

RESEARCH ARTICLE

Legal-Technical, Social and Political Objectives of The Codification of Legislation

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Abstract

This article analyses the objectives of the codification of legislation on the basis of the scholarly views of foreign jurists, treating them as a system of three interrelated dimensions — legal-technical, social and political. The legal-technical dimension is disclosed through the ideas of Jeremy Bentham, Anton Friedrich Justus Thibaut, Friedrich Carl von Savigny, Jean-Étienne-Marie Portalis, Konrad Zweigert, Hein Kötz and Alan Watson, and encompasses the systematic arrangement of legal material, the unification of legal terminology, the elimination of internal contradictions, and the technique of transferring and adapting legal institutions. The social dimension is examined on the basis of the works of Roscoe Pound, Gustav Radbruch, H. Patrick Glenn, Gunther Teubner and René David, in which codification appears as an instrument of legal certainty, social stability, the institutionalization of a society's self-understanding, and legal education. The political dimension is revealed through the views of John Austin, Jean-Louis Bergel, Franz Wieacker and Peter Stein, where codification is interpreted as a means of centralizing state power, consolidating national unity and securing the internal and external legitimacy of the state. Separate attention is devoted to the historical formation of the idea of codification, to the doctrines of Ihering, Kelsen, Hart, Weber and Luhmann, and to such contemporary tendencies as decodification, recodification and the discussion surrounding a European civil code. The author concludes that an approach confined to the legal-technical aspect alone is incapable of revealing the full essence of codification, and that the task of the codifier consists in attaining a balance among the three groups of objectives.

KEY WORDS

Codification, legislation, legal technique, systematization, code, legal certainty, legal tradition, sovereignty, national unity, comparative law, legal transplants, decodification, recodification, soft power.

INTRODUCTION

As one of the most effective means of improving the legal system, codification has long stood at the centre of legal scholarship. Codification is not merely a technique for systematizing legal norms; it is also a complex socio-political process that reflects the stage of development reached by society and the state. In foreign legal scholarship this question has been investigated through differing approaches: some

scholars have treated codification as a purely legal-technical phenomenon, while others have interpreted it as a process inseparably bound up with social and political factors. The present article analyses the three principal objectives of codification — its legal-technical, social and political aspects — on the basis of the scholarly views of foreign authors.

The purpose of the present article is to systematize theoretically the objectives of codification as they are reflected in foreign legal scholarship, and to reveal the interconnection among the legal-technical, social and political groups of objectives. The methodology of the study rests upon the historical-legal, comparative-legal, formal-legal and systemic-structural methods of analysis. Taken together, these methods make it possible to trace the evolution of the doctrines of codification, to compare the approaches of different legal schools, and to assess the practical significance of those approaches for contemporary lawmaking.

Historical formation of the idea of codification. The idea of codification has traversed a long path of evolution in the history of law, and the legal-technical, social and political objectives now ascribed to it took shape gradually in the course of that path. Henry Sumner Maine, examining the transition of ancient societies from customary law to written law, regarded the appearance of the first codes as a turning point that freed law from the monopoly of a narrow priestly or aristocratic stratum and rendered it publicly accessible [16]. Seen in this light, even the earliest codes performed simultaneously a technical function (the fixing of norms in written form), a social function (making the law knowable) and a political function (concentrating the authority to declare what the law is).

In his special study of the concept of the code in Western Europe, Jacques Vanderlinden demonstrated that the term “code” has borne different meanings in different epochs: at times a simple compilation of existing texts, at others an exhaustive act reworked in substance and arranged as a system [18]. This conclusion is of importance because the legal-technical objectives of codification cannot be assessed in the abstract, in isolation from the meaning attached to the code in a particular historical context. Raoul van Caenegem, in turn, connects the codification movement of the modern age with the growth of state power and the decline of the *ius commune*, emphasizing that codification simultaneously unified the law and nationalized it [17].

Giovanni Tarello analyses the codifications of the eighteenth century as a product of the legal culture of the Enlightenment, within which the demands for the clarity, brevity and completeness of law bore an ideological rather than a purely technical character [19]. Jean-Louis Halpérin, examining the history of European law from the middle of the eighteenth century onwards, shows that each wave of codification

coincided with a period of political transformation — revolution, the formation of national states, or a change of regime [20]. Historical research thus confirms that the technical, social and political objectives of codification have at all times been realized in their interconnection.

Legal-technical objectives of codification. Modern conceptions of the legal-technical essence of codification trace their roots to the work of Jeremy Bentham. Substantiating the view that law must be presented in the form of a single, internally consistent and comprehensible system, Bentham advanced the idea of the “pannomion” — a unified code embracing all branches of law [1]. In his opinion, the scattered, mutually contradictory and indeterminate legal customs of the common law had to be replaced by a body of written laws that was precise, logically constructed and comprehensible to every citizen.

The German jurist Anton Friedrich Justus Thibaut likewise occupies an important place in the analysis of the technical aspects of codification. Substantiating the need to create a unified civil code for Germany, he emphasized that the fragmentation of legal norms gives rise to practical difficulties in the application of law [4]. Friedrich Carl von Savigny, who objected to this position as a representative of the historical school, defended the natural development of law through the “spirit of the people” (*Volksgeist*) and proposed that artificial codification be approached with caution [3]. This Thibaut–Savigny debate remains to this day the principal theoretical source for understanding the legal-technical necessity of codification.

The French jurist and author of the Napoleonic Code, Jean-Étienne-Marie Portalis, defined the technical tasks of codification with precision in his celebrated “Preliminary Address” (*Discours préliminaire*): simplifying the laws, bringing them into a single system, eliminating contradictions and ensuring stability in the application of law [5]. Portalis regarded codification as the task of finding a balance between protecting the law from excessive detail and leaving the judge the freedom necessary for interpretation.

In modern comparative law, Konrad Zweigert and Hein Kötz systematize the technical functions of codification in their fundamental works as follows: ensuring the internal consistency of norms, unifying legal terminology, and eliminating the gaps between lawmaking and law-enforcement practice [9]. Characterizing codification as the “architecture” of the legal system, they emphasize that its

principal technical task consists in bringing legal material into a coherent and predictable form.

In his theory of legal transplants, Alan Watson analyses the process of codification as a technique for transferring legal institutions from one system to another. In his view, codification is frequently not the distinctive product of national legal traditions, but rather a process of systematically adapting institutions borrowed from other legal systems, which lends particular significance to the technical-methodological side of codification [10].

A special place in the development of the technique of codification belongs to Rudolf von Ihering's doctrine of legal constructions. Analysing the "natural-historical method" of Roman law, he emphasized that legal material must be reduced to abstract legal constructions and concepts, since only in that form can it be surveyed as a whole, taught, and applied without contradiction [21]. This approach became the theoretical foundation of the Pandect system, in which a general part containing the common concepts precedes the special parts — a structural solution that remains in use in the codes of many states to this day.

Hans Kelsen's pure theory of law made it possible to substantiate the technique of codification from the standpoint of the hierarchical structure of the legal order. Treating the legal system as a stepped structure of norms in which the validity of each norm is derived from a higher norm [22], this theory furnishes the codifier with a clear criterion: a codified act must occupy a precisely defined place within that hierarchy and must not contradict the norms standing above it. Herbert Hart's doctrine of the rule of recognition serves the same practical end, since a code, as an authoritative and publicly accessible text, considerably simplifies the identification of valid norms and reduces disputes as to the sources of law [23].

Assessing the contemporary significance of the idea of codification, Reinhard Zimmermann emphasizes that the principal technical value of a code consists not in the completeness of its text but in the unity of the conceptual system and of the scholarly doctrine that forms around it [31]. In his view, a code that is not supported by a developed doctrine and by consistent terminology rapidly loses its systemic character under the pressure of numerous amendments. This observation is directly bound up with one of the central legal-technical objectives of codification — the securing of terminological unity.

Social objectives of codification. The work of the American jurist Roscoe Pound is of major importance for understanding the social essence of codification. As the founder of the school of "sociological jurisprudence," he defined law as an instrument of social control (social engineering) and saw codification as a mechanism necessary for balancing the various interests present in society and ensuring social stability [6]. In Pound's view, a codified legal system enables members of society to know their rights and obligations in advance, which in turn makes social relations predictable.

In his philosophy of law, Gustav Radbruch interprets codification as the practical expression of the principle of legal certainty (Rechtssicherheit). In his view, written and systematized law performs the function of a social guarantee, enabling ordinary citizens to defend their rights and to exercise control over the activity of state bodies [7]. Radbruch considered the balance between legal certainty, justice and expediency to be the fundamental social task of codification.

In his work "Legal Traditions of the World," H. Patrick Glenn examines codification as a form of institutionalizing the social memory of various legal traditions. In his view, a code is not only a normative instrument but also a means by which a society understands itself and consolidates its shared values [12]. Through codification, society formalizes its social structure and its outlook on family, property and other relations.

In his theory of legal autopoiesis, Gunther Teubner analyses the codified legal system as a self-organizing subsystem of society. In his view, codification, by conferring relative autonomy upon the legal system, makes it possible both to adapt that system to social change and at the same time to preserve its stability; the tension between these two functions constitutes the permanent social problem of codification [13].

From the standpoint of comparative law, René David assesses codification as an instrument of legal enlightenment and of raising the legal consciousness of citizens. In his view, a clear and comprehensible code serves to realize the citizens' right to legal knowledge, to reduce legal nihilism, and to shape a culture of legality within society [11].

Max Weber's sociology of law is of fundamental importance for an understanding of the social function of codification. Analysing the process of the rationalization of law, he characterized systematic, logically formalized and generally applicable written law as the highest expression of "formal-

rational” domination, and regarded it as a precondition of the predictability required by a market economy and by bureaucratic administration [24]. From this standpoint, the social objective of codification consists in rendering the outcomes of legal decision-making calculable for economic and social actors.

Developing the systems-theoretical approach, Niklas Luhmann examines law as a self-referential communicative system whose function is the stabilization of normative expectations over time [25]. Codification, from this perspective, is one of the means by which the legal system fixes its own boundaries and reduces the complexity of social communication. The views of Luhmann and of his follower Teubner make it possible to interpret the social objective of codification not merely as a matter of convenience for citizens, but as a mechanism sustaining the very capacity of society to function.

Political objectives of codification. The work of John Austin occupies a special place in the analysis of the political nature of codification. Defining law, on the basis of the theory of legal positivism, as the command of the sovereign, he viewed codification as a means by which state power consolidates and centralizes its own sovereignty [2]. In Austin’s view, a unified codified system of legislation eliminates the competition of local, feudal or ecclesiastical legal orders and secures the monopoly of state power.

The theoretical preconditions of the political dimension of codification are also connected with Charles-Louis Montesquieu’s teaching on the separation of powers. In emphasizing that the judge should be no more than the mouth that pronounces the words of the law, and that laws must be drafted in a simple style, without superfluous elaboration [26], Montesquieu in effect formulated the political programme of codification: the subordination of judicial discretion to a legislative text. The French codification of the beginning of the nineteenth century became the direct practical embodiment of this idea.

In French history, the adoption of the Napoleonic Code is the classic example of codification serving a political purpose. Analysing this process, the French legal historian Jean-Louis Bergel emphasizes that codification was a political instrument for consolidating revolutionary ideas — legal equality, the abolition of feudal privileges and national unity [15]. In Bergel’s view, the code was not only a legal but also a symbolic-political document, which served to strengthen the legitimacy of the new state order.

In his studies of the history of European private law, Franz Wieacker links codification to the process by which national statehood was formed. In his view, the wave of codification observed in nineteenth-century Europe (France, Austria and subsequently Germany) formed a constituent part of a political project aimed at creating a single legal space within the territory of the national state, overcoming regional fragmentation and strengthening central authority [8].

In his theory of legal evolution, Peter Stein examines codification as a means of reinforcing the control of state power over lawmaking. In his view, in a codified legal system the role of judicial practice and customary law is restricted, while the legislative power is consolidated as the sole source of law, and this exerts a direct influence on the balance of powers [14].

In addition, Zweigert and Kötz also explain the political function of codification as raising the international standing of the state and transforming its legal system into a model capable of being “exported” to other states. They emphasize that the French and German codes exercised an influence on the legislation of many countries of the world, and that this constituted one manifestation of the soft-power policy of the codifying state [9].

The political nature of codification is manifested with particular clarity in the experience of the common-law states. Studying the fate of the idea of codification in the common-law world, Gunther A. Weiss shows that the codification projects of David Dudley Field in the United States, and those of the English reformers of the nineteenth century, met with resistance not for technical but for political reasons: the judicial corporation and the legal profession perceived codification as an encroachment upon their own authority [28]. John Merryman likewise emphasizes that in the civil-law tradition the concept of the code is bound up with the ideology of legislative supremacy, whereas in the common-law tradition even a consolidating statute continues to be interpreted against the background of judicial precedent [27].

Decodification, recodification and contemporary tendencies. In the second half of the twentieth century the classical understanding of codification came up against serious challenges. Natalino Irti described this state of affairs by means of the concept of the “age of decodification,” demonstrating that the appearance of a multitude of special statutes outside the civil code — governing labour, housing, consumer protection, agrarian and corporate relations —

deprives the code of its former position as the centre of the legal system [29]. Decodification is hazardous above all from a legal-technical standpoint, since the systemic quality, the terminological unity and the internal consistency attained through codification are gradually eroded.

Generalizing the experience of contemporary codifications, Rémy Cabrillac distinguishes between codification carried out by way of substantive reform and codification "at constant law" (codification à droit constant), in which existing norms are merely gathered together and systematized without alteration of their content [30]. The second form serves predominantly legal-technical and social objectives — the ordering of scattered legislation and the facilitation of access to it — whereas the first is invariably bound up with a political decision as well. This distinction is of practical significance in the planning of codification work, since the two forms demand different resources, different procedures and different criteria of evaluation.

A further contemporary tendency is recodification, that is, the fundamental reworking of codes already in force. The new civil codes adopted in the post-socialist states, the reform of the French law of obligations, and the recodification processes carried out in the states of Central Asia demonstrate that codification is not a single act but a continuous process. Within such processes the political objective (the consolidation of a new economic and social order) and the legal-technical objective (the elimination of collisions accumulated over decades) are pursued simultaneously [20; 30].

Finally, the discussion concerning the creation of a European civil code has raised an entirely new question: is codification possible in the absence of a single state? The proponents of this project rest their case primarily on legal-technical and economic arguments — the unification of terminology and the reduction of transaction costs [32] — while its opponents point to the absence of a common political will and of a shared legal culture. This debate confirms once again that the technical, social and political objectives of codification cannot be separated from one another.

In this connection the following measures appear expedient: carrying out, before the drafting of a codified act begins, a preliminary scholarly analysis establishing which of the three groups of objectives is dominant in the given case; consolidating a unified system of legal terminology binding upon all codes; conducting periodic monitoring of the amendments introduced into codified acts so as to prevent the

erosion of their systemic character; and drawing, in the course of this work, upon foreign codification experience while taking into account both the particular features of the national legal system and the proposition, substantiated by Watson, that borrowed legal institutions require adaptation [10; 30].

Conclusion. In foreign legal scholarship, the process of codification is explained through a system of three interrelated objectives. The legal-technical objective is directed at systematizing legal material, eliminating contradictions and simplifying law-enforcement practice, and in this respect the views of scholars such as Bentham, Portalis, Zweigert and Kötz constitute the fundamental theoretical foundation [1; 5; 9]. The social objective views codification as an instrument for stabilizing relations among the members of society, ensuring legal certainty and institutionalizing the self-understanding of society; in this direction the studies of Pound, Radbruch, Glenn and Teubner acquire particular importance [6; 7; 12; 13]. The political objective, in turn, interprets codification as an instrument for centralizing state power, consolidating national unity and securing the internal and external legitimacy of the state, and here the views of Austin, Wieacker, Bergel and Stein are of special significance [2; 8; 14; 15].

It must be emphasized separately that these three groups of objectives do not always coincide; on the contrary, a conflict frequently arises among them in practice. The political aim of adopting a code within a short period may come into conflict with the requirements of legal technique; the demand for the social accessibility of the text may conflict with the need for a high degree of abstraction; and the striving for stability may conflict with the necessity of adapting to social change [29; 31]. For this reason the essential task of the codifier consists in attaining a reasonable balance among these objectives rather than in absolutizing any one of them.

Thus, regarding the process of codification solely as a legal-technical phenomenon cannot disclose its full essence. The research of foreign scholars demonstrates the need to analyse the multifaceted — technical, social and political — aspects of codification in their interconnection. Such an approach serves to enrich further the contemporary theoretical-legal research devoted to the codification of legislation.

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