Private Law Codification, Modernization and Nationalism: A View from Critical Legal History

Heikki Pihlajamäki

Abstract

Private law codification is not as indispensable to continental legal culture as standard legal histories would have us believe. Law was modernizing roughly at the same time, and in the same way, in Western countries that did not codify private law, including the common law world and Scandinavia. This suggests a connection between the legal history of regions with and without codification; in this exercise in critical legal history, I argue that the engine driving the modernization of Western law has been legal scholarship, not legislators and their codes. Moreover, the idea of a European civil code may struggle today at least partly because the civil code never had the monopoly over European legal development standard legal histories have assigned to it. The article thus illustrates the relationship between comparative legal history and critical legal history; critical legal history may not be comparative by definition, but it almost always is comparative in fact, at least in the broad sense of comparative legal history exemplified here.

“Ma vraie gloire, ce n’est pas d’avoir gagné quarante batailles; Waterloo effacera le souvenir de tant de victoires.
Ce que rien n’effacera, ce qui vivra éternellement, c’est mon Code Civil.”
—Napoléon Bonaparte

I. Introduction

There is no European civil code, but it has a long and arduous history. It begins in the 1980s, when the European Parliament first expressed its wish for such a code in 1989, and then again in 2000 and 2004. The Parliament has also issued around twenty directives in various fields of private law, such as consumer law and competition law. These directives do not, however, form a coherent whole but are rather individual statutes emerging as a result of felt political needs. After the initial enthusiasm of the 1980s, the idea of establishing a common civil law for the entire European Union no longer seems plausible to most experts. Why is the idea of a European civil code in such trouble? To find out, this article goes back to nineteenth- and twentieth-century Western legal history to address the even more fundamental problem of exactly how important private law codification has been for European legal history.

* Professor of Comparative Legal History, University of Helsinki.

Legal modernization is difficult to understand without referring to the monumental private law codes. If one were to choose only one legal phenomenon as the symbol of legal modernization, it could well be the civil code. A leading European legal historian recognizes “in the code the road to the modernization of civil law.” The code, he claims, brought about “an epochal turn in European legal history.” The civil codes contributed to the modernization of private law; in other words, they solved the fundamental antagonism between universally oriented and national legal systems, customary and statutory law, public and private law, non-dispositive and dispositive law, segmented and general legal capacity, and absolute land possession. Codification has been depicted as an important part of the “civilian’s contemporary epistemological construct”; part of her or his mentalité. The civilian thus “reasons from the social and legal perspective embodied in the code.”

However, I will argue in this article that private law codification is not such an indispensable part, almost a conditio sine qua non, of the continental legal culture as it is often portrayed. Law was also modernizing roughly at the same time and in the same way in those parts of the Western world in which private law was not codified, such as the common law world and Scandinavia. This leads a comparative legal historian to wonder whether there may be an explanation that unites the legal history of the regions without codification with those that codified their private laws. As a matter of logic, this need not of course be the case. There may well be different ways of arriving at legal modernization. However, I think that the common denominator exists, and it is legal scholarship.

I will indeed claim that the motor driving the modernization of Western law has been legal scholarship, not the legislators and their codes. As I hasten to acknowledge an intellectual debt to Baron Raoul van Caenegem, I must also emphasize that I fully understand the impossibility of solving a problem of this magnitude in one article. This piece must, therefore, necessarily remain only a sketch, on which I hope to be able to expand in due course with more pages at my disposal.

The article starts with a brief account of the standard history of codification and of the reasons with which codification is usually associated. In short, codification is usually explained as a primary vehicle of legal modernization. It will then be shown that modernization by no means depended on codification (part II). When looked at from a cultural perspective, codification is often interpreted as a result of nationalism, one of the forms in which nationalism appeared, or one of the tools with which nationalism worked. Nationalism could well, however, be attached to older codes as well (as in the Nordic countries), and sometimes nationalist pride was taken precisely in not codifying private law (as in the case of Catalonia (part III)). The conclusion (part IV) will pull together the

---

3 Id.
4 Id.
5 Pierre Legrand, Against a European Civil Code, 60 Mod. L. Rev. 44, 45-46 (2007) (italics in the original).
various threads and will argue that the idea of European civil code is in trouble at least partly because the civil code never had such a monopoly over European legal development as standard legal histories claim. Before beginning, three methodological remarks are in order. First, I will look at the phenomenon of the private law code through a broad lens of critical legal history. This particular form of legal history, the way I understand it, offers insights into the present law that go deeper than the present-day surface. Critical legal history identifies and explains anomalies and problems in present-day law. Ideally, critical legal history reveals structures which, if not determining them, at least set limits on the range of choices that the actors (present lawgivers, courts of law, and legal scholars) realistically have at their disposal.

Second, this article belongs to the field of comparative legal history. Critical legal history is not by definition comparative, but in practice it almost always is, at least in the broad sense that I would like to define comparative legal history. Comparative legal history often uses a systematic method of comparison in much the same way that comparative lawyers do when doing classic comparisons, comparing A with B. The comparative legal historian would thus first choose an array of legal phenomena or areas of regulation, which the objects of comparison have in common. The comparative legal historian would then compare the way these phenomena function in practice or how a particular legal question is regulated in the systems being compared.

The comparative legal historian, however, can also be less systematic. He or she can take a national or regional legal institution as the focus of interest, much as a traditional legal historian working within the boundaries of a national legal system would. However, unlike the traditional legal historian, the comparative legal historian would always position the research object in its international context. Without this context, he or she would feel at risk of losing something essential in trying to answer research questions. The comparative legal historian would think like this because law is an international phenomenon. Legal institutions transfer from one country to another, although the mechanisms through which they change or remain the same are often similar in different countries. Comparative contexts, therefore, can turn out to be true treasure troves of explanations.

Third, this article draws heavily on materials seldom considered when codification is discussed, partly for the understandable reason that these are cases of non-codification and, in some cases, because they have to do with regions that are rarely if ever taken into

---

9 On comparative legal history, see Heikki Pihlajamäki, Comparative Contexts in Legal History: Are We All Comparativists Now?, in The Method and Culture of Comparative Law: Essays in Honour of Mark van Hoecke 121 (Maurice Adams & Dirk Heirbaut eds., 2014).
consideration when “European” legal histories are written on any subject. I will thus not only write about France, Germany, Italy and Spain, but also about the Nordic countries (Denmark, Finland, Iceland, Norway, and Sweden)—which never codified their laws. Somewhat more in passing, I will also refer to the so-called “failed codifications” of England and the United States, as well as one of the “late codifications,” which is Catalonia.

II. Codification as a Modernizer of European Law: Cleaning up the Mess

Global forum shopping is serious business, which requires stern marketing measures from the governments lest all legal business vanish to competing countries. It is interesting to see what features governments portray and want others to consider as strengths and typical features of the legal systems within which those governments operate. A fancy propaganda leaflet issued as a joint-effort by the German and French Ministries of Justice describes continental law in persuasive terms and, more than anything, as a codified legal system:

Continental law is characterized by statutes and codification. Codification is the systematic collection of rules of law into official compilations such as civil or commercial codes. Far from being rigid, this ordered compilation, on the contrary, facilitates modernizing the law as needed. Because of such codification, continental law is accessible to everyone. It is easy to comprehend: by reading the codes, any person, whether an entrepreneur or a consumer, can learn the rules of law that apply to him. . . .

In common law countries, the search for the applicable law often requires consulting a long series of court decisions in order to find an appropriate precedent—if one even exists. Understanding all of these court decisions is often difficult for non-lawyers, who therefore must rely on professional legal advisers. The need for such legal assistance greatly increases the costs for those seeking to enforce their rights. Continental law is a global law. The concept of codification, which has its roots primarily in Europe, applies not merely in French law.

This leaflet interestingly mirrors the self-understanding of continental lawyers, which in turn is based on comparative literature on legal families. The quality of their being “codified” laws is often emphasized in descriptions of continental law. The “theory of codification,” as described by Helmut Coing, “grew out of the Enlightenment.” According to the Enlightenment thinkers, codification was supposed to be comprehensive and lasting. Any narrow provisions were to be left out of the code. Codification was to implement the social contract and thus to protect freedom, equality and property. The provisions of a code were meant to establish rules and not to decide cases, which was not self-evident in pre-modern legislation—one need only think about major compilations such as the Corpus iuris civilis or Corpus iuris canonici. Furthermore, the code had to

10 On the general tendency to write “European” legal histories from the German point of view, see Douglas J. Osler, The Myth of European Legal History, 16 Rechtshistorisches Journal 393 (1997). Osler talks about a Rechtsgeschichte narrative of European legal history, which identifies the essential turning-points in European legal history as those that logically led to the glorious Rechtswissenschaft of the nineteenth century. These include Italian legal scholarship after the rediscovery of the Digest, French humanism of the sixteenth century, early modern natural law, and the Historical School of the nineteenth century.

11 Continental law: global, predictable, flexible, cost-effective/Kontinentales Recht: global, sicher, flexibel, kostengünstig (http://www.brak.de/w/files/05_zur_rechtspolitik/international/broschuer_e_de.pdf).
be systematic and clearly divided into portions, so as to be as understandable and pedagogical as possible.  

Jeremy Bentham’s theory of codification ended up being more influential on the continent than in his native England. Bentham emphasized the following features of codification. It was to regulate at least one area of human life comprehensively. Ideally, a code was to include all the rules that were relevant to a citizen in one state. Second, a code was to be systematically, not casuistically organized, and it was to be written in a clear and understandable way. Third, a code should be uniform, one and the same, for all of the state. And fourth, the code needed to exclude judicial arbitration as much as possible. 

Comprehensive civil codes claiming a monopoly over all other legal sources were a radical novelty at the end of the eighteenth and early nineteenth centuries; this despite attempts at comprehensive collections of legal norms having existed before. Prussian, Austrian, and French civil codes differed from one another as to their background ideology and legislative technique. Their drafters, however, shared a belief in the possibility of creating a code with no contradictions, including everything and not needing further amendment.

Codes and other authoritative legal collections were needed to clear up the complicated systems of legal sources of the ancien régime and to bring uniform law to the whole geographical area of the state. It was beside the point that the uniformity of the ius commune would then be lost. On the other hand, in the eighteenth-century conception codifications were built on natural law, which brought another kind of uniformity to them.

The need to clarify the law often emerges from those in political power. This was the case in Justinian’s Byzantium, and it was clearly the case in Napoleonic France. However, codifications are not always in the interest of political power only. A vigorous development of legal scholarship is necessarily almost always at work in the background. The late nineteenth-century American codes and the American Law Institute restatements of the early twentieth century are a case in point. The making of the German Civil Code (Bürgerliches Gesetzbuch) is a similar case, although it was an official product and, unlike the restatements, was sanctioned as law. The BGB was nevertheless very much a product of legal science and the German scholarly community, without which it would not have come about. The European Draft Common Frame of Reference is par excellence the work of a professorial group.

---


In the famous German *Kodifikationstreit*, Anton Justus Thibaut, having first pointed out how easy it was for the French jurist to decide cases on the basis of the Civil Code, explained how much more difficult it was for the German lawyer, who needed to be immersed in the endless amount of historical sources:

So is our entire indigenous law a jumble of conflicting provisions . . . quite likely to separate Germans from each other and to make it impossible for the judges and advocates to gain thorough knowledge of the law.17

A response to the German discussions also occurred in the Italian states, and the works of Jeremy Bentham were translated as well.18 In Sicily, the chaotic state of legal sources had already led to a widespread wish in the late eighteenth century that the law should be compiled.19 Similarly, in the Papal State the Promulgation Edict of the Civil Procedural Code of 1817 was motivated by the need to unify and to make the code as simple and short as possible: “A code of civil law, which brings under a single prospectus, of the greatest simplicity and clarity, the legal norms presently wrapped in a coat of a law . . . so arduous to trace . . . and of uncertain, fluctuating application.”20

As for Portugal, the state of the law was generally regarded as chaotic and confusing in the early nineteenth century. One of the representatives at the Cortes describes the situation thus: “No one would ignore the mess in which our law finds itself and, consequently, our most urgent need of a civil code.”21 The ancien régime Portuguese civil law relied on the following sources: the Ordenações Filipinas (1693) with their appendices and repertories, the Systema dos Regimentos (Manescal–Campos Coelho), the royal statutory law, the decisions of the Casa da Suplicação, the *Índice Chronologico Remissivo da Legislação Portugueza* (1805) and Borges Carneiro’s *Resumo Chronologico das Leis* (1818-20). Like elsewhere in Europe, the enormously influential private law scholarship came in addition to this mass of legislation. The new code was meant to be understandable for all; thus, it was supposed to be short, clear and systematic.22

---

17 A.F.J. Thibaut, *Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland* 14 (1814). In Germany, codification had remained incomplete. Prussian law had been codified in the *Allgemeines Landrecht* of 1794, and on the left bank of the Rhein the *Code Civil* was in force. The situation was, however, much more complex than this. In Prussia alone, the *Landrecht* had not swept out all local laws. In Pomerania, Brandenburg, Silesia and parts of Saxony, the code was only subsidiarily in force in relation to local law. In addition to this, the German *gemeines Recht* was the subsidiary common law in all parts of Germany. It has been estimated that more than 100 systems of inheritance law were at work in pre-codification Germany.


19 Id. at 233.

20 Id. at 249.


22 Id.
The same themes of chaos and confusion were repeated everywhere, and the examples from the continent could go on and on. Let one more suffice, an example that is geographically the closest possible to the Nordic countries. This example also nicely encapsulates the pre-codification legal situation that nineteenth-century reformers wished to remedy. In the Baltic Sea Provinces of the Russian Empire, law was dispersed in two ways: geographically and socially. In this relatively small area, comprising roughly present-day Estonia and Latvia, there were twelve different private law systems. There were three provinces (Estonia, Livonia, and Courland), and in each of these, all four estates (nobility, clergy, burghers, and peasants) had their distinct laws. Friedrich George von Bunge set out to draw up a common civil law for all of the provinces, and the Baltic Civil Law entered into force in 1865.23

An important part of the common law world faced similar problems, for the amount of case law in the United States had grown alarmingly from the early nineteenth century onwards. In 1822, about 140 volumes of law reports had been published. The number of volumes published grew to 500 by 1839 and to an astonishing 2944 by 1882.24 Like constructive jurisprudence in Germany, American legal formalists also wished to bring order to what they felt was a messy state of legal sources. Formalists like Christopher Columbus Langdell wished to reduce the huge mass of case material to a manageable amount,25 and the Historical School, the predecessor of the Begriffsgewalt, used the historical method to extract the most important sources from the jungle of cases, customary law rules, Roman law, and statute law. Both schools of legal thought wished to bring order to law through ordering their sources into a system.

The chaotic state of legal sources was thus resolved differently on the continent and in the United States. The continent codified, the United States did not. The difference, however, is not as large as this might imply. Just as in Germany, it was legal scholarship that took care of setting the law straight in the United States. Without legal science, there would have been no American formalism, German constructive jurisprudence, or codifications. The similarities between America and Europe are no coincidence, as the German influence on late nineteenth-century American legal scholars has been convincingly shown.26

Codification also had its constitutional side since, while parliaments decided on the content and shape of private law democratically, they (at least in theory) assumed powers previously held by legal scholars and courts. Codification was also an important tool for implementing the results of the liberal revolutions, as conservative circles feared

23 See Marju Luts, Juhuslik ja isamaaline (2000).
26 See Mathias Reimann, Nineteenth-Century German Legal Science, 31 B.C. L. Rev. 837 (1990); David Rabban, Law’s History: American Legal Thought and the Transatlantic Turn to History (1990).
for precisely the same reason. The political unrest of 1848 was behind the Italian codifications of Modena, and in the Duchy of Parma and Piacenza an overriding objective was to rid the codification of 1820 of Napoleonic influences.27 Besides unification of the civil law in force within a given territory, social progress was the other main reason giving impetus to the codification movement. Thus Alonso Martínez, the main editor of the Spanish Código Civil of 1889, expressed the wish in the Promulgation Edict that the Code “satisfy the complex necessities of the modern Spanish civilization.”28

Before moving on to the regions where civil law was not codified, we need tools to assess the conditions under which a code is likely to be produced. Roscoe Pound provided such a matrix in 1954, and it still seems to explain many of the cases of both codification and non-codification. According to Pound, four factors need to be present for a civil law to be codified. First, the traditional legal system will need to have exhausted its potential for reform. Second, the traditional system will need to have become archaic and uncertain. Third, the center of legal expansion will need to have passed to the legislator—and an efficient legislator needs to exist. And fourth, a need for a uniform law needs to exist.29

The continental countries, in which the civil law was codified, undoubtedly meet all of Pound’s criteria. The ancien régime legal system could no longer serve as a basis for reform—not even in late-nineteenth century Germany, although Savigny had thought otherwise. It was simply too archaic. The effective governance emerging in the nineteenth century presupposed uniform law, and the rising nationalism supported this. The gravamen of legal development had been passed to the legislative bodies in most parts of Europe. And last, the emerging capitalist and democratic ethos both presupposed a uniform law to replace the old estate privileges and special legal arrangements, of which it was difficult to keep track.

According to a leading textbook of comparative law, Nordic legal orders distinguish themselves from the other civil law systems in that they do not have codified private law. The lack of private law codifications distinguishes Denmark, Finland, Iceland, Norway and Sweden from the other countries that share the continental civil law heritage.30 The reasons why the Nordic countries left their civil laws uncodified in the nineteenth and twentieth centuries would be worthy of their own study. Surprisingly, no such work exists either for the whole region or any of its constituent states.31 I will offer a hypothesis here, which I believe works for all five countries, although each may have additional reasons of its own that apply only to that particular country.

---

27 Ranieri, supra note 18, at 257, 293.
28 Johannes-Michael Scholz, Spanien, in 3(1) Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte, supra note 13, at 397, 473.
31 But see Kodifikasjon og konstitusjon: Grunnloven § 94 s krav til lovbbøker i norsk historie (Hilde Sandvik & Dag Michelsen eds., 2013).
It is pivotal to keep in mind that the Nordic countries already had comprehensive law codes, governing not only civil law but also criminal and procedural law. Norway had its Norske Lov (Norwegian Law) from 1683, and Denmark (of which Iceland was part until 1945) its own Danske Lov (Danish Law) from 1686. Sweden’s Law of the Realm was established in 1734. Could one build modernization on these laws? In hindsight, it is easy to answer this question affirmatively, because the laws were kept in force, amended and reformed here and there. But the answer must be partly negative at the same time, because legal modernization also presupposed a set of separate statutes to meet the new needs. The example of Finland will need to suffice here.

The Swedish Law of the Realm was kept in force in Finland even after its annexation to the Russian Empire as an autonomous Grand-Duchy in 1809. After the Estate Diet of the Grand-Duchy was allowed to convene again after an over fifty-year “Stateless Night” in 1863, vigorous legal modernization through statute law began. The most important statutes included those on limited liability companies and limited partnership companies (1864), private banks (1866), bankruptcies (1868), mortgages (1868), and sureties (1873). The reform period culminated in the passing of the Trade Act in 1879.32

We can say that, in the least, the old codes did not form an obstacle to legal modernization (Pound’s requirement 1). The epicenter of legal development was certainly the parliaments and other legislative bodies such as Finland’s Estate Diet—before a modern parliament was established in 1905 (Pound’s requirement 3). Legal modernization was all about a uniform legal order, so the need was definitely there (Pound’s requirement 4).

Pound’s requirements 1, 3, and 4 are thus all fairly self-evident. Requirement 2 brings one to a much more interesting problem. The main reason, common to Denmark, Finland, Iceland, Norway, and Sweden, is related to the fact, explained above, that private law codes were intended to clarify the messy system of legal sources that had developed over the centuries in many parts of Europe. Such legal disorder was, however, not a problem of the Nordic countries to the same extent. Whereas in the central and southern parts of Europe dominated by the ius commune, law emanated from several different sources, the Nordic legal landscape was far simpler. The learned ius commune had never taken root as a true subsidiary source of law in Scandinavia. The few city laws that had existed in the middle ages had eroded in the early modern period. Local customary laws had largely been codified in the medieval provincial laws and the laws of the realm (ca. 1350, 1442 and 1734) based on them. Otherwise, customary law had a rather weak position.33

Although Nordic legal scholars recognized that the old codifications were in need of reform, the kinds of discussions that took place between Thibaut and Savigny were only vaguely reflected in Scandinavia. The influence of the historical school has neither-


33 On the legal sources in early modern Sweden and Finland, see Heikki Pihlajamäki, “Stick to the Swedish law”: The Use of Foreign Law in Early Modern Sweden and Nineteenth-Century Finland, in 2 Ratio Decidendi: Guiding Principles of Judicial Decisions (“Foreign” Law) 169 (Serge Dauchy et al. eds., 2010).
less sometimes been given as an explanation of the rejection of private law codification in the Nordic countries. This explanation, however, does not satisfy for three reasons. First, the main actors opposing codification in the Nordic countries were not opposed to legislation as such. C.O. Delldén, the main Swedish opponent, in fact eloquently glorified the Swedish Law of the Realm of 1734 in the pamphlet he wrote to assess the Swedish Proposition of 1826. The rules of the Law, “inherited from the ancestors,” had helped the Swedish peasant “reach heights, which perhaps few people could.” According to Delldén: “We do not hesitate to express our conviction: this law book has great value and attracts fondness when it comes to both its form and contents, and even if almost a century has passed since it was promulgated, any thorough changes must require the most pressing reasons.”

Delldén was thus willing to preserve the Law of the Realm. It would, however, be far-fetched to interpret this as the influence of the historical school. Delldén was enthusiastic about the old law book, a piece of legislation not about customary law, legal science or similar emblems of the historical school. Nor was he against changing and remodeling the Law of the Realm, as long as the fairly functional structure of the Law was kept intact. The old Law and its form were so dear to the Swedish people, which with the help of the Law had “reached heights few other peoples had,” that the economic benefits and the equalitarian reasons (in the law of inheritance) borrowed from the abstract theories were less important than the harm that a new codification would bring. But this did not mean that Delldén was against reform. In fact, thought Delldén, “the growing amount of partial statutory changes . . . and modifications called for a new edition” of the Law. “[E]very expert jurist” acknowledged that practical lawyers, law students and civil servants would benefit from a reform. The Law of the Realm “would thus remain without changes in its principles and form, and our legal order would receive the betterment which can be said to be called for by the general need.”

Delldén’s stance was thus anything but purely Savignyan. Instead, he was pragmatic and wished to reform the existing Law of the Realm. In an assessment of the Proposition for Church Law the following year, Delldén followed the same logic, thinking that the old Church Law of 1686 should be taken as the starting point for partial reform.

Second, even if we accepted that the influence of the historical school might explain the vague interest in codification in the early part of the nineteenth century, the ideological influence hardly suffices as an explanation for the whole century. As explained above, as soon as it was politically possible, Finland’s Diet started reforming the Grand-Duchy’s laws, with most reform work falling in the 1860s and 1870s. Whatever ideals of the historical school were left, they certainly did not prevent the Finns from reforming the law.

---

34 Carl O. Delldén, Anmärkningar vid förslaget till allmän civillag 2-3 (1829). Similar discussions took place in Denmark and Norway; see the articles in Kodifikasjon og konstitusjon, supra note 31. The Danish and Norwegian developments cannot, however, be treated here.

35 Delldén, supra note 34, at 8-10.

36 Carl O. Delldén, Granskning af förslaget till Kyrko-Lag och Ordning (1830).
Third, the leading historian of Nordic legal ideologies has recently questioned the impact of the historical school in the Nordic countries as such. According to Lars Björne, Nordic legal scholars wrote practical legal literature, in which legal practice gained increasing importance as the nineteenth century wore on. Customary law never acquired the kind of strong position it enjoyed amongst Savigny’s followers in Germany; the Nordic countries, instead, always emphasized statutory law.37

The end product—a modernized private law—did not look very different in the Nordic countries as compared to the rest of the Western world. Private law codifications, however, had other political aims than just reforming the substantive law. Codifications were emblems of nationalist unity, and were important symbols of nationalism. They were, of course, also products of nascent political democracy. Just as Thibaut had envisaged, democratically elected parliaments now decided on the whole of civil law, instead of leaving it for the courts and jurists to develop.

Viewed from the European and Western perspective, the significance of the codes was not diminished by the fact they were rejected in some areas, such as the Nordic countries and the common law jurisdictions. Over the decades, in fact, cracks have increasingly appeared in the magnificent edifice of the private law codes, to such an extent that a prominent German professor has wondered whether the end of private law as a separate field of law altogether might be in sight.38 Since the late nineteenth century, scholars have criticized the codes as based on an impossible conception of the law as a closed, autonomous system.39 Constructive jurisprudence has had its critics since the time of Rudolph von Jhering. Hermann Kantorowicz, writing under the pseudonym Gnaeus Flavius, expressed his complete disbelief in codes and statutory law in his classic “Struggle over Legal Science” (“Der Kampf um die Rechtswissenschaft”) of 1906. Kantorowicz describes the prevailing ideal of the jurist ironically:

The reigning ideal image of the jurist is as follows: a higher civil servant with academic training, he sits in his cell, armed only with a thinking machine, certainly one of the finest kinds. The cell’s only furnishing is a green table on which the State Code lies before him. Present him with any kind of situation, real or imaginary, and with the help of pure logical operations and a secret technique understood only by him, he is, as is demanded by his duty, able to deduce the decision in the legal code predetermined by the legislature with absolute precision.40

In fact, discretion dominated every aspect of legal reasoning and decision-making. This discretion needed to be made open and scientific:

37 2 Lars Björne, Den nordiska rättssvetenskapens historia 433 (1997).
38 See Mathias Schmoeckel, Das Ende des Privatrechts, in Notar als Berufung: Festschrift für Rainer Zimmermann 291 (Peter Hanau et al. eds., 2010).
39 See Rudolph von Jhering, Der Kampf ums Recht (1872).
Obviously then space must be given to the very same type of specialization within the judicial profession, as in all others, whereas whether it needs to begin at university or after the completion of studies remains an open question. Here too we find some promising signs of the times: the merging of legal and government academic departments; the increasing emphasis on national economic instruction to jurists; the emergence of juristic-psychological tutorials and associations; investigations into the psychology of testimony (a problem of immense scope); rapidly expanding philosophical schooling; sociological and real-life studies by criminologists.

Kantorowicz had little faith in the possibility of tying judges to the letter of the law. They would always find ways of using their own discretion:

“Base All Judgment on the Civil Code.” But today we subject ourselves to an ever-increasingly delightful degree of arbitration, from which statutory law ought to be expressly excluded. And state courts refer ever more to truth and faith, to good practice, to the concept of service, to reasonable discretion and other surrogates of the code. Of course: “following explicit state orders,” goes the popular objection—we are still able to recognize the will in its self-annihilation. Perhaps one might also say that the judge would judge solely according to the code, even if our code contained only a paragraph: the judge decides according to reasonable discretion.41

Swimming against the democratic current, Kantorowicz’s free law movement was obviously doomed to the margins of legal thinking. There was no way the majority of legal scholars could be in favor of a school which openly argued for judicial independence from statute law. The interesting thing, however, from the point of view of this article, is the way Kantorowicz dismantled the prevailing belief in the judge as only a mouthpiece of the law.

It should also be noted that although the free law movement never came to prevail in Germany, Kantorowicz’s “signs of the times” were similar to those that other critical legal scholars observed and helped to bring about in other parts of the Western world during the first decades of the twentieth century. Suffice it to mention American progressivists and legal realists such as Roscoe Pound, Karl Llewellyn, Jerome Frank, Robert Lee Hale (and many others with slightly differing approaches and emphases) as well as Scandinavian realists such as Axel Hägerström, Alf Ross, Karl Olivecrona, and Otto Brusin; and Francois Gény in France. In the United States, the critical movements from the progressivists onwards have in fact been so successful that they managed to eradicate legal formalism quite thoroughly from American legal theory, rendering it considerably more flexible than continental law. This “American advantage,” as Mathias Reimann has recently argued, has greatly contributed to the adaptability of American law to global challenges.42

Continental law, as argued above, has nevertheless produced some flexibility as well, and some cracks in the codes’ edifice have been a product of legal practice. The difficulties of the European Code relate to the general difficulties that the idea of a civil code has faced during the second half of the twentieth century. The term “decodification” de-

41 Id. at 2027, 2024.

notes the tendency by which more and more important areas of civil and private law are regulated outside the civil code in separate statutes. Examples of such statutory law range from intellectual property and insurance law to civil code topics such as employment law, contracts of carriage, monopoly and consumer protection. According to the decodification theories, this kind of statutory law threatens to “break up the original unity of the civil law system, creating a plurality of microsystems with different principles.” In addition to separate statutes outside actual codes, civil law has often changed through court practice. The case law of the German Reichsgericht during the Weimar Republic is a case in point. For instance, the Dampfpreissfall in 1920 reintroduced the doctrine of clausula rebus sic stantibus (Wegfall der Geschäftsgrundlage), which was not part of the Civil Code of 1900, back into German law.

III. Codification and Nationalism

Private law codes often fulfill a symbolic function. There is often a cultural or political need to maintain or create a sense of unity or togetherness within the polity when the codification of its civil law is considered. Nationalist feelings, if they exist, go against any Europe-wide policies, a European code included. But then, nationalism of a European variety may well be an argument to bolster the idea of a European code. When one looks historically at the relation between nationalism and codification, the link certainly exists. However, nationalism has been used for many different purposes, including opposition to codifying the civil law.

The rise of nationalism in the nineteenth century—and especially near its close—has been explained by urbanization and emerging capitalism, as a creation of pure state power, and—more anthropologically—as a “shared feeling” or an “imagined community.” Bayly argues that none of these explanations is sufficient by itself. Instead, all of them should be taken into account, as “some of them would have to be given more weight in some situations than others.”

Nationalism is often seen, and rightly so, as linked to the process of codification from the early nineteenth century onwards. Nationalism has been one aspect of most codifications—at least those made at the national level—all along. The nationalist aspects of the French Code Civil are the most obvious example. The Code Civil is still seen today, and perhaps especially today, as an argument against a European code, representing deeply French cultural and political values such as democracy and self-determination. Anton

44 For more examples, see Reinhard Zimmermann, Das Bürgerliche Gesetzbuch und die Entwicklung des Bürgerlichen Rechts, in Historisch-kritischer Kommentar zum BGB, Band I: Allgemeiner Teil, §§ 1-240, at 12-15 (Mathias Schmoeckel et al. eds., 2003).
Justus von Thibaut, worried about Germany’s political fragmentation, saw a unification of German “bourgeois law” (a combination of private, criminal, and procedural law) as a practical matter, a way of saving the Germans from legal particularism which had caused problems in the past. For Savigny, nationalism and the German Volks played a decisive role, but directed him to oppose codification, which to him could only be arbitrary and harmful.

By the mid-nineteenth century, the idea of codifying German law was gaining support and nationalist motivation. Theodor Mommsen, for instance, wrote in 1848 that “the German nation demands, and demands with greater right than ever, from its legal scholars a uniform and national civil law.”

Nationalism could lead not simply to different kinds of codes. It could also lead to non-codification or to preferring to keep an old code instead of adopting a modern one. Catalonia is an example of the first type. Catalonia did not codify its civil code until 1960, preferring to stick to its local customary law with the Spanish civil code as subsidiary law. Catalanian customary law became the carrier of nationalistic sentiments.

Throughout the nineteenth century, the idea of a civil code governing the individual’s personal life and his or her relations with others had become the order of the day in most parts of the European continent; indeed, as Stephen Jacobson has put it, “one of the many requisites of modernity,” together with many other legal and cultural phenomena. Codification was politically very much part and parcel of the liberalist agenda, whereas conservatives tended to oppose the idea because of its inherent threat of reform. However, towards the end of the nineteenth century, the idea of codification became increasingly shared by all political groups. Codification was now one of the instruments with which national unity was created, in Coing’s words, much like the national flag and the national anthem. This has been the case not only for the French Code Civil, but just as much for the Italian (1865), German (1900) and Dutch codes (1938). The codes enacted in the new republics born out of the collapse of the Soviet Union, and those of the ex-socialist republics, can also be viewed as having high symbolic value for newly found national unity. The same goes also for “failed codes,” ones that never came into existence. The Franco-Italian code failed in 1938 because of the international tensions of the epoch, and the failed English and American codification projects are sometimes taken to exemplify the particular, uncodifiable nature of the common law.
The newly independent Latin American countries organized their private laws mostly according to the same model. The reasons given were similar to those in Europe: a wide range of politicians, lawyers, scholars, and judges claimed that the civil law inherited from the Spanish period was excessively complicated and confusing.\footnote{Alejandro Guzman-Brito, Historia de la codificación civil en Iberoamérica 124-29, 147-51 (2000).}

It says something about the spirit of the early nineteenth century that many Latin American constitutions described drafting codes as one of the tasks of legislative bodies. Codified law was one of the institutional priorities that a newly founded nation needed. Many attempts started too early and failed because of a lack of legal expertise. The Constitution of Tunja (1811, New Granada) mentions this, as does the draft constitution of Río de la Plata of 1813. The Colombian Constitution of 1830 entrusted the Congress with the power “to draw up national codes of all kinds and to enact laws and decrees necessary for the regulation of the different branches of the administration, and to interpret, amend, and annul existing legislation.”\footnote{Matthew Mirow, Latin American Law: A History of Private Law and Institutions in Spanish America 133 (2004).} The Bolivian Civil Code of 1830 was an adaption of the French Civil Code. However, the most influential of all Latin American civil codes was the Chilean code, drafted by Andrés Bello and enacted in 1855. The code was heavily indebted to the French Civil Code, but Bello had also incorporated elements of the Spanish Siete Partidas and Roman law into his law. The code spread effectively and was adopted in El Salvador, Ecuador, Nicaragua, Colombia, and Honduras. Bello’s work exerted a powerful influence on the civil codes of Uruguay, Mexico, Guatemala, Costa Rica and Paraguay.\footnote{Brito, supra note 52, at 141-42.} Another well-known Latin American code is the Argentinian Civil Code drafted by Dalmacio Vélez Sarsfield and enacted in 1871. Vélez Sarsfield drew on Bello’s code and on Augusto Teixeira Freitas’s draft civil code for Brazil (1860–64).\footnote{Ricardo Levene, Manual de historia del derecho argentino 437 (1985).} National unification played an important role in Latin American codification processes, as the Mexican struggle for a federal codification shows. During the second half of the nineteenth century, federalists often fervently opposed a nation-wide civil code. The preparations were nevertheless begun, leading to the enactment of the Mexican Civil Code in 1870.\footnote{Mirow, supra note 53, at 136.}

Whether or not civil law was codified somewhere depended on a variety of factors of which nationalism was only one. Nationalism could be channeled to many different uses, and nationalism could be attached to various kinds of codification projects and even to non-codification. The interplay between nationalism and codification is interesting in the Nordic countries as well. Although “modern” codifications were not undertaken, nationalist feelings were associated with the old codifications of the seventeenth (Denmark and Norway) and eighteenth centuries (Sweden)—and this continues to be the case to a large extent. The pre-modern Nordic codifications have enjoyed a position equal to the liberal codifications. Thus the Danish Law (1683) was described in 1954 as having “held
the place of the Danish legal community’s podium for almost 275 years” (“i snart 275 aar staæt som det danske retssamfunds podiøm”). Although full of lacunae, one could still, “not least among somewhat older jurists, encounter an almost sentimental feeling towards the Danish Law” (“man kan i nutiden, ikke mindst hos lidt ældre jurister, møde en næsten sentimental indstilling over for Danske Lov”). The law has indeed always been praised for both its formal qualities and for its content. The Danish law was lauded in 1694 by Molesworth for its “Justice, Brevity and Perspicuity,” exceeding all other laws in the world. Prussia’s Fredrick I wanted to use the Law as the basis for a wholesale reform of Prussian law—although this project failed. It has been Anders Sandøe Ørsted, however, whose praise has had the greatest effect on modern conceptions of the Danish Law. The Law distinguishes itself through a high esteem for bourgeois freedom and equality, through a mild and human spirit, together with . . . a respectable moral severity, and through its regulations, which for the most part bear witness of a mild but sharp eye, mature deliberation and careful discretion; by, often, in its simplicity, having found the law much better than newer statutes drafted in a more refined epoch.

The attitude towards the Nordic pre-modern codifications was thus twofold in the nineteenth century. On the one hand, it was recognized that the codes needed updating, although a chaotic state of legal sources was never the concern, as was the case in the more southerly parts of Europe. On the other hand, the pre-modern codifications served as national emblems in very much the same way as the liberal codifications elsewhere in the western world. Almost sentimental feelings were commonly associated with these laws, which were seen as great legislative products of their times.

**IV. Conclusion**

Some scholars have turned against the idea of a European civil code because it is, they claim, impossible to unify the cultures of common law and continental law. But even continental private law rests much less on the idea of codification than our German-Italian-French-centered legal history has led us to believe. While the codification movement, according to Pio Caroni, might have marked an “epochal turn in European legal history,” as most of the countries were concerned, large regions such as Catalonia, Hungary, and the Nordic countries were left untouched by the codification wave. Codifications were tremendously important in many ways, but they were not absolutely necessary for the modernization of European private law, which could just as well be modernized by other means. In the Nordic countries this was done by statutory law other

---

57 Anders Sandøe Ørsted, Haandbog over den danske og norske Lovkyndighed 1, at 7 (1822).
58 Id.
59 Id. at 6.
60 Id. at 7.
61 Legrand, supra note 5.
62 Caroni, supra note 2, at viii.
than a code, and in common law countries it was academic legal scholars who took charge of modernizing the law. What the entire Western world shared was legal scholarship in its “scientific” version. Legal science came to provide the foundation for modern law everywhere in the West, whether or not private law was codified during the “long nineteenth century.”

The idea of codification has its staunch supporters but also fierce opponents. Some doubts have deep historical roots; some are of a more recent pedigree. One of the loudest critics has over the past couple of decades been Pierre Legrand. His main concern has been that a European civil code would inevitably show disrespect towards common law, which operates on a completely different basis than continental law. Whereas continental law is prone to Wissenschaft, common law concentrates on conflict-solving. While in continental law “emerging contingencies of life . . . find themselves . . . subsumed under one or other of the available categorical umbrellas with all the confidence that comes from the attribution of significance to the act of categorisation and to the criteria allowing for the separation of the categories,” the common law remains “a law of the item where the fact continues to matter above all else.”

A European civil code would, according to Legrand, seriously threaten the “plurijurality” of European law, of which common law is an integral part.

The globalization of law poses an even more serious problem for a European civil code than the plurijurality of European law. Global law is produced largely by other means than traditional statute law: international treaties and informal intergovernmental networks of cooperation shift law-making from the national to the global level. The nineteenth-century ideal of a civil code is obviously not the best instrument to capture this development. Global law is also increasingly difficult to place in the traditional categories of continental law, and the distinction between private and public law is currently vigorously debated.

The edifice of Western codification is mighty, but it is also full of cracks—some old, some newer. And yet it would be a form of legal-historical arrogance, and indeed naive, to think that the European civil code will either stand or fall as a result of the history of codification. Legal history can sometimes help explain the present. When it comes to foreseeing the future, legal historians must remain much more cautious. The European civil code, for reasons explained above, is not at the moment in a particularly favorable situation. This does not mean, however, that the political climate might not change sometime in the future. Law has a developmental logic of its own, which does not always obey political currents. At the moment it seems that global law is increasingly escaping the confines of civil codes, both existing ones and the potential codes still on the desks of legal scholars.

Let us return to Roscoe Pound. The American progressivist thought that in order for civil law to be codified, the traditional legal system will need to have lost its potential for reform. This may indeed be the case with the traditional European civil codes. Pound

---

63 Legrand, supra note 5, at 50 (italics in original).

64 See After Public Law (Cormac Mac Amhlaigh et al. eds., 2013).
also argued that, in order for a codification to take place, the traditional system must have become archaic and uncertain, creating the need for a uniform law. European and global civil law have certainly become uncertain, but whether this is truly considered a problem—or rather an advantage—remains an open question. Pound also argued that the center of legal expansion needed to have passed to the legislator, and that an efficient legislator had to exist—otherwise no code could emerge. At the European level, such a legislator exists in principle, but its capability of efficiently codifying all relevant law in fact remains doubtful. Through Pound’s eye-glasses, the chances of codifying European civil law would not look promising.