world have shown great confidence in the idea of codification ever since Justinian made what can legitimately be regarded as the most influential legislative pronouncement of all times in the sixth century, not all countries have partaken of this enthusiasm. To this day, jurisdictions belonging to the common law tradition do not have codes as civilian jurists understand them. That the absence of a genuine reception of Roman law in England lies at the root of the prevalence of uncodified systems of law in the common law world is undeniable, as Varga rightly underlines (p. 159). But this fact alone cannot account for the opposition to the idea of codification that has actively manifested itself over the last two centuries and that remains very much alive today (even though it is true to say that “thinkers respected precisely for their adherence to the structures of [the] Common Law” (p. 158), such as Austin, Pollock, and Maitland were all proponents of codification).⁶⁷ Other reasons must be sought. Because he finds some of the answers in the common law *mentalité*, Varga’s reflections on Anglo–American law are highly stimulating. How, then, can we explain the fact that there came to be, as Eörsi puts it, a case of “Judge–Made Law v. Codified Law?”⁶⁸

66. W. Lorenz, *On the ‘calling’ of our time for civil legislation*, in QUESTIONS OF CIVIL LAW CODIFICATION 128 (A. Harmath & Á. Németh eds., 1990).

67. See, e.g., J. AUSTIN, LECTURES ON JURISPRUDENCE 660-81 (R. Campbell ed., 5th ed. 1885) [“Since such are the monstrous evils of judicial legislation, it would seem that the expediency of a Code (or of a complete or exclusive body of statute law) will hardly admit of a doubt”]. *Id.* at 660; Frederic William Maitland, *The Making of the German Civil Code*, in 3 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 485-88 (H.A.L. Fisher ed., 1911). See generally CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT (1981); Alison Reppy, *The Field Codification Concept*, in DAVID DUDLEY FIELD [.] CENTENARY ESSAYS 17 (Alison Reppy ed., 1949); Herbert F. Goodrich, *Restatement and Codification*, in *id.* at 241; Hessel E. Yntema, *The Jurisprudence of Codification*, in *id.* at 251; Stefan A. Riesenfeld, *Law–Making and Legislative Precedent in American Legal History*, 33 MINN. L. REV. 103 (1949), with particular reference to the Massachusetts code of 1648, officially known as *The Book of the General Laws and Liberties Concerning the Inhabitants of the Massachusetts*, which Watson calls “the earliest code of the modern Western legal world.” ALAN WATSON, LEGAL TRANSPLANTS 66 (1974). Accord R.C. VAN CAENEGEM, JUDGES, LEGISLATORS AND PROFESSORS 153 (1987).

68. EÖRSI, *supra* note 39, No. 286, at 493.

For Varga, “[the] unity of law which has prevailed ever since the [thirteenth] century and [the] continuous evolution (by means of compromises) from feudalism to present-day capitalism” are the “decisive causes” to explain the non-codified state of English law (p. 159). In other words, in yet another paradox of history, England does not have codification “although it pioneered in building up an efficient administrative organization and particularly a uniform national law” (p. 337). According to Varga, the explanation lies in the fact that “the forum to produce law [has been] widely extended [he refers to the “centuries-old material produced by the judicial administration of justice”], and it is precisely the lack of concentration of law-making competences under one authority which has prevented codification” (p. 337).

But, although this explanation is no doubt accurate and relevant, it cannot be fully satisfying if only on account of the French and German experiences which also offer examples of “lack of concentration of law-making competences” through a myriad of customs subsisting well into the eighteenth and nineteenth centuries. Other explanations put forth by the author are, therefore, helpful. Thus, Varga refers to the attachment to tradition; that is, to the procedural method of legal development shown by the English legal community, the overall conservatism of English (legal) life, the failure by citizens to realize that law enters into all transactions they undertake and that they should demand that it be accessible (and the correlative tendency by the legal fraternity to maintain its privileges), the “national conceit” due to the existence of an early and subsequently unbroken development of the common law over many centuries (an attitude which, in itself, contributes to explain the lack of reception of Roman law in England⁶⁹), the preference for reforming methods over revolutionary ones (with the code seen as a product of the French Revolution and the idea of codification being regarded as doctrinaire), the absence of an academic tradition, and the insistence on practical training (pp. 159–60). In the same vein, Rudden aptly refers to a deep-rooted suspicion of the English legal *mentalité* towards a “simple and untechnical style,” intellectual

69. R.C. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* 85-110, esp. 92, 98, 102 (2d ed. 1988).

systematization, and concision.⁷⁰ Similarly, Weir writes: “The Englishman is naturally pragmatic, more concerned with result than method, function than shape, effectiveness than style; he has little talent for producing intellectual order and little interest in the finer points of taxonomy.”⁷¹ A clear expression of the traditional English attitude towards legal systematization is indeed to be found in the leading case of *Read v. J. Lyons & Co., Ltd.*, where Lord Macmillan stated:

Your Lordships’ task in this House is to decide particular cases between litigants and your Lordships are not called upon to rationalize the law of England. That attractive if perilous field may be left to other hands to cultivate. . . . Arguments based on consistency are apt to mislead for the common law is a practical code adapted to deal with the manifold diversities of human life and as a great American judge has reminded us ‘the life of the law has not been logic; it has been experience.’⁷²

A variation on this theme can be borrowed from the case of *Reg. v. Deputy Governor of Camphill Prison, Ex parte King*, where Griffiths L.J. said: “[T]he common law of England has not always developed upon strictly logical lines, and where logic leads down a path that is beset with practical difficulties the courts have not been frightened to turn aside and seek the pragmatic solution that will best serve the needs of society.”⁷³

If one is to consider the common law *mentalité*, another aspect deserves to be mentioned which is what Julius Stone has called the “deep rooted common law tradition of judicial hostility to

70. Bernard Rudden, *A Code Too Soon [:] The 1826 Property Code of James Humphreys: English rejection, American reception, English acceptance*, in *ESSAYS IN MEMORY OF PROFESSOR F.H. LAWSON* 102-03 (Peter Wallington & Robert M. Merkin eds., 1986).

71. Tony Weir, *The Common Law System*, in *2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: THE LEGAL SYSTEMS OF THE WORLD [:] THEIR COMPARISON AND UNIFICATION*, ch. 2, No. 82, at 77 (René David ed., n.d.).

72. [1947] A.C. 156 H.L. 175. It is true, of course, that there was more concern for symmetry and logic shown by Lord Simonds. *Id.* at 182-83.

73. [1985] Q.B. 735 (C.A.) 751.

legislation.”⁷⁴ Civilian judges very much work *with* the code in order to flesh it out and give it meaning. To the common law mind, this, of course, is liable to give rise to arbitrariness. But, Rousseau was not worried and, indeed, saw the English alternative as a worse evil: “Rien de plus puérile [sic] que les précautions prises sur ce point par les Anglois. Pour ôter les jugements arbitraires ils se sont soumis à mille jugements iniques et même extravagans.”⁷⁵ Hegel also disparaged the idea that “a legal code should be something absolutely complete” (indeed referring to this ambition as a “morbid craving”), and rejected the view that “because a code is incapable of such completion, therefore we ought not to produce something ‘incomplete,’ i.e. we ought not to produce a code at all.”⁷⁶ Common law judges have traditionally worked *against* the statute which they long saw as a “tyrant” (with the common law being cast in the role of “nursing father”!).⁷⁷ Indeed, there was a time when some English courts at least were prepared to “controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.”⁷⁸

Finally, it appears to be the fact that the common law tradition simply does not understand “codification” in the same way as do civilian jurisdictions. According to Varga, common law lawyers tend to think of codification as “an epitomization of the whole system of law within a single code” (p. 298), something like “a Code summing up the laws in force in Justinian’s Empire” (p. 298). This may be why what advocates of systematization there were, such as Bacon in the

74. JULIUS STONE, *THE PROVINCE AND FUNCTION OF LAW* § 29, at 198 (1946). The situation has differed in the United States where judges have proved more favorably disposed to statutes. See P.S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* 100-12 (1987).

75. Jean-Jacques Rousseau, *Considérations sur le gouvernement de Pologne*, in 3 *OEUVRES COMPLÈTES*, 1000 (Bernard Gagnebin & Marcel Raymond eds., 1964) [originally published in 1782] (“Nothing more puerile than the precautions taken on this point by the English. To remove arbitrary judgments, they have subjected themselves to a thousand iniquitous and even extravagant judgments.”).

76. HEGEL’S PHILOSOPHY OF RIGHT, *supra* note 44, No. 216, at 139.

77. *Maleverer v. Redshaw*, (1669) 1 Mod. 35, 86 E.R. 712 (K.B.). See generally J.G. SAUVEPLANNE, *CODIFIED AND JUDGE MADE LAW [:] THE ROLE OF COURTS AND LEGISLATION IN CIVIL AND COMMON LAW SYSTEMS* 22-25 (1982).

78. *Dr. Bonham’s Case*, (1610) 8 Co. Rep. 113b, 77 E.R. 646 (K.B.), 652.

seventeenth century, seemed solely concerned with the need to clarify the law (and not with its reform).⁷⁹ An explanation for this view may again be founded on the fact that English legal and political unity had already been achieved. But, as Varga notes, “the need to clarify the law hardly ever resulted in comprehensive codification, save perhaps in regimes reminiscent of the rule of Justinian or more recent absolutisms” (p. 159). It did, in the case of England and the United States, result in the emergence of consolidation acts (in nineteenth-century England) or uniform laws, textbook writing,⁸⁰ and restatements (in the United States) which, acting as genuine substitutes for codification, neutralized the demand for it (p. 166). It remains that, as opposed to a simple compilation of pre-existing rules, codification cannot be separated from a reform of the law and from a new understanding of its deep nature (a new conception of law, of its foundations, of its technique, and of its knowledge). To codify is not simply to consolidate, but also to coordinate in a scientific way, to arrive at the formulation of general principles and logical classifications embracing a complete and coherent branch of the law. A code is thus intended to be *res nova*. In that sense, codification remains foreign to English law.

While it is true that there is no necessary identity between codification and the civil law tradition (France was a civil law country even in 1803, and there is a California Civil Code!⁸¹), it is the case that civil law jurisdictions have generally privileged the code as a means of legal ordering. Codification demonstrates the degree to which the workings of the civilian legal *mentalité* are deeply rooted in the civil law tradition, a legal tradition spanning over two thousand years. It is this civilian *mentalité* that accounts for the civil law lawyer's view of the nature of law, of the role of law in society, of the organization and operation of a legal system, and of the way the law

79. See, on Bacon as legal systematizer, D.R. COQUILLETTE, FRANCIS BACON 99-117 (1992).

80. See, on the elaboration of textbooks, David Sugarman, *Legal Theory, the Common Law Mind and the Making of the Textbook Tradition*, in LEGAL THEORY AND COMMON LAW 26 (William Twining ed., 1986); A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632 (1981), reprinted in LEGAL THEORY AND LEGAL HISTORY 273 (1987).

81. See generally, on the American codification experience, *supra* note 67; MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, at 117-21 (1992).

must be conceived, applied, studied, and taught.⁸² Thus, a civil code reflects the long-standing conviction of all civilians that legal systematization is at once possible and useful. Nor is this simply a matter of legal method because civilians are apt to regard codification as an important bastion against arbitrariness, that is, against the mystical and secret character of the law. As Varga notes, if one is to believe Titus-Livius's version of the adoption of the law of the Twelve Tables around 450 B.C., one of the best-known early manifestations of the idea of codification, this law very much represented an example of codification coming at the request of plebeians oppressed at the hands of Roman patricians (p. 42, not. 19). Another illustration is offered by the demand for a united body of civil laws in the form of a code made by the three *Etats* immediately before the French Revolution, although the fears of arbitrariness arose more on account of judges than of the king in this particular case.⁸³

While a code is undoubtedly a *point d'arrivée* (the culmination of a long historical evolution often spanning many centuries), it is also a *point de départ*, the starting-point for new, code-based (or code-oriented) developments in a given legal system. A code thus simultaneously serves to close the past and open the future (pp. 93, 108 and 110). Of course, the chemistry varies. For instance, the German civil code is much more a *point d'arrivée* than a *point de départ*—a situation unlike that in which the French civil code found itself. To say that a code is a *point de départ* is to invite the following question: what impact can a code be expected to have on a legal community? A facile answer is to assert that the code will stimulate the interpretive activities of scholars through commentaries seeking to fill the gaps, solve the antinomies, and further systematize the rules. In my opinion, however, such assessment remains superficial. Trigeaud more adroitly captures the typical civilian jurist's reaction to codification: "La codification a favorisé un type éternel de comportement, elle a accentué le risque d'un attachement aux textes, et ceci s'est tourné contre l'esprit des 'lumières,' contre l'inspiration primitive des codes."⁸⁴ Such jurist "considèr[e] le droit

82. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 2 (2d ed. 1985).

83. See J. VAN KAN, *LES EFFORTS DE CODIFICATION EN FRANCE* 247-51 (1929).

84. JEAN-MARC TRIGEAUD, *L'image sociologique de l'homme de droit et la préconception du droit naturel*, in *ESSAIS DE PHILOSOPHIE DU DROIT* 227 (1987) ["Codification has favoured a perpetual type of behaviour, it has accentuated the risk of

positif comme un système de signes acceptés qui procure toute garantie, comme une convention qui rallie le plus grand nombre et met à l'abri des appréciations critiques."⁸⁵ He adds: "C'est l'homme de droit qui cède au 'confort intellectuel,' à la quiétude de pouvoir se reposer sur le droit existant ramené aux 'lois.'"⁸⁶

It is arguable, therefore, that the adoption of a new code is likely to privilege the dogmas of positivism and nationalism, thereby reinforcing the strong legal ethnocentrism prevailing in a particular jurisdiction. Moreover, because codification will have a profound effect on legal education, in that it will shape the legal curriculum and orient legal literature, the adoption of a code can be expected to have a significantly deleterious impact on the fabric of legal scholarship in general, and on civilian legal thought in particular.⁸⁷ Specifically, history teaches us that fundamental critical research is likely to be sacrificed to make way for textbooks, as in France, or commentaries following the arrangement of the code, as in nineteenth-century France and Germany, that mostly aim to provide useful tools for judges and practitioners. This is also what happened, for instance, after the adoption of the 1866 *Civil Code of Lower Canada*. Long before these modern tendencies, the same phenomenon had manifested itself upon the re-discovery of what came to be known as the *Corpus Juris Civilis* as is evidenced by the work of the Glossators in the twelfth and thirteenth centuries and that of the Commentators in the fourteenth and fifteenth centuries. Indeed, it could be argued that such "small" jurisdictions as Quebec and the Netherlands, both having recently undergone recodifications, are particularly prone to intellectual stagnation—although the latter is probably far less susceptible to the phenomenon than the former on account of its invigorating cultural cosmopolitanism.

attachment to texts, and this has turned against the spirit of the Enlightenment, against the primitive inspiration of the codes"].

85. *Id.* ["(he) consider(s) the positive law as a system of accepted signs that affords every guarantee, as a convention that brings together the largest number (of people) and protects (one) from critical appreciation"].

86. *Id.* at 226 ["It is the man of law who lapses into 'intellectual comfort,' into the quietude of being able to rely on existing law reduced to laws"].

87. *Quaere*, whether the preservation of a dated or obsolete code can, *a contrario*, be said to foster scholarly creativity through an increase in the number, range, and significance of the interpretive occasions it would normally generate. But this phenomenon could not suffice, in any event, to justify the maintenance of an antiquated code.

Nowadays, there seems to have appeared a certain disillusionment with codification. Indeed, one notes that only a handful of jurisdictions have been prepared to undertake a wholesale reform of their civil codes since the war. Significant areas of the law are now regulated outside the code. This is the era of *decodification*,⁸⁸ through this evolution, the code acquires an identity not only because of what it contains but also because of what is not of it: what is not of the code serves to define the code. It remains, however, that the contemporary importance of the phenomenon of codification is not in doubt. Varga reports that a UNESCO-sponsored survey published in 1957 found that the form now termed "codification" existed in 67% of known legal systems and that each system consisted on average of six codes (p. 18). In most cases, codes were adopted under the influence of French (mainly) and German developments, although it is clear that the phenomenon of codification has also manifested itself in other contexts, such as in Scandinavia (p. 117 and p. 140, not. 109). One of the most powerful techniques of objectivation of law, a means to reduce *jus* to *lex*, codification (or re-codification) continues as an instrument favoured by legislators in circumstances as diverse as those prevailing in Louisiana,⁸⁹ the Netherlands, Quebec, and Peru.⁹⁰ In Varga's words, the concept of codification has undergone transformation in the process. From being the tool that purported to answer a specific historical situation in countries like France and Germany and to serve to move these countries beyond feudalism, the code, as "an imposition of form upon the past,"⁹¹ has become "one of the basic forms of appearance of law" (p. 117).

88. See generally Miguel Acosta Romero, *El fenomeno de la descodificacion en el derecho civil*, 73 REVISTA DE DERECHO PRIVADO 611 (1989). I am indebted to my colleague Xavier Lewis, of the Commission of the European Communities, for bringing this reference to my attention.

89. See, for Louisiana's recent re-codification of its law of obligations, 1984 La. Acts No. 331. Since the adoption of the Louisiana Civil Code in 1825, subsequently re-enacted *verbatim* in 1870, "40% of the entire Civil Code . . . has been revised," much of it since 1976. See Vernon V. Palmer, *The Death of a Code—The Birth of A Digest*, 63 TUL. L. REV. 221, 222 n.2 (1988).

90. Peru adopted a new *Código civil* in 1984. See generally Felipe Osterling Parodi, *Draft Civil Code of Peru*, 14 LAW. OF THE AMS. 593, 593-95 (1983) [now U. OF MIAMI INTER-AM. L. REV.].

91. J. HUIZINGA, *A Definition of the Concept of History*, in PHILOSOPHY & HISTORY 5 (Raymond Klibansky & H.J. Paton eds., 1975).

IV

But, is codification obsolete? While Varga does not address the issue, it is difficult for me to avoid. Because, quite apart from law reform, codification implies a general context of simplification and unification, it may be that it is no longer possible to carry it out effectively, that it now belongs to the realm of illusion. We have, after all, resolutely entered the era of complexity. Thus, legal monism (that is, the exclusive and unchallenged supremacy of written law) has given way to a multiplicity of legal sources, or polyjurality. Likewise, political monism (that is, the unquestioned supremacy of the nation-state) has yielded to supra-national and infra-national powers. At a more abstract level, linear and deductive rationality have been replaced, for many, by an anarchical, or “anything goes,” attitude to thought processes. Finally, promethean temporality (that is, the idea of time directed towards a future governed by reason and law) has given way to legal forms characterized by precariousness and provisionality.⁹² Against this background, it becomes imperative to consider whether the adoption or re-codification of a civil code, at this time, does not represent a *damnosa hereditas* for future generations of jurists and, especially, for twenty-first century ones. This risk, of course, calls into question the merits of the whole enterprise of codification itself. One understands better why it has been said that “codified law may lead to a spiritual impoverishment.”⁹³

A codification for our times must eschew detailed propositions of law, and must intervene only at the level of general principles or rules, expressly leaving it to judges to supplement the texts. This will, in turn, force judges operating on the French model of “*motivation*” to move beyond judgments that revel in their air of cold inevitability and lead them to espouse a dialogical model of judicial reasoning more closely aligned with that prevailing in the common law tradition. Thus to confine the enterprise of codification to open-textured provisions is, of course, bound to exacerbate the tension that has been noted by Lascoumes as arising between two expectations stemming from the adoption of a code: the desire for a pedagogical document

92. MICHEL VAN DE KERCHOVE & FRANÇOIS OST, *LE SYSTÈME JURIDIQUE ENTRE ORDRE ET DÉSORDRE* 116 (1988).

93. EÖRSI, *supra* note 39, No. 310, at 530.

and the need for judicial security. While pedagogical ambitions call for symbolic assertions and ringing formulas, judicial security demands a “*mode d'emploi*,” or *modus operandi*, which is never precise and exhaustive enough. In Lascoumes’s words, “[l]e bréviaire et le codex sont des genres potentiellement antinomiques.”⁹⁴ While the imperatives of certainty must clearly be borne in mind, the common law experience suggests that codes are not a prerequisite to their attainment. It is, in any event, simplistic to assume that codes beget certainty.

The need for codification to operate at a certain level of abstraction is even more acutely felt if one believes that codes should, as political instruments and as forms, play a leading role on the supranational stage, for instance, in giving substance to a second *jus commune europaeum*. The idea of a European Code is not new. Napoleon, for example, wanted “[u]n Code Européen.”⁹⁵ He wished to achieve “l’unité des codes, celle des principes, des opinions, des sentiments, des vues et des intérêts.”⁹⁶ More recently, the European Parliament adopted a resolution in which it formally requested “that a start be made on the necessary preparatory work on drawing up a common European Code of Private Law.”⁹⁷ Lately, a commission has been engaged in the preparation of a European restatement of contract law.⁹⁸

Koschaker’s classic study on the role of Roman law in European legal systems had already called for a “*europäisches Naturrecht*.”⁹⁹ The author had in mind a Natural Law “das nicht spekulativ aus der Vernunft, sondern streng historisch aus der Vergleichung derjenigen Privatrechtssysteme gewonnen wird, die zum rechtlichen Aufbau Europas und darüber hinaus der ganzen

94. PIERRE LASCOUMES ET AL., *AU NOM DE L'ORDRE* [:] *UNE HISTOIRE POLITIQUE DU CODE PÉNAL* 281 (1989) [“there is a potential antinomy between the genres of the breviary and the codex”].

95. LAS CASES, *supra* note 30, vol. III, pt. V, at 310 [“a European Code”].

96. *Id.* vol. IV, pt. VII, at 126 [“the unity of the codes, that of principles, opinions, feelings, views, and interests”].

97. *Off. J. E.C.* 1989 C 158/400 (26 May 1989).

98. See O. Lando, *Principles of European Contract Law*, *RABELSZ* 56, 261 (1992); Giuseppe Gandolfi, *Pour un code européen des contrats*, 91 *REVUE TRIMESTRIELLE DE DROIT CIVIL* 707 (1992).

99. KOSCHAKER, *supra* note 57, at 346 [“a European natural law”].

Kulturwelt beigetragen haben.”¹⁰⁰ Whether a European codification can (or should) effectively be achieved is not for these pages to consider. What is clear, however, is that anyone interested in the future of codification, and therefore in its many pasts, will do well to read and ponder Varga’s scholarly and insightful contribution to the legal literature in comparative legal history.

100. *Id.* [“that is not speculative, deriving from Reason, but a law which is strictly historical, deriving from the comparison of those systems of private law which have contributed to the construction of Europe and, in addition, to the whole civilised world”].

