

Chapter 4

THE MANY FACES OF THE CODIFICATION OF LAW IN MODERN CONTINENTAL EUROPE

by Damiano Canale

4.1. Codes and Codifications: An Overview

The legal codes of the modern age served two main functions in civil-law countries.

On the one hand, they were the fundamental tool of the trade for legal professionals: Judges, lawyers, public servants, and citizens regarded them as the main source for the cognition of law and as the basic framework of the legal system. This has sometimes led legal scholars to assume, incautiously, that “civil law stands for codification” (Caenegem 1987, 39), even though codes have now lost their central position in contemporary legal systems and no longer characterize the civil-law world (Merryman and Perez-Perdomo 2007, 152ff.; Irti 1979; see vol. 1, 161).

On the other hand, codes embodied a definite conception of the nature of law and the social function of regulation by law. This is a threefold conception whereby (a) the law consists of a set of general prescriptive sentences forming part of a legal system; (b) a prescriptive sentence is law not by virtue of its content but by virtue of its source, in that the authority of law is identified with the authority of the state’s legislative power; and (c) the aim of the law is to guarantee liberty and equality, considered to be necessary conditions of any genuine individual good and of any social justice and welfare.

Once the first modern codifications were completed in the second half of the 18th century this conception began to spread across Europe, and it deeply modified legal methodology and legal knowledge, as well as the way in which officials conceived their own function within the state. This change did not take place all at once, however. It was the result of a long process that had started at the same time as had the modern natural-law tradition (see chap. 2 of this volume). Moreover, legal scholarship is divided on the course of this change. What conceptual shifts made it possible to understand the law as a codified system of legal provisions, how this assumption modified the general understanding of law, and what its consequences were for the European path to the constitutional state and democracy—all these are still controversial questions.

The ambiguity of the term “code of law” in the “age of codification”—understood here as the period running from the enactment of the Bavarian Civil Code (1756) to the enactment of the Austrian General Civil Code (1811), a period that will be the focus of this chapter—is a first clue to the historical

reasons that make modern codification an open question in legal history and legal philosophy. As Diderot and D'Alambert observed in their *Encyclopédie*, the word *code* "means a general presentation of laws; but this name is given to many sorts of presentations that are very different from one another" (Diderot and D'Alambert 1779, III, 570). According to the *Encyclopédie*, this term may refer to (1) collections of Roman law (the Gregorian Code, the Theodosian Code, the Justinianian Code); (2) collections and anthologies of Roman ecclesiastical jurisprudence (the *canons*) and other Church rules and principles (the *Codex canonicum*, the *Codex Gratianis*, etc.); (3) collections of old and new laws, regulations, writs, edicts, constitutions, ordinances, etc., collected either in a single volume or in a single collection of volumes (the *Code Néron*, the *Corpus Constitutionum Marchicarum*, etc.); (4) collections of statutory provisions that govern an area of the law of the land (the Criminal Code, the Merchant Code, the Civil Code, etc.); (5) treaties of law that include jurisprudential maxims, precedents, regulations, general provisions, principles and other sorts of rules that are relevant to the corresponding legal subject (the *Code de cures*, the *Code des chasses*, etc.).

The boundless variety of codes that were still in effect at the end of the 18th century have often stymied legal scholars looking for a definition of the term *code* in the modern age. Legal scholars traditionally draw in this regard a distinction between *consolidation* and *codification*. Consolidations group existing legal material so as to make it more accessible to professionals; codes strictly understood are bodies of legal rules enforced by authority of the state to replace any preexisting law (Viora 1969; Tallon 1979; Cavanna 1982; Wesenberg and Wesener 1985). At the same time, codes may have either *primary* or *subsidiary* force of law: They include either the law of the land or the law that legal professionals have to apply in only those cases where the law of the land gives no clear answer, under the principle that *ius specialis* prevails on *ius generalis*. Both these classifications, however, are surrounded by controversy and show that no definition per *genus et differentiam* can be assigned to our subject. Codes in a strict sense, such as the French Civil Code of 1804, would typically include preexisting legal material but would do so within a new framework; and subsidiary codes, such as the Prussian General Code of 1794, were in fact promulgated so that they could play a primary role in their respective legal systems, despite their subsidiary status.

It may therefore serve our purposes better if we establish a functional classification of codes of law. From the 18th century to the present day, codes have been designed to present different legal texts and simplify their use, or they have been designed to systematize legal materials so that all legal prescriptions are rationally interconnected, or again they have been designed to set up a new legal system on the basis of a fundamental political decision, so as to support the system's normative authority and the state's cohesion. Modern civil-law codes typically serve *all* of these purposes. On the contrary,

premodern codes serve only the first one, and common-law codes merely aim at simplifying legal information or at rationalizing an area of law so as to reduce judicial uncertainty (Vogel 2004; Atiyah and Summers 1987).

4.2. Three Discursive Levels

Apart from these definitional problems, it is useful to look at the different discursive levels on which legal codification has traditionally been discussed by legal scholars, since this will help us better clarify the concept of a code in modern legal history.

In particular, legal codification can be considered from the point of view of (1) legislative technique, (2) legal theory, and (3) legal philosophy. It is worth examining these discursive levels separately, even though each of them is closely connected with the others. In fact, if we consider them as a whole, they give us the *traditional* view of the codification of law in European legal culture, that will come under criticism in this chapter. It is a view still popular among legal scholars as well as among legal practitioners. In particular, legal scholars use this view to emphasize the contrast supposed to exist between common-law systems and civil-law systems, as well as between alternative models on which to base legal training and the administration of justice. Legal practitioners, for their part, typically use it not to describe the structure of statutory legal systems but to justify a solution to a case and to legitimize legal adjudication.

4.2.1. Legislative Technique

As far as discourse on the level of legislative technique is concerned, the age of codification was inspired by three main principles that in the second half of the 18th century were widely upheld by philosophers, legal experts, publicists, civil servants, and “enlightened” sovereigns. Firstly, in keeping with an ancient *topos* invoked in the Renaissance by T. More, F. Bacon, and T. Campanella, the law ought to be *simple*: It needs to consist of only a few rules—clear, public, and written—that can be known and understood not only by legal experts but also by its final addressees. Secondly, the law ought to be *coherent*: It must not admit of alternative solutions to a case and must therefore exclude any legal contradiction. Thirdly, the law ought to be *complete*: It must regulate *all* of the cases the courts may be asked to solve and must therefore do away with the need to seek out further sources of law.

The code was supposed to be the best means by which to achieve these principles, and so it was supposed to greatly simplify the legal system, guarantee better protection of individual rights, make the outcome of a trial predictable, and subject every person to ordinary law in force within a jurisdiction. The main argument in favour of codification revolved, in particular, around

the problem of the sources of law, a problem that, under the ancien régime, affected both regulation by law and the activity of legal professionals. As concerns the first aspect, the law consisted of a progressive and stratified accumulation of different types of rules drawn from local customs, medieval constitutions, Roman law, canon law, imperial law, royal edicts and ordinances, precedents, expert legal advice, and so on. This variety of sources made it problematic to determine their content and mutual relations, and hence their applicability to the case, which depended on tradition, authority, and territory, and not on deductive reasoning or on any hierarchical relations between legal rules. The criteria for finding the law applicable to the case were not generally fixed: They depended on the subject of the case, the personal status of the parties, the judicial authority that had been asked to decide, and the territory where the case occurred or where the court was located (cf. chap. 3 of this volume). As concerns the second aspect, the selection and interpretation of the rules regulating the present case, particularly under Roman law, required forms of nondeductive reasoning that strictly depended on the kind of court, on judicial and doctrinal trends, and on the education of the judges. If one considers, in addition, the lack of unified procedural rules and the central organization of the judiciary (Mohnhaupt 2000; Picardi and Giuliani 1985; Nörr 1976), it follows that the judicial solution of the case “is often felt by its addressees as an arbitrary one” (Svarež 1960, 599). Franz von Zeiller, the drafter of the Austrian Civil Code of 1811, paradigmatically argued that

If one allows the state’s national law to coexist with a foreign law, an old one that in many cases can no longer be applied to current legal matters; if one allows huge amounts of laws to endlessly accumulate, in such a way that even legal experts cannot fully know the law; if judges refer to their own philosophical views in lieu of legal provisions, because they do not know all such provisions or because none of these provisions apply any longer to the case at hand; if a single court and the legal experts confer authority on contradictory statutes, customs, adjudications, doctrinal opinions, and prescriptions [...], then conflict among different laws, doctrinal opinions, and adjudications will enormously increase. (Zeiller 1801, 61; my translation)

A codified legal system was supposed to overcome all these problems by introducing a new way of drafting and organizing legislative provisions, which represented a turning point in the method of regulation by law.

4.2.2. *Legal Theory*

Where discourse on the level of legal theory is concerned—that is, where the effort is to single out the distinctive features of legal rules, of legal systems, and of legal interpretation—the modern idea of a code is no less revolutionary. According to this idea, the coming into force of a code entails the abrogation of all preexisting law: Codified legal prescriptions become the only source of valid law within the state’s territory. In this way, the terms *lex*,

Gesetz, *loi*, and *legge* (a law or statute) began to merely denote a written legal provision formulated and enforced through the state's legislative authority, in contrast to natural law, Roman law, customary law, precedent, the opinions of legal experts, and so on, which were no longer formally considered autonomous sources of law. They could still be indirectly considered sources of legal obligation within the State, but only if a statute provided that, under particular circumstances, they should be recognized as rules having binding force, or only if the legislator enacted legislative provisions having the same content as a corresponding nonlegislative provision.

This explains why, in codified legal systems, *all* law is originally considered a system of commands enacted by the sovereign. This gives the sovereign strict control of all legal content and form: Existing legal materials continue as law only if the sovereign *wills* that they still be law. But even where existing materials are so recognized—and hence even when the law's normative *content* seems not to change—such a recognition is not neutral. Existing legal materials assume the *form* of statutory imperatives, and so the various kinds of guidance by law that characterized the ancien régime were drastically reformed. Analogical reasoning, equity (understood as justice or fair dealing), authoritative judicial principles, precedents, jurisprudential maxims, doctrinal opinions, and the like, came to be used as *exceptions* in solving a case. The law was understood to consist only of homogeneous normative entities, i.e., only of prescriptive sentences, and this enables it to be structured as a *legal system*.

This new conception of law and the legal system had important consequences for legal interpretation, too. Legal interpretation was still considered a source of law in 18th-century continental Europe. On the one hand, precedents were assumed by the judiciary to have the force of law (Mohnhaupt 1980, 168). In particular, the courts' constant flow of decisions could acquire a *direct* binding force as customary law, or it would acquire an *indirect* binding force through legal reasoning, in cases where the judge applied the argument from judicial authority in finding the legal source pertinent to the case. On the other hand, the plurality and indeterminacy of legal sources opened the door to a high degree of discretion in judicial activity, giving rise to the *topos* of "judicial despotism" which characterized Europe's philosophical and political literature in the late 18th century (see chap. 3 of this volume).

The codification of law was considered the means to best suited to overcome these issues. According to the modern codes of the 18th and 19th centuries, precedent has no binding force and so cannot be considered a source of law. Moreover, modern codes would include a detailed regulation of legal interpretation: They established the way in which to determine their own normative contents. In this way, judicial discretion in legal interpretation was banned by codes. The codes required the judge to interpret codified legal provisions according to their wording understood as the plain expression of the legislator's intent: The judge must *declare* the law, i.e., he is simply re-

quired to ascertain its content. In cases of legal indeterminacy, the codes allowed no one other than the legislator to clarify the legislator's own will, even though courts were still allowed to use analogical reasoning to fill legal gaps. Therefore, the codes seemed to bring into practice two further theoretical *topoi* of the Legal Enlightenment (see chap. 3 of this volume): In the manner of Montesquieu, they reduced the judge to the *bouche de la loi*, that is, to a public official who was strictly obligated to declare the law without interpreting it; and in the manner of Beccaria, they conceived adjudication as the result of a “perfect syllogism” governed by the rules of deductive reasoning. It should be noted, however, that the European science of legislation in the 18th century was perfectly aware that adjudication could not be reduced to deductive reasoning and that modern codification could not eradicate judicial discretion (Albrecht 2005; Théry 2004; Mohnhaupt 1980). In fact, the codification of all areas of law led to an *increased* discretionary power of the judiciary, since general provisions of code law would often replace more detailed forms of regulation. The regulation of legal interpretation introduced by the modern codes simply was aimed at increasing political control on the judiciary by incorporating it in the government of the State.

4.2.3. *Legal Philosophy*

Where discourse on the level of legal philosophy is concerned—that is, where the problem is to investigate the nature of law and of legal authority—the age of codification is seen as determining the transition from theory to practice in modern natural law. This thesis can be reduced to three main claims as follows.

(1) The three major codes of this era—the Prussian General Code (ALR, 1794), the French Civil Code (or Code Civil, 1804), and the Austrian Civil Code (ABGB, 1811)—positivized the principles of liberty and equality, forming the basis of modern natural law, and drew from them both the rules governing the social and economic activities of citizens.

(2) In this sense, the codification of the natural-law principles at the beginning of the 19th century marked the first step toward the liberal state and toward modern constitutionalism in Europe. Once transformed into a set of positive legal prescriptions, the principles of liberty and equality would govern not only the behaviour of citizens but also the activity of officials and public administrators in general, who would themselves be subject to the law. The next step in this process was to make law subject to legislative power: Once the positive law is understood to bind not only its final addressees but also the judiciary and the public administration, the principles of natural law assume the status of *fundamental rights*, ones that citizens can claim against the state, too. This would set the political system on the road to democracy. On the one hand, in order for citizens to be free and equal, there must be general rules that guide them, and these must be clear, coherent, and public. On the other

hand, these rules can ensure freedom and equality only if their content is determined by the citizens themselves, that is, only if they form part of a democratic political system. The codification of law, then, can be considered a fundamental phase in the historical process that led Europe to constitutionalism, democracy, and the rule of law.

(3) The codification phase was a process in its own turn, involving successive evolutionary stages embodied in the three codes previously considered. Thus, on this view, the ALR, the Code Civil, and the ABGB mark the three main stages in the evolution of the European legal systems from the sources pluralism of the ancien régime to the legislative monism of the 19th century (Conrad 1961). The first stage is represented, on this view, by the Prussian General Code, which wrought the sources pluralism of the Brandenburg-Prussian territories into a unified legal system wholly dependent on the sovereign's will. But this code did not introduce, as the basis of regulation by law, the concept of a "unified legal personality," understood as the basis on which each individual in the state is equally capable of exercising rights and being bound by duties. Instead, the code remained anchored to the personal differences characterizing the rank society of the ancien régime. The second stage would then be represented by the French Civil Code, which introduced for the first time the legal device of a unified legal personality. In this way, the French codification radically simplified the structure of the legal system, thereby making possible the development of a modern civil society based on individual autonomy. This code, however, established the primacy of codified legal directives not only over all other legal sources but also over individual rights, which would be legally binding only insofar as they were acknowledged by the legislator through the code. The third and final stage is represented by the Austrian General Civil Code (1811), which recognized in principle the primacy of individual rights over codified legal prescriptions, thus recognizing the existence of a private legal sphere that cannot be violated by the state or by any other person.

4.3. Natural Law and Codification

This interpretation of the age of codification has been very influential and is worth examining here in greater detail. To begin with, one needs to consider in what sense the code was regarded, in late 18th-century Europe, as a way to positivize natural law and turn its principles into directives by which to guide behaviour in society. In fact, the relation between natural law and legislation was the subject of much controversy in the age of codification and can be broken down into three main models, corresponding to alternative conceptions of code law in general.

According to the first model, which one might call the *methodological* model, the legal code was a specification of natural law: By deductive reason-

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