Section 3, first part
Many Faces of the Codification of Law in Modern Continental Europe

Academic year 2018-2019
Many faces of Codification means that we have a number of different “codification paths”.

As we will see, we have different approaches (starting point: codification in the second half of the Eighteenth century; point of arrival: BGB and Swiss civil code, at the beginning of the twentieth century).

We deal only with civil codes. There is a practical reason: we have no time to study other ambits (penal codes and so on), but also a substantial reason. Civil codes were the “core codes”, that is the heart of the modern, bourgeois, legal systems.
The first projects of codification are linked to natural law (Law of reason) and the enlightened absolutism.

First example from Germany, Bavaria, where the *Codex Maximilianeus Bavaricus civilis* was issued in 1756. This text, however, made no claims to exclusivity (*completeness, not heterointegrability*). In the event that the code proved imcomplete, the learned Roman law would be invoked. There was little influence from NL on this “code”. 
In Prussia the codification movement started from the first half of Eighteenth century. Codification was linked to the centralization policy of the Kings. **Frederick II** (1740-1786), one of the “models” of the enlightened absolutism, wanted to disclaim Roman law and to establish a German territorial law. **Samuel Cocceius** (1679-1755) was the jurist, formed according to the ideas of Pufendorf, leading as chancellor the reforms of Judiciary.
But Cocceius thought that RL was still the basic material and so his *Project Corporis Iuris Fredericiani* (1749-1751) didn’t correspond to the intentions of Frederick. Too based on RL, it was unclear.

The *Project* contains a strong NL background but its aim is to “reform”, making clearer and better ordered (see Domat: *droit romain dans un ordre naturel*), RL (Corpus iuris Justiniani).

Voltaire, Diderot and D’Alambert, Beccaria and other philosophers judged very positively this text but the King disowned it.
In Austria the Codex Theresianus (1766) can be seen as another attempt to codify private law. As well as Frederick II, Maria Theresa was a typical “enlightened sovereign”. This Codex – written in German – followed RL systematic, too, with a style of provisions more discursive than prescriptive. However, this “code” rules only private law and in this ambit abolishes territorial provisions. The subject of law is unique. So, we could say that this text is poised between the ancient and the modern.

In another field, criminal law, Austria was the first nation to make a very modern code.
In this section we deal above all with three codes, between 18. and 19. centuries.

I mean the Prussian General Code (1794), the French Civil Code (1804), and the Austrian General Civil Code (1811).

They can be viewed as three alternative projects of civil society within the political and institutional frame of the modern state. They embody, in legal form, three different logics of socialization through which the state law aims to regulate those aspects of individual life that are relevant for the cohesion, government, and
welfare of the political community. Modern codes require individuals to organize their private sphere according to what is considered to be the common interest, since this is a necessary condition of individual well-being.

The Prussian General Code was considered by its commentators to be obsolete from its birth: it found a limited field of application and was soon revised.
The French Civil Code was widespread throughout Europe: it was considered the most perfect product of the age of codification, became the model of all codified legal systems and remains so up to the present day. The Austrian General Civil Code drew more interest from European legal culture and remained in force for more than a century in the Austrian territories, even though it was still considered too bound up with the past.
We can say also that these three codes are alternative from the point of view of legal science “models” and interpretation of law by the judges and legal doctrine. (see Section 4)
The **Prussian General Code** = ALR
(*Allgemeines Landrecht fur die Preussischen Staaten, 1794*).

As we have seen, Samuel Cocceius’ *Project* “failed”. He worked to a new plan but he died in 1755. His work was taken over by Johann Heinrich Casimir von Carmer (1720-1801) and especially by Carl Gottlieb Svarez (1746-1798). Both were heavily influenced by NL as law of reason.

Their work- the ALR – was introduced in 1794.
It is a widespread opinion among legal scholars that the ALR embodied the spirit of the “Prussian natural law school”. In other words, the ALR is considered to be the outcome of a particular line of development in the 18th-century natural law, a line connecting Christian Wolff to G. J. Darjes, D. Nettelbladt, C. von Carmer, C. G. Svarez, and E. F. Klein, and so a line connecting the Wolffian school to the drafters of the ALR.

This influence has been widely overestimated because we need to distinguish Wolffian method from the contents of the text, still linked to RL as «repository» of maxims of NL
The model of society outlined by the ALR is still bound up with the German “rank society” (*ständische Gesellschaft*) of the ancien régime, in which different people had different rights and duties according as they had this or that role in society. In this sense, the Prussian code seems to be only partially conceived as a means by which to uphold by law the modern principles of liberty and equality: the unification of the legal system did go so far as to unify legal personality. Instead, the code reflected the personal differences that still characterized Prussian society at that time.
We can say that ALR’s aim is to mirror, organizing better, the society as well as it is: based on status and social ranks (Feudal nobility, clergy, bourgeois, farmers...). On this model, codification was not aimed at effecting a palingenesis of civil society or at guaranteeing individual autonomy against public powers. The code was conceived by Frederick II and its drafters as a means by which to “reproduce” in legal form the existing social order by reducing it to a common principle of government (the sovereignty of the state), for in this way society could be guided toward achieving a common end (perfection and happiness).
On this approach, each individual will have more than one status. A man, for example, can have at the same time the status of male, husband, father, head of the household, tradesman, Catholic, and citizen, and each such status comes with a set of rights and duties specific to its sphere of action, according to Wolffian (neo-aristotelic) philosophy and ethics.

So, no wonder that this text comprises no fewer than 19,000 articles... Apart from private law, it also covered public law, criminal law, commercial law, feudal law...
For these reason the ALR has not the formal qualities typically associated with the age of codification. Especially, it lacks simplicity and clarity.

After all, Prussian codification at the end of the 18th century was aimed at consolidating the absolutistic regime of Frederick II. Civil law is rather conceived as a tool in the sovereign’s hands for guiding the members of the State in the pursue of common good, since this is considered the only way to
achieve individual happiness and welfare. A general code of law is the best way to accomplish this task: the code makes it possible to ascribe all valid legal prescriptions to the sovereign’s will; it serves to rationalize the administration of justice and to organize society as one big clock in which each cogwheel contributes to the working of the overall mechanism.
Civil society is conceived in the Prussian code as an organic and multiple complex of personal statuses, such that all persons having the same status are equal and so can each exercise their liberty. These statuses, however, will not have any binding force unless they are established by positive law, or recognized by the code. This recognition implies that each person will be ascribed a unique set of rights and duties specific to the social role the legislator attributes to her or him.
Equality and liberty are not in the manner of Hobbes, Rousseau, and Kant. Equal treatment is within each differentiated sphere of action: all persons with a certain status will have the same rights and duties, and a different status will entail a correspondingly different legal capacity. It is an equality of differences.
STRUCTURE

The Prussian code of 1794 is divided into three parts. But this division does not correspond to Gaius’s distinction between *persona*, *res*, and *actio*, nor does it correspond to any reinterpretation of it. In fact, the ALR is divided into an Introduction, containing general provisions of law; a First Part, regulating the *status civilis*, or the behaviour of individuals as members of the state; and a Second Part, regulating personal
differences, or the behaviour of individuals as participants in the different spheres of action defined by the different personal statuses.

Introduction contains rules for legal experts and judges, or secondary rules concerning the enactment, efficacy, application, and interpretation of codified legal provisions.

Centrality of the civil code in the construction of the legal system.
§ 22 The laws of the State constrain each member of it, without any distinction of rank, class and gender.

§ 83 Universal human rights are grounded on natural liberty, i.e. on the possibility for anyone to pursue her or his own wellbeing without detriment to others. To put it in Wolffian terms, the provision states that human nature is such that everyone has the right to pursue his or her wellbeing. This is understood by Wolff to be the fundamental principle of natural law, and yet its binding force in the state is owed to its being set forth in positive law.
FIRST PART of the ALR is devoted to legal personality in general, that is, to the condition of individuals as members of the state (to their *status civilis*) regardless of their personal circumstances and statuses (FORMAL EQUALITY). This, then, is the most modern and “bourgeois” section of the code, and it would survive the ALR’s revision in the 19th century. In this part of the code,
all persons are regarded as equally subject to the law and so as free and equal: their natural rights, duties and obligations are levelled out by the code from the start, and the code accordingly establishes from that point onward the way by which to acquire rights, duties, and obligations, that is, it sets out the general regulation of contracts, torts, property, and so on.
SECOND PART:
Here, personal differences among persons are regulated according to the system of statuses outlined by the Wolffian school of natural law. Having set forth in the first part the formal equality of individuals as persons equally subject to positive law—and so as equally entitled to acquire rights and equally liable to incur duties—the code now regulates the material inequality of individuals, who are now considered with respect to their role in society.
As Svarez pointed out, “individual rights and duties within the State spring from three sources: 1) birth; 2) social rank (Stand); 3) actions or facts to which positive law attribute this effect”. Differences in rank or status will obviously be reflected in most legal institutions, such as marriage, inheritance, contracts, and property, and these institutions will accordingly take on different regulative contents.
The State imposes restrictions to farmers (for ex. they and their descendants “are not allowed to undertake a bourgeois profession without state licence” (ALR, II, 7, § 2)); servant farm workers are subject to relevant restrictions as to marriage, freedom of movement, and parental authority, this to ensure their full and continuous contribution to the common welfare (ALR, II, 7, §§ 150, 161ff., 171ff.).

Middle-class activities (commerce, industry) are minutely regulated for the purpose of coordinating them under an overall plan (ALR, II, 8, §§ 128, 150, 161, 180).
Under the ALR, the nobility lost the political role and most of the privileges it had during the *ancien régime*. This class became a “service class”, one that enjoyed greater capacities than the other classes when it came to marriage, wills, and patrimony, but that could not take up commercial activities and was subject to the state’s administrative control.
The ALR was thus aimed at transforming Prussia’s old rank society (ständische Gesellschaft) into a “service society,” one in which each person was bound by a unique set of personal spheres of action set forth by the code itself, and in which everyone’s activity was conceived as functional to a common, overarching end. Wolff’s eudemonistic ethics at the end of the 18th century legitimized the authority of the sovereign’s enacted positive law.
All the king’s subjects were equally subject to the king’s legislation, but each person was different from others according to his social status.

ALR affirmed many principles of NL and some aspects of Enlightenment but it did not want to be a “revolutionary” code.

Conversely, its aim was “conservative” maintaining social ranks in terms of service to the State and the well-being of society.
For these reasons ALR was so long, complicated, mixing different legal regimes, finally too elaborated and detailed to be easily manageable and comprehensible.

It was a **reform model**, assuming that the legal code is justified by natural law, which authorizes the sovereign to enact legal provisions and to consider them the only source of law within the state.
AFTER THE REVOLUTION: the French civil code (1804)

Few words on the French Revolution: Constitutional; social; legal one...

Abbé Sieyes: nation (Tiers état) → France
His 1789 pamphlet *What is the Third Estate?* became the manifesto of the Revolution, helping to transform the Estates-General into the National Assembly in June 1789
What is the Third Estate? Everything. What has it been hitherto in the political order? Nothing. What does it desire to be? Something."

Third Estate was composed by 20 millions of people, aristocracy by few thousand...

Siéyès's pamphlet played a key role in shaping the currents of revolutionary thought that propelled France towards the French Revolution. In his pamphlet, he outlined the desires and frustrations of the alienated class of people that made up the third estate. He attacked the foundations of the French Ancien Régime by arguing the nobility to be a fraudulent institution, preying on an overburdened bourgeoisie.
The pamphlet voiced concerns that were to become crucial matters of debate during the convocation of the Estates-General of 1789.

Whereas the aristocracy defined themselves as an élite ruling class charged with maintaining the social order in France, Sieyes saw the third estate as the primary mechanism of public service. The pamphlet placed sovereignty not in the hands of aristocrats but instead defined the nation of France by its productive orders composed of those who would generate services and produce goods for the benefit of the entire society.
Sieyes challenged the hierarchical order of society by redefining who represented the nation. In his pamphlet, he condemns the privileged orders by saying their members were enjoying the best products of society without contributing to their production. Sieyes essentially argued that the aristocracy's privileges established it as an alien body acting outside of the nation of France.

5 June 1789 = Third Estate represents nation. Estates General self-proclaims National Assembly
20, June 1789: oath of the Ballgame’s Hall
14, July 1789: the conquest of the Bastille
Declaration of the Rights of Man and of the Citizen was adopted on **27 August 1789** by the **National Constituent Assembly**
Equality, freedom and Legality

Article I – Men are born and remain free and equal in rights. Social distinctions can be founded only on the common good.

Article II – The goal of any political association is the conservation of the natural and imprescriptible rights of man. These rights are liberty, property, safety and resistance against oppression.

• Article III – The principle of any sovereignty resides essentially in the Nation. No body, no individual can exert authority which does not emanate expressly from it.
Article IV – *Liberty* consists of doing anything which does not harm others: thus, the exercise of the natural rights of each man has only those borders which assure other members of the society the fruition of these same rights. These borders can be determined only by the law.

Article V – *The law* has the right to forbid only actions harmful to society. Anything which is not forbidden by the law cannot be impeded, and no one can be constrained to do what it does not order.

Article VI – *The law* is the expression of the general will (...)
The Revolution and the codification

One of the programmatic points of the French Revolution (FR) of 1789 was the codification of civil law.

Codification would put an end to the legal pluralism in France and would subject all citizens to the same rules, irrespective of class. The codification would achieve equality before the law.

Supremacy of law is, as we have seen, at the center of the Declaration of 1789.
On 5 July 1790 the Constituent Assembly ordered the Codification of the law: “the civil laws will be reviewed and reformed by the legislators, and a general code with simple and clear laws which are in accordance with the constitution will be made”.

France had a tradition in consolidating legal provisions (royal legislation and customary law). Louis XIV and XV *Ordonnances* were important works to rationalize whole parts (also private law: Ordonnances of D’Aguessau under Louis XV, on donations (1731), testaments (1735), trusts (1747))
As we have seen, legal rationalism was an important movement also in France. See Jean DOMAT (XVII c.) and R.-J. POTHIER (XVIII)
Pothier, a magistrate and professor from Orléans, had in his numerous treatises provided a survey of private law, starting from RL and the customary law of Orléans. In this way, he arrived at a systematic account of what could be regarded as a ‘French’ system of civil law. French codes drafters will make grateful use of Domat and Pothier’s works posing the issue about the relationship between ‘old’ law and the new political regime.
During the first turbulent decade of Revolution, the C did not progress very well. Two drafts (1793-1794) of a civil code were submitted to the parliament but rejected. These drafts were the work of a committee headed by Jean-Jacques de Cambacères (1753-1824). But the decade was important also because a number of statute laws were adopted in specific areas of civil law (so called “intermediate legislation”), such as marriage and divorce (1792), civil status (1792), illegitimate children (1793), hereditary succession (1794). Moreover France had the first two codes in criminal law (1791) and criminal procedure (1795).
Jean-Louis David,
Napoleon through the Alps
18 Brumaire (9 November 1799). Napoleonic coup d’état
Constitution Year VIII (13 dec. 1799): Napoleon Bonaparte is one of the three consuls governing France...

1802: Napoleon appointed consul for life

1804: Napoleon crowned emperor!

In 1800 Napoleon appointed a limited commission of four members to drafting a civil code.
The four members, important lawyers fallen into disgrace during Terror, were: the President of the Court of Cassation François Denis Tronchet (1726-1806), a judge of the same Court Jacques de Maleville (1741-1824), the Commissioner of the Government Jean Etienne Marie Portalis (1746-1807) and Félix Julien Jean Bigot de Préamenaou (1747-1825), former member of the Parlement of Paris abolished by the Revolution. Jean-Jacques Régis de Cambacérès as ministry of Justice led the commission.
They hailed from various parts of the country and from different legal backgrounds in RL and customary law. The draft was elaborate in only four months (August-November 1800) and sent to the court of cassation. The draft was discussed at length in the State Council, where Napoleon himself took part in various deliberations and pushed through his views in various areas.
But the draft was seriously discussed also by the «Tribunat». This elected assembly could approve or reject the articles but it could not change them.

The text approved by the Tribunat was then voted by the second assembly (Corps législatif) on the basis of the speeches given by the speakers of the Government and of the Tribunat.

The discussion was very important and animated.
It is significant to observe that the final text promulgated by the law of March 21, 1804 merged the 36 single laws with which the single parts of the Code had been issued gradually.
Theoretical background of CC

1 - As we have said, Domat and Pothier influenced the French legal culture of the 18th century by defining the standard methodological approach for legal scholars and the legal profession until Napoleon’s reform of university education in 1806.

They both considered natural law, French customary law, Roman law, and royal ordinances as different parts of a common body of laws that have to work together in order to set the machinery of the state in motion.
Domat upholds an intuitive natural-law theory based on God’s cosmological plan, and so he rejects the modern natural-law tradition of Grotius, Hobbes, Pufendorf, and Locke. Domat’s idea of the legal system is essentially pre-modern, although inspired by Descartes’ geometrical method.

Pothier, by contrast, integrated the modern natural-law tradition into the body of civil law by emphasizing the continuity between French positive law, Roman law, and the principle of secular natural law set forth by Grotius and Pufendorf.
2) Natural law principles are a further basis of the Code Civil, which strongly influenced the codification process especially after the French Revolution. In fact, the revolutionary movement was decisive not only in giving impetus to legislative reform but also in popularizing the natural-law lexicon.

In 1789, Abbé Sieyes observed that a set of ideas and principles that had hitherto been of no interest, were now becoming familiar to everyone. So it was with the idea that legislative power belongs to the nation and not to the king, that citizens are equal and have equal rights, and that the nation needs a written constitution in which the rights of citizens are enshrined, and through which they are protected from encroachment by external powers (Sieyés 1789).
3) Legislation as Education to Social Morality

According to the *Idéologues* movement a code of laws is the means by which to correct human nature on the basis of a perfect rational plan. This plan is provided by the science of government (by politics), a science to which belongs the science of human beings (Hélvetius, d’Holbach, Morelly, Destutt de TRacy.)
Jean-Étienne-Marie Portalis
1748-1807
The lawyer and philosopher Portalis had been exiled in Germany between 1797 and 1799. He returned to France after Brumaire.

The science of legislation is by Portalis derived not from NL theory but from the features of the land and the population. This was entirely in keeping with Montesquieu’s major work, *Spirit of Laws*, which in fact, in the second half of the 18th century in Europe, was regarded as a veritable “encyclopaedia of human knowledge.”
Portalis argues that the Civil Code does not need to invent a new civil society but rather to give stability to the existing one by “maintain[ing] whatever does not have to be necessarily destroyed”. The code has only to align with the peculiar attitudes of the nation, in harmony with the spirit of the time, and in so doing it will improve the habits, morality, and welfare of the population.
These general principles account for the method adopted by Portalis’s commission in drafting the Code Civil. In fact, the French Civil Code is a selection of French customary law, Roman law, and Revolutionary legal provisions, collected into a single code and unified by a common language and disposition. Natural law did not really contribute any legal provision to the code but rather gave a new sense to codification in general, which was now conceived as a means by which to establish a unified civil society.
In summary, the Code Civil of 1804 was not just a consequence of the French Revolution, or just a reactionary instrument by which to govern the masses, or just a legislative compromise between past and future.

Rather, one can appreciate from its philosophical background that these elements were all in the code, coexisting as aspects of a common historical and conceptual development.