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

Academic year 2018-2019
The Code Civil is very innovative but nevertheless largely draws on existing law. As Portalis says in his *Discourse préliminaire* to the Code, not everything that is ancient needs to be rejected: “All that is old has been new. It is most essential to imprint upon the new institutions a certain character of permanence and stability that will allow them to become old”.

Portalis acknowledges that law results from historical evolution. So, he rejects the intellectual claims of rationalist constructivism.
The French drafters didn’t include any preamble containing theoretical remarks, references to natural-law principles, general rules of government, rules of procedure, and so forth. They considered the Civil Code as part of a more comprehensive codification process involving all areas of the law of the state, and based on the constitutional laws of the state (Maleville 1805, I).
The CC was regarded as a tool for regulating private relations among citizens, and in this way the code introduced a model that would be adopted by the civil-law systems right up to the present day.

In this case, the French Legislator didn’t follow Portalis’ vision. Indeed, the latter presented a wider preamble containing general legal definitions and classifications that were considered redundant during the revision process and were thus stricken out.
Portalis wanted to introduce “natural reason” as the basis of positive law. Portalis cited NL as a criterion of legal interpretation, too. In fact, under Article 4 of the code, the judge was bound to pass judgment even if “the law is silent, obscure or not enough to regulate the case.” Article 11, Title 5, of Portalis’s preamble, stated that “in civil matters, when the law is vague the judge becomes a minister of equity. Equity is the return to natural law, or to the recognized uses, when the law is silent.”
“Equity – Portalis said – is an appeal to NL in case positive law is silent, contradictory or obscure”

But this last article was stricken out by the State Council in the final version of the CC. Finally State Council approved a very short Preliminary Title “Of the publication, effect and application of the laws in general” formed by only six articles.

State Council (and Napoleon) stricken out Portalis’ proposal because they feared the return to the ancient regime arbitrary power of the judges (arbitrium iudicis)
As we have seen, the Enlightenment philosophers (Montesquieu, Voltaire, Beccaria...) and the French revolutionnaires were against the power of judges to give the rule for the different causes. They criticized the role of judges as “legislators”. Only the sovereign (monarch or people, is the same) can determine the general rules (laws). If the judges could interpret law according to their knowledge, they would invade legislative power that belongs exclusively to the political sovereign.
Montesquieu = judge “bouche de la loi”
Beccaria = the judge has to make simply a judicial syllogism = judgment as mechanical operation
Revolutionnaires = 1) référé legislatif, 1790 (when the law is obscure or inadequate, the judge has to ask to Legislator how to interpret law or to establish a new rule); 2) Tribunal de Cassation (1790) = has to determine if the judges have correctly applied the law
Legicentrisme and “myth of the right law” (product of the general will)
Law = rational, general, right
We can see the outcome of this vision also in the CC.

Art. 4 (Preliminary Title): “The judge who shall refuse to determine under pretext of the silence, obscurity, or insufficiency of the law, shall be liable to be proceeded against as guilty of a refusal of justice” (déni de justice).
Art. 5 (Preliminary Title): “The judges are forbidden to pronounce, by way of general and legislative determination, on the causes submitted to them”. These two articles want to reaffirm the primacy of law and of the legal interpretation. The judges have to find always a solution within the code. They cannot refuse to do it. So, in the outcome, the judge is bound to decide the cause solely on the basis of the legal resources provided by the code. The code is now the “enclosure” within which judges have to act.
The Code Civil is divided into three books: (1) On Persons; (2) On Goods and Different Modifications of Property; (3) On Different Ways to Acquire Property. This division corresponds to the distinction, in Roman law, among personae, res, and actiones, a distinction that traces back to Gaius’s Institutiones. The French drafters took up this classical organization of legal materials by way of signalling a continuity with the European legal tradition, but in doing so they wound up stripping this tradition of its original meaning, because they were
proceeding on the basis of Pothier’s Treatises of civil law.

In reality, the CC is quite unsystematic. The third book in particular is much larger than the other two and is “a sort of a mixed bag where we can find, pell-mell, successions, donations, the general theory of contracts, delicts and quasi-delicts, matrimonial regimes, special contracts, suretyship, prescription and possession” (Bergel 1988, 1085). And the second book seems no less incoherent.
So, it is better not overestimate the CC tripartite division according to Gaius’s schema. Probably the weakness of the systematic plan of the code reveals that the essential aspect was not the order of ideas but the political function that the code pursued.

Above all, the function of modern codification was to affirm the political supremacy of sovereignty and of legislative power, so as to unify the state and construct a civil society of free and equal individuals.
The two innovative pillars of the French CC are usually considered property and contractual autonomy, whereas the conservative and authoritarian conception of family law that characterizes the code represents a step backward with respect to the revolutionary legislation on the relation between husband and wife, as well as on divorce and parental authority, and, more generally, on the condition of women.
The famous Articles 544 and 545 of the Code Civil state:
544. Property is the right to enjoy and dispose of things in any way you wish with absolutely no limitation, provided they are not used in a way prohibited by the laws or statutes.
545. No one can be compelled to give up his property, except for the public good, and for a just and previous indemnity.

Property was regarded by the drafters as “the universal soul of any legislation”. “All institutions have to guarantee property, all governments have to pursue this special and unique end” (Cambacérès)
Property in art. 544 reunites in the same person the medieval model of *dominium* divided into *directum* (the ‘real’ right of property) and *utile* (the real economic and social use of a property).

Property is considered, as to its origin, an absolute right that admits no interference; but as to its function, this right can be claimed by the state for the purpose of ensuring the common welfare. From this point of view, therefore, property does not impose a limit on the action of government but does quite the opposite. This ambiguous characterization of the right
to property in the French code—which here, too, reflects the two sides of the modern concept of liberty—makes regulation by law compatible with different social contexts, constitutional frameworks, and political regimes, and this contributes to explain the code’s longevity.

Something similar can be observed in regard to the regulation of contracts. Article 1134 of the Code Civil states that “legally formed agreements have the force of law over those who made them.”
This provision is usually considered by legal scholars as affirming the principle of contractual autonomy, a benchmark of the modern idea of liberty affirmed by natural-law theory. The French CC was in this sense designed, through Article 1134, not so much to uphold contractual autonomy in any strict sense as to make it possible to control and organize contractual agreements and to closely regulate contracts (Halpérin 2001, 33).
In post-revolutionary France, however, these institutions came to be embedded into a new conceptual framework that endowed them with a new function within the state: even the institutions of the past and the legacy of Roman law and French customary law were conceived as a means by which the individual could become a genuine citizen, and could thus learn to be free.
The most relevant technical innovation of the Code Civil consists in unifying the criteria of legal personhood under the state: each citizen is considered in the abstract as a subject of legal rights and duties independently of his or her station in life, that is, independently of social status and personal circumstances. This innovation radically simplifies the structure of the legal system: regulation by law is no longer organized on the basis of the various activities and relations (as by ALR in Prussia); the system is instead now based on the equal legal status and personality recognized for all citizens, and then on the relations that each citizen
brings into being through the forms typified by the legislator.

Positive law makes each natural person equal to others, since everybody is equally subject to the law within the state: the status of citizen coincides with a person’s subjection to the law, and hence with the independence of will that positive law guarantees. **It turns out that legality, equality, and liberty are mutually connected from a conceptual point of view.** Legality is a necessary and sufficient condition of liberty, and this condition is satisfied if those subjects to the law are equal. At the same time, human beings are equal in the state if, and only if, positive law qualifies them as such, that is, if the law makes them free.
At the end of the 18th century in France, positive law (la loi) was conceived as a means by which to definitively release citizens from the bondage of the ancien régime and to harmonize their personal activities so as to ensure their common welfare. Individual rights played a derivate and residual role in the legal system: The French Civil Code does not assume a set of natural or fundamental rights limiting the state’s legislative power, nor does it assume that...
government is subject to the principle of legality. Stated otherwise, the natural rights of liberty and equality are not considered in the code as forming the basis of law and government. Quite the contrary: Citizens have any individual rights only insofar as positive laws attribute such rights to them.

**Law-centered / State-centered vision**

In this sense, positive law is the means given to government for constructing a civil society composed of free and equal individuals; it is not a system of rules aimed at protecting the individual’s freedom and equality from State’s encroachment
Why the French CC of 1804 is unanimously considered the best achievement of the science of legislation in the modern age?

Success helps a lot.

This judgment is justified by the fact that this code has known an extraordinary success throughout the world over the last two centuries: it has been adopted in many European countries and been taken as a model of civil codification in America, Asia, Middle East, Africa, among other places.
Awareness and myth: napoleonic CC, allegory of Jean Baptiste Mauzaisse (1833).
Tomb of Napoleon, *Dome des invalides* (1840-1861)
Three interpretations of the French code that traditionally stand in competition to one another.

1) The French CC was the final product of the French Revolution (Halperin): it brought into civil law the principle of freedom and equality affirmed by the Declaration of the Rights of Man and Citizen of 1789, and it put individual freedom at the core of the legal regulation of property, contracts, and liability;

2) The French CC was the legal tool serving to carry out Napoleon’s authoritarian project in society: It unified the civil law system to construct a disciplinary centralized state; it enforced a reactionary regulation
of marriage, parental authority, and property, and it subjected individual property to the principle of social interest. All this on the basis of the pessimistic anthropology that characterized French philosophical culture after the "Terror period" (Martin).

3) The French CC amounted, in all respects, to a "law of compromises": a technical compromise between legal regulation of northern and southern France, the former based on custom and the latter on Roman law; a political compromise between the principles of the revolution and the legacy of the ancien régime; and a philosophical compromise between the idea of law as
a guarantee of individual freedom and the idea of law as a means by which to educate individuals in freedom.

As we have said, all these elements contributed together to the success of the CC. As well as all very complex works, we can find many levels of interpretation.
Finally, N.B.

CC was the “centre” of a new, modern, successful codification’s system. Napoleon and France were the makers of the first and one of the most important codification process in our time. In few years they codified all legal order:
- 1806, Code of civil procedure
- 1807, Commercial Code
- 1808, Code of criminal procedure
- 1810, Criminal Code
As we have seen, Maria Theresa commissioned work on codification as early as 1753. The first draft was completed in 1766 (Codex Theresianus), but it was not appreciated. Karl Anton von Martini (1726-1800) criticized this draft because too little inspired by NL. Only a part of this work became in 1786 the Josephinische Gesetzbuch. Martini’s Project of 1794 (applied only in Galicia, today a region between Poland and western Ukraine)
They all had an equal influence on the history of Austrian codification, setting the stage for the future ABGB.

Only in 1811 Austria had a CC as whole, after Prussia and France. 

ABGB *(Allgemeines Bürgerliches Gesetzbuch)*  =  
*General Civil Code of the German Hereditary Territories of the Austrian Monarchy*

It is a modern code which, among other things, abolishes legal discrimination between the different estates.
TWO MAINS INFLUENCES AS BACKGROUND OF ABGB

1) Catholic Natural Law and Legislation

don Martini contribution to the history of natural law and to the science of legislation can be said to lie in his effort to reconcile modern natural law with Christian theology. Martini tries to integrate into modern natural law the theological tradition of Second Scholasticism—with the idea of reason as a source by which to gain knowledge of the good—as can be appreciated as well from
Martini’s frequent quotations of Francisco de Vitoria, Petrus Fonseca, Domingo de Soto, and Francisco Suárez, which is also a way of criticizing Thomas Aquinas. But in making this integration Martini models the Christian theological tradition on the basis of both Pufendorf’s natural law and Wolff’s systematic method.

2) Zeiller’s Reception of Kant’s Philosophy of Law
Franz Edlen von Zeiller was professor and the head of the legislative commission charged with drafting the ABGB.
Zeiller’s view that natural law is deeply indebted to Kant’s critical approach for the important achievement of clarifying and singling out the fundamental principles of natural law.

Zeiller follows the general premises shared with the Kantianism of the late 18th century and Martini’s design of NL according to which individuals have an innate right to personality and freedom consisting in “the right to have rights”.

But it is the positive legislation of the state to translate the principles of pure practical reason into positive legal provisions. So, the natural rights may be modified or suspended by the sovereign based on the principles of legislative and political prudence.

This justifies incorporating many feudal forms and institutions into the ABGB, and it explains how the code might provide for personal differences all the while (and without contradiction) affirming the principle of unified legal personality.
In order to keep an open door to the past without rejecting the natural-law principles of liberty and equality, the Austrian drafters used the legislative techniques of cross-reference and hetero-integration, with many codified legal provisions either (a) making explicit reference to political laws (i.e., the sovereign’s laws) for the regulation of some key areas of social relations or (b) making an implicit exception to a rule of law.
The legislator becomes in this sense the sole administrator of individual rights and duties and is accordingly entitled to restrict or expand them depending on historical conditions and events. At the same time, while individuals are considered to be free human beings, their liberty is subject to the guardianship of the state, which may not regulate every aspect of their social life but is nonetheless empowered to suspend legality and the exercise of freedom whenever it deems this necessary.
STRUCTURE
The Austrian General Civil Code of 1811 consists of an **Introduction** and three sections respectively entitled “On Rights in Personam,” “On Rights in Rem,” and “On the Common Determination of in Personam and in Rem Rights.” This distribution of legal materials recalls, here too, Gaius’s triad (*personaes*, *res*, *actiones*) and is in this respect more in keeping with the system of Roman *Institutiones* than is the Code Civil or the ALR. The normative content of in personam and in rem rights, however, is strongly influenced by Martini’s and Zeiller’s systems of
natural law, as well as by the tradition of German feudal and customary law. **ABGB is formed by 1502 articles.**

**INTRODUCTION** = very important because sets out in particular a thorough **regulation of legal interpretation** that became **paradigmatic** in European legal systems, together with Savigny’s theory of interpretive canons, and that still influences contemporary legal dogmatics.
According to §§ 6–8 and 10–12 of the ABGB, legal provisions ought to be interpreted according to their literal meaning (plain meaning) and the legislator’s intention (legislative intent). If these criteria do not suffice to determine the content of legal provisions, then the judges must resort to analogical reasoning, that is, they must look to either other legal provisions regulating similar cases or to the general principles of law.
And, finally, “if the legal case remains dubious,” the judges must consider the context of the case “in the light of the natural principles of law.”

Here we can see one of the most relevant differences with French CC. In France Portalis’s proposal about NL/Equity had been stricken out. In Austria ABGB introduced forms of hetero-integration by way of customary law and provincial legislation.
The task of ensuring the unity of the legal system was thus entrusted to the judiciary. The judge is not a “judicial machine,” Zeiller observes, but is instead bound by positive law in the sense of being obliged “to penetrate the spirit of law” for the purpose of defending the inviolability of the sovereign’s will and of making it effective by application.
FIRST PART of ABGB: devoted to “personality rights,” which in Zeiller’s system of natural law are understood as rights and duties that people have on account of their being rational human beings.

This way of framing the first part of the code introduced into the legal system the principle of a unified legal personality. All individuals are equal in the eyes of the law, in the sense that they are equally capable of having the rights and duties set forth in a legislative provision (ABGB, § 18).
But, at the same time, abstract legal capacity did not prevent different personal positions from being regulated in different ways by positive law, precisely as was the case in the old rank society (ständische Gesellschaft) that still survived in the Austrian territories in the early 19th century. In fact, Article 13 states that “privileges and exemptions that are attributed both to single persons and social bodies are to be considered the same as all other rights, as long as political laws do not prescribe something different.”
ABGB however don’t follow ALR model regulating a great series of different statuses. ABGB is based on a legislative technique whereby the civil law eliminates the plurality of personal statuses, along the lines of modern natural law theory.

This is not to say, however, that personal differences altogether disappeared: they were simply “transferred” to the goods and to the way in which goods can be used.
For example, the right to property is not just defined by the ABGB as the free use of a thing (ABGB, § 354), along the lines of the French Civil Code, but is in the first instance defined as the “belonging” of a type of good to somebody (ABGB, § 353). This logically enables the legislator to distinguish between property understood as the substance of a good (dominium directum) and property understood as the products or use deriving from a good (dominium utile) (ABGB, § 357), and to regulate the property regime applicable to “fiefdoms” and “feudal goods” (ABGB, § 359).
What made it possible to coherently include these legal institutions of the *ancien régime* into the code was that the content of property rights was based in the code on the rationality of the relation between a type of good and the person to whom the good belongs.

In summary, the ABGB outlines an original way to build up civil society by means of positive law. The Austrian legislators sought to create through the code a society of free individuals, that is, of persons who behave in accordance with the principles of universal reason.
But for this individuals have to be guided to freedom by the state, the existence of which requires that personal natural rights be limited, personal differences be acknowledged, and many legal institutions of the ancien régime be preserved. Moreover, positive law and codification only establish the general principles of law, which can be specified by political and local laws, that is, by authority of the government.
The Kantian principle of autonomy was thus interpreted by the Austrian legislators as the basis of a model of society in which liberty was something that law and government had to accomplish by placing limitations on equality and individual free will. The boundaries of such a limitations, however, were not dependent on the law itself but on the “prudential” choices of political power.
SOME FINAL REMARKS ABOUT the three models of civil codification: ALR (1794), CC (1804), ABGB (1811)

They mark the passage from the ancien régime to bourgeois society and the liberal state, but we can now go back to the main promises of the age of codification and see whether these promises were kept. Did the codification of law bring into effect the principles of liberty; did it ensure that everyone be treated equally; did it ensure the certainty of law and the coherence of the legal system; and did it enable the state’s unification
and the development of a free civil society? In other words, did the code actually transform the legal system and society, or is this rather a “myth” (Grossi 2005, 85ff.) conceived by legal positivism in the 19th and 20th centuries, a myth used to this day to justify the legal enforcement of political decisions, and which continues to exert a strong influence on legal interpretation and adjudication in civil-law countries?
As we have seen, there is no single answer that can be given to these questions, the reason being that the modern codification of law was not a unitary process. The Code Civil, the ALR, and the ABGB had quite different theoretical backgrounds, outlined different models of civil society, ascribed different meanings to liberty and equality, gave different interpretations of the past and its legacy, and were drafted using different legislative techniques. What they had in common was their inheritance of RL, which provided the normative
devices of civil regulation; they also took up and shared the method of NL, a method on which basis codified legal materials were organized; and, finally, they shared the principles of liberty and equality, regarded as the values guiding the entire modern codification process.

As we will see, these elements distinguish the “NL codes” from the later models of European codification, such as the German Civil Code of 1900 (BGB). In fact, the BGB was the main legislative product of the German Pandectistics
a conceptualist approach to law and legislation which rejected the codification models based on NL.

The study of the modern codification process shows that a code is neither a necessary nor a sufficient condition for achieving principles as liberty, equality and son, but rather gives a legalistic interpretation of them serving to subject citizens to a common power and to unify the state and found a civil society.