Codification in a Period of Transition

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INTRODUCTION

Codification is considered to be an important instrument in fostering the development and transition of countries that belonged to the former Soviet Bloc after World War II. As these central and eastern European countries transition from planned economies into market economies at the end of the twentieth century and the beginning of the twenty-first century, codifica-

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tion is a subject of discussion again. This Article, focusing mainly on civil and commercial law codification, analyzes whether codification is an effective instrument for transitioning countries and questions the real role of codification.

Legal rules of former socialist countries were never identical; however, these countries were considered to belong to one "legal family" on political and ideological grounds.[1] Socialism disappeared after 1990. However, previous similarities among these countries have led to similar problems in periods of transition.

I. OBJECTIVE OF CIVIL-LAW CODIFICATION IN COUNTRIES OF TRANSITION

The transformation of the political and economic system in central and eastern European countries has no theoretical foundation. One possible theory is the so-called big bang — a fast, radical change of the system.[2] A contrary view opts for gradual adjustment — several step changes emphasizing the complex institutional character of the process of transition.[3] Some Western advisors argue that establishing institutions is second priority to setting the rules of the game and suggest adopting an entire civil code like that of Finland or the Netherlands. Other experts suggest relying on a common-law-like process.[4]

Several factors determine what legal development process should be chosen. One factor is the concept of law itself. Several observers have noted that law is considered an instrument of political power in countries of transition.[5] A strong normativist

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[1] *See* KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 160, 306 (Tony Weir trans., 2d ed. 1992).

[2] *See* Paul H. Rubin, *Growing a Legal System in the Post-Communist Economies*, 27 CORNELL INT'L L.J. 1, 7-9 (1994) (explaining and criticizing various big bang proposals).

[3] *See* Herman W. Hoen, *Theoretically Underpinning the Transition in Eastern Europe: An Austrian View*, 19 ECON. SYS. 59, 60-63 (1995) (distinguishing gradualist approach to transition to market economy from "shock" approach); Hans van Ees & Harry Garretsen, *The Theoretical Foundations of the Reforms in Eastern Europe: Big Bang Versus Gradualism and the Limitations of Neo-Classical Theory*, 18 ECON. SYS. 1, 1-3 (1994) (questioning usefulness of neo-classical economics in analysis of market transformation in eastern Europe).

[4] *See* Rubin, *supra* note 2, at 9-11 (arguing that post-communist countries should rely upon common-law legal process to adapt to market economy).

[5] *See* Ann Seidman & Robert B. Seidman, *Drafting Legislation for Development: Lessons from a Chinese Project*, 44 AM. J. COMP. L. 1, 44 (1996) (asserting that both developing and former socialist countries use law to create social change).

view has been maintained.[6] During the socialist era, illusions controlled the way of thinking in socialist countries, resulting in a false reliance upon legislation or law. The illusion of the French revolution was that the formulation of some general declaratory rules would be sufficient. In a similar way, after World War II, it was supposed that the central power could solve almost any problem in a short time.[7]

The decision to transform a planned economy into a market economy is a political decision — one in which the law has little importance. The role of the law becomes greater if the political decision leaves room for choosing between different possible solutions. In the case of a sharp break with a former political system — a decision for discontinuity — legislation does not have much choice and helps bring about a new system. Even in this situation, however, the question remains whether the transformation will be effected by codification or by the adoption of a series of separate acts. An example of this kind of development can be found in Germany. In East Germany, a revolutionary transformation occurred. As Drobnig put it, within less than a year, the strictly planned state economy was transformed into a social market economy as practiced in the Federal Republic of Germany.[8] Nevertheless, this solution had its own problems.[9] The change was the result of the adoption of central legal acts that were not considered codification.

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[6] *See* Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93, 103 (1995) (explaining that effect of maintaining optimitstic normativism has been retention of notion of law as mechanism for social engineering); Thomas W. Waelde & James L. Gunderson, *Legislative Reform in Transition Economies: Western Transplants — A Short-Cut to Social Market Economy Status?*, 43 INT'L & COMP. L.Q. 347, 348 (1994) (reporting that former Soviet Union states continue to use law as instrument to transform economies).

[7] *See* GYULA EÖRSI, COMPARTIVE CIVIL (PRIVATE) LAW 433-34 (Martine Petetin & Kenneth Munn eds. & Gábor Pulay et al. trans., 1979).

[8] *See* U. Drobnig, *The Conversion of a Socialist Economic System to a Market Economy: Legal Implications*, *in* COMMERCIAL AND CONSUMER LAW 309, 309 (Ross Cranston & Roy Goode eds., 1993) (stating that East Germany shifted to market system in less than one year).

[9] There are several practical questions in connection with the transformation of the legal system, but here reference is made to an ideological element: several people think that East German law was clearer; it was easily understandable. *See* Steffen Heitmann, *DDR-Rechtsnostalgie im Winkel — was es damit auf sich hat und was wir daraus lernen Konnen*, 44 NEUE JURISTISCHE WOCHENSCHRIFT 2912, 2912-13 (1996) (discussing particular legal problems that arose during transition from planned state economy to market based economy).

Evidently, the German situation was a special case and other countries have not followed suit. Experience has shown that the transformation has not begun with the enactment of new civil or commercial codes. As the decisive element of the former regime was of political and ideological character, amendments of the constitution or the enactment of a new constitution were needed to bring about fundamental changes in the political and economic system.[10] Property law rules belonged so much to the essential part of the previous political system that the establishment of the new position of private property required new constitutional law rules, followed by new civil law rules.[11]

The history of codification shows that it was the enlightened absolute monarch who wanted to establish a new rational legal system by way of codification.[12] The effort, however, was not successful.[13] Several lawyers believe that the ideas of the French revolution were realized by the civil code and that the new economic system of a market economy was established by codification.[14] However, French legal history does not support this hypothesis. First of all, feudal institutions had been abolished

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[10] For a discussion that the role of the Constitution under the new conditions requires separate studies, see generally Attila Harmathy, *Droit constitutionnel — droit civil*, 50 REVUE INTERNATIONALE DE DROIT COMPARÉ 45, 62-63 (1998).

[11] *See, e.g.*, Wolfram Gärtner, *Die Eigentumsgarantien in den Verfassungen Polens, Ungarns, der Tschechischen und der Slowakischen Republik — Verfassungsrechtliche Grundlagen und Verfassungspraxis*, 39 RECHT IN OST UND WEST 75, 76 (1995) (comparing property rights in former Socialist countries, changes in constitutional law, and custom); Polja Goleva, *Verfassungsrechtliche Grundlagen des öffentlichen Eigentums in Bulgarien*, 38 RECHT IN OST UND WEST 193, 193-94 (1994) (describing privatization of public property in Bulgaria as introducing new property concept); Hans-Clemens Köhne, *Eigentumsordnung und Immobilienerwerb in der Tschechischen Republik*, 42 OSTEUROPA RECHT 48, 49-52 (1996) (outlining new property rights as codified in Czech civil law); Joachim Lipott, *Rußlands neue Wirtschaftsverfassung*, 40 OSTEUROPA RECHT 192, 202-04 (1994) (describing reformed property rights under Russia's new constitution); Stoyan Stalev, *Die Transformation der Rechts- und Wirtschaftsordnung in Bulgarien (Probleme und Perspektiven)*, 39 RECHT IN OST UND WEST 97, 97 (1995) (discussing Bulgaria's new constitutional right to property and challenges facing legal transformation); Victor Dan Zlatescu & Irina Moroianu Zlatescu, *Le Droit Roumain dans le Grand Système Romano-Germanique*, 43 REVUE INTERNATIONALE DE DROIT COMPARÉ 829, 831-33 (1991) (noting that significant judicial changes primarily require constitutional order).

[12] *See* FRANZ WIEACKER, PRIVATRECHTSGESCHICHTE DER NEUZEIT MIT BESONDERER BERÜCKSICHTIGUNG DER DEUTSCHEN ENTWICKLUNG 323 (1967).

[13] *See id.*

[14] *See* James Gordley, *Myths of the French Civil Code*, 42 AM. J. COMP. L. 459, 459 (1994) (noting that many scholars mistakenly assume that French Civil Code reflects French Revolution philosophy).

before the enactment of the civil code.[15] In addition, some important conditions of the functioning of market economy, such as the liberty of undertaking, were not incorporated into the code, and their evaluation was doubtful in constitutional law.[16] Finally, the code was full of compromises, mixing ideas of social changes with traditions.[17] It contained traditional Roman law rules, instead of declarations of revolutionary philosophy, and the drafters had no intention of breaking with the past.[18] Because the socialist concept of law is that of an instrument of political power, the assumption is that a socialist state used codes for establishing a new system. In reality, this was not the case. The history of socialist law indicates that several acts were enacted before the codes were completely drafted.[19]

Contrary to first impressions and to public expectation, including the view of politicians and often that of lawyers, civil and commercial codes do not establish new economic systems. Although it does not establish a new system, civil and commercial law codification can have an important role in the process of transforming a legal system.

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[15] *See id.* at 497, 504-05 (stating that French National Assembly abolished feudalism during French Revolution); James Q. Whitman, *Les seigneurs descendent au rang des de simples créanciers: Droit Romain, Droit Féodal et Révolution*, 17 DROITS: REVUE FRANÇAISE DE THÉORIE JURIDIQUE 17, 19 (1993). Gordley agrees that the civil code itself did not reconceptualize French property law. *See* Gordley, *supra* note 14, at 504-05.

[16] *See* FRANCOISE DREYFUS, LA LIBERTÉ DU COMMERCE ET DE L'INDUSTRIE 15, 16 (1971); Gordley, *supra* note 14, at 476-78 (asserting that drafters of Civil Code did not emphasize freedom of contract principles).

[17] *See* Gordley, *supra* note 14, at 459 (discussing theory that civil code embodies compromise between modern and traditional principles).

[18] *See* DREYFUS, *supra* note 16, at 15-16 (recognizing that although drafters had no intention of breaking with past tradition, as they instituted rights for people in their individual and professional capacity, they did create new economic system); Gordley, *supra* note 14, at 459-61 (asserting that drafters retained as much traditional law as possible due to philosophical and practical restraints); Whitman, *supra* note 15, at 24-26 (noting complexity in reception of Roman law in Europe). *See generally* Jean Carbonnier, DROIT CIVIL: INTRODUCTION 132-34 (2d ed. 1994) (setting forth evolution of French judiciary system); Bruno Oppetit, *Portalis philosophe*, 1995 RECUEIL DALLOZ SIREY 331, 333 (discussing Portalis's philosophy and emphasis on history, legislation, and tradition in civil law context).

[19] *See* Attila Harmathy, *General Problems of Civil Law Codification in the Law of CMEA Countries*, *in* QUESTIONS OF CIVIL LAW CODIFICATION 52, 52-60 (Attila Harmathy & Ágnes Németh eds., 1990) (discussing development of Socialist law in several European nations).

II. ROLE OF CIVIL-LAW CODIFICATION IN TRANSFORMING THE LEGAL SYSTEM

A. Types of Codification

Codification has a long history. Its role is different depending on what period and which country is considered.[20] Max Weber's analysis distinguished two main types of codification. In the first type, an enlightened ruler with a paternalistic attitude, wanting to bring about unity of rules, security, and transparency by means of systematic listing of the rules, directs codification. This kind of codification would establish new rules of behavior, reflecting new compromises. In the second type, codification arises because rationalization is the most important element and no serious changes in the content of the rules is considered. Thus, the whole work concerns mainly the administration of bureaucracy.[21]

B. Recent Tendencies

Recently the second kind of codification seems to have gained ground. At the end of the twentieth century, legislation has produced an enormous amount of legal rules, and no one can be expected to know the frightening mass of legislation. As Carbonnier noted, an inflationary production of law has taken place.[22] Obviously, measures are required to fight against the flow of new rules.

In France, a codification committee was charged in 1989 with directing the work of codifying administrative law rules.[23] The task involves codifying an enormous amount of legal rules by the year 2000.[24] The role of the second type of codification is

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[20] *See* Shael Herman, *Historique et Destinée de la Codification Américaine*, 47 REVUE INTERNATIONALE DE DROIT COMPARÉ 707, 709 (1995) (comparing United States codification with French).

[21] *See* MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT 488-95 (5th ed. 1972).

[22] *See* JEAN CARBONNIER, DROIT ET PASSION DU DROIT SOUS: LA V[E] RÉPUBLIQUE 107-12 (1996) (setting forth measures of inflation, remedies to inflation, and effect of inflation on legal system).

[23] *See generally id.* at 112 (stating that French government believed instituting 1989 committee would be sufficient remedial measure).

[24] This task includes codifying 8000 acts, 80,000 decrees, and several hundred thousand circulars. *See* Roland Drago, *La codification en droit adminstratif français et comparé*, 24 DROITS: REVUE FRANÇAISE DE THÉORIE, DE PHILOSOPHIE ET DE CULTURE JURIDIQUES 95,

nothing else but rationalization and systematization of the existing chaotic mass without changing the content of rules.[25]

In modern German legal history, codification meant mainly an effort to achieve rationality and security.[26] Recently, several German scholars have emphasized that the nineteenth century concept of the revolutionary role of codification establishing a new unified legal system cannot be maintained.[27] The modern role should be to foster the transformation of laws aiming at transparent, noncontradictory, and simple provisions. An important role of codification should be to safeguard the interests of the community and restrict as far as possible the political aspects and influence of different lobbyists.[28] The question remains whether the hypothesis of the two attitudes of codification — codification as the taming of the power of jurists by democracy and codification as the compressed expression of science — and their relationship with rationalizing legal analysis is supported by history.[29]

In England, the idea of codification has been connected with law reform. Law reform was adopted because of the lack of transparency — the enormous amount of legal rules and cases to be studied. In 1965, there were about 4000 statutes in force, the number of reported cases was about 350,000, and there were about 100 volumes of delegated legislation. Although law reform was considered to be lawyers' law by some eminent lawyers, the opinion was influenced by the aim not to give way to policy considerations. In contradiction to this opinion, Sir Michael Kerr, Law Commissioner at that time, emphasized that "all use-

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99 (1996).

[25] *See* Guy Braibant, *Utilité et difficultés de la codification*, 24 DROITS: REVUE FRANÇAISE DE THÉORIE, DE PHILOSOPHIE ET DE CULTURE JURIDIQUES 61, 63-72 (1996) (discussing common advantages and difficulties of codification); Drago, *supra* note 24, at 95-101 (arguing that fundamental option should be compromise between codification and deregulation).

[26] *See* Alfred Dufour, *L'idée de codification et sa critique dans la pensée juridique allemande des XVIII'-XIX' siècles*, 24 DROITS: REVUE FRANÇAISE DE THÉORIE, DE PHILOSOPHIE ET DE JURIDIQUES 45, 45 (1996) (noting that idea of codification appears as principal "leitmotiv" of German legal developments between end of seventeenth and mid-nineteenth centuries).

[27] *See* Hein Kötz, *Schuldrechtsüberarbeitung und Kodifikationsprinzip*, *in* FESTSCHRIFT FÜR WOLFRAM MÜLLER-FREIENFELS 395, 397 (Albrecht Dieckmann et al. eds., 1986) (discussing opinion of several German scholars on role of codification).

[28] *See id.* at 397-407.

[29] *See* Roberto M. Unger, *Legal Analysis as Institutional Imagination*, 59 MOD. L. REV. 1, 10 (1996).

ful reform must to some extent transgress into fields of policy."[30] In fact, from the very beginning, law reform was more than a production of consolidated acts. Legal rules devised to meet the requirements of earlier ages with different needs were changed to provide a flexible and suitable system for the days of the late twentieth century and law reform has achieved considerable success.[31]

C. Role in Countries of Transition

Legislation must be active in countries of transition. Rules of a centralized political system and of a planned economy are repealed and new rules are drafted to replace the old ones meeting the new requirements. With the exception of the German case, neither of the countries concerned could change their existing legal systems in a short period of time. Continuous changes have taken place, often modifying the new rules.

To illustrate the size of legislation, according to my rough calculation, between January 1, 1990 and December 31, 1997, there were 894 acts, 1635 government decrees, and 2331 decrees of ministers in Hungary. Additionally, the Constitutional Court published 501 decisions in the Official Gazette. The number of pages promulgating these rules was 51,104 during the period mentioned. There is no similar data known for the law-producing activity of other countries of transition. Hungary is not in the worst position from this respect either. Complaints about contradicting rules can be read in legal literature. This chaotic situation is an important reason for codification. Under these circumstances, the role of codification is to rationalize the legal system, create unity, and give rise to hopes that stability will be achieved.[32] The great amount of statutes and decrees have a

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[30] *See* Michael Kerr, *Law Reform in Changing Times*, 96 L.Q. REV. 515, 515 (1980).

[31] *See* Stephen M. Cretney, *The Law Commission: True Dawns and False Dawns*, 59 MOD. L. REV. 631, 649 (1996).

[32] *See* Oleg Sadikov, *Das neue Zivilgesetzbuch Rußlands*, 4 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 259, 259-61, 271-72 (1996) (noting that new civil-law statutes in Russia are carefully drafted to reflect new normative ideals while promising stability); E. A. Sukhanov, *Russia's New Civil Code*, 1 PARKER SCH. J.E. EUR. L. 619, 621-23 (1994) (discussing adoption of civil code as means of bringing order to Russian civil law); Wolfgang Freiherr von Marschall, *Creating the Necessary Instruments for a Market Economy in the Post-Communist Countries of Eastern Europe: Policies and Problems*, 39 ST. LOUIS U. L.J. 951, 955 (commenting

different character in countries of transition than in other countries. The increased production of legal rules is the consequence of the transformation of the political, economic, and legal system. The same reasons exist for inflation of legal rules in countries of transition as in other countries of the world, but these reasons are for the moment in the background, and emphasis is on the needs of system transformation.

D. Are Commercial Codes Needed?

An additional role of codification can be observed in some of the countries of transition. Prior to the revolutionary changes in some socialist countries, the concept of the so-called economic law prevailed. Most of the traditional categories of civil law were abolished. This was the case in Czechoslovakia.[33] The Czech Republic and Slovakia began codifying at an early stage of development because the economic code, based on state property and plan targets, was inapplicable under conditions of an evolving market economy. The lack of corporate law was an additional obstacle of development. The civil code was amended substantially. Corporate law became part of the new commercial code. The enactment of the commercial code meant partly a return to the traditional solution applied before the socialist regime and partly a continuation of the dichotomy of civil law of citizens and separate regulation of business life (economic law under socialist conditions).[34]

This role of codification is, to some extent, a consequence of legal considerations, as the adoption of a separate economic code was not a necessary result of the socialist system. Countries that have reserved traditional categories in the civil code during the socialist period are in a better position after these changes. Weber has called attention to the fact that a system of law can

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on disoriented nature of early legislative law).

[33] *See* Viktor Knapp, *Unity or Diversity in Civil Law: A Legislative Dilemma in the Czech Republic*, 1 PARKER SCH. J.E. EUR. L. 637, 640 (1994) (noting that commercial law was replaced by economic law). This was also the case in East Germany, but East Germany solved the problem in a way different from other countries.

[34] *See id.* at 641-43 (commenting that current civil code is mixture of old and new legal structure); Reinhard Zimmermann, *Codification: History and Present Significance of an Idea*, 3 EUR. REV. PRIVATE L. 95, 112 (1995) (discussing changes in Czech law brought about by 1964 Czech Civil Code).

remain nearly unchanged while the economic system changes substantially.[35] This is particularly true in the case of codes, which can have a remarkable independence from the economic and political system in which they are applied. The Polish, Hungarian, and Russian Codes are examples of codes maintaining more or less categories consistent with market economies, granting them a great advantage in the first period of transition.[36] The firm, strong theoretical basis of codification has shown its merits.

Countries without corporate law also have to establish a new system of legal rules consistent with a market economy. The return to the way of regulation in the period prior to the socialist era seemed a logical solution. Consequently, the commercial codes, containing corporate law, reappeared.[37] Codification, in this role, influenced the development of the new system and had nothing or very little to do with theoretical legal considerations.

III. CONDITIONS OF CODIFICATION

A. Political Will and Interest

Legislation is dependent on political and social conditions of a country. Codification is determined to an even greater extent by different political and social factors. The starting point is accepting the idea of a great comprehensive legislation, which needs a political decision. Without a political will, there is no

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[35] *See* WEBER, *supra* note 21, at 196.

[36] *See, e.g.*, Jerzy Rajski, *Revival of Commercial Law in Poland, in* COMMERCIAL AND CONSUMER LAW: NATIONAL AND INTERNATIONAL DIMENSIONS 318, 318 (Ross Cranston & Roy Goode eds., 1993) (comparing Polish civil law in market and socialist periods); Rubin, *supra* note 2, at 26 (noting that Hungarian Civil Code contains principles consistent with market economy); Bernard Rudden, *Civil Law, Civil Society, and the Russian Constitution*, 110 L.Q. REV. 56, 61-64 (1994) (discussing flexibility of Russian Code in post-socialist economy).

[37] *See, e.g.*, Boris Bogdanov Landjev, *The New Bulgarian Commercial Law: An Overview*, 18 REV. CENT. & E. EUR. L. 353, 354-55 (1992) (discussing development of commercial code in Bulgaria).

chance for codification, even for a rationalizing kind of it.[38] However, experience shows that the necessary political will is often problematic.

Considering the history of codification, Roscoe Pound has stated that one of the reasons why codification takes place is the need in a political society for one law instead of several laws developed by different subdivisions.[39] The will of this unity is questioned in the contemporary state and it has even been stated that the second part of the twentieth century is a period of "decodification" due, among other causes, to the great influence of different lobbyists — short time dispersed interests.[40] The problem is a rather different formulation of the questions that were debated in the nineteenth century: what period is proper for codification, and when are necessary conditions given to codification?[41] Changing conditions of the contemporary state and society require the reconsideration of ways of preparing codes, too. Traditional solutions do not seem to be proper under conditions of mass production of legal rules.[42]

Countries with long legal traditions and codes deriving from the formative era of the given branch of law are not adaptive to codification. Comprehensive policy decisions are missing in these countries, and without them codification cannot step forward. Countries in a period of transition have different kinds of problems. They do not face problems of traditional systems; thus, they are not bound by traditions. On the contrary, they have to get acquainted with new situations and new ways of decision-making and adjust methods of legislation and elaboration of codes to the new situation. Contrary to the one-party system

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[38] *See* Braibant, *supra* note 25, at 67-68; Julliot de la Morandière, *La réforme du Code Civil*, 1948 RECUEIL DALLOZ 117, 120-21 (noting that Parliament appeared to care more for socialist concerns while economy demanded narrower laws).

[39] *See* Roscoe Pound, *Codification in Anglo-American Law*, *in* THE CODE NAPOLEON AND THE COMMON-LAW WORLD 267, 278 (Bernard Schwartz ed., 1956) (discussing reasons for codification according to historical experience).

[40] *See* Kötz, *supra* note 27, at 397-98 (exploring societal forces that push for recent trend of decodification); Rodolofo Sacco, *La codification, forme dépassée de législation?*, *in* RAPPORTS NATIONAUX ITALIENS AU XI[E] CONGRÈS INTERNATIONAL DE DROIT COMPARÉ 65, 65-66 (1982).

[41] *See* FRIEDRICH KARL VON SAVIGNY, VOM BERUF UNSERER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT (1840).

[42] *See* Bruno Oppetit, *L'avenir de la codification*, 24 DROITS: REVUE FRANÇAISE DE THÉORIE, DE PHILOSOPHIE ET DE CULTURE JURIDIQUES 73, 79 (1996).

where the highest organ of the party makes decisions on political issues of legislation, decisions in these countries are arrived at as a result of negotiation with several representatives of different interests. The problem is not only the existence of different lobbyists but the realization of their existence and the lacking expertise to calculate on their activity. The usual means and ways of working out and discussing drafts have become inappropriate because politicians are not yet experienced in legislation, and experts are missing. The new process has to be learned. New technical means of legislation have to be worked out. There are also several constitutional problems of legislation starting from the question of the role of the state to the concept of the rule of law.[43]

B. System of Administration

Furthermore, important factors influencing codification rely on the political system existing in the given country: its system of functioning, the character of state administration, and the relationship between the legislature and judiciary. These factors usually have effect on the style, not the possibility, of codification. The question to what extent a centralist government influences codification of corporate law has been discussed recently in French legal literature.[44] A certain correlation has been pointed out: the proportion of mandatory rules and the application of criminal law sanctions.[45]

It is hard to make any general statement on the style of codification of countries in transition from this respect. Still, it is probable that the codification style of countries in transition is less free of interventionist measures than that of other countries. There are, however, important political differences concerning

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[43] The 1996 volume of *Droit Polonais Contemporain (Polish Contemporary Law)* contains several articles that focus on different questions of constitutional law rather than legislation, but they are helpful in understanding problems of legislation. *See, e.g.*, Mariusz Gulczynski, *The Constitutionalization of the New Social Order in Poland*, 1996 DROIT POLONAIS CONTEMPORAIN 56-57, 60-61 (discussing process of creating new Polish Constitution).

[44] *See, e.g.*, Jean Paillusseau, *La modernisation du droit des sociétés commerciales*, 1996 RECUEIL DALLOZ SIREY 287, 287-88.

[45] *See* Bernard Bouloc, *L'objectif de sécurité dans la loi du 24 juillet 1966*, 114 REVUE DES SOCIÉTÉS 438-39 (1996); Paillusseau, *supra* note 44, at 287-88 (setting forth reasons for need to modernize laws of commercial society).

directions and styles of legislation. In connection with the role and formulation of political views, scholars have noted that there are links between the existence of the culture of individual rights and the development — an affinity between collectivism and losing the goal of the creation of a liberal society.[46] Political development has a decisive role in this respect, too.[47] Analyzers of the Russian situation have pointed to the effect of weakness of the state (central authority) and the lack of clear boundaries of competence of different state organs on the role of legal rules.[48]

C. Role of the Legislature and the Judiciary

The style of codification varies according to what the prevailing view is regarding the legislature and the judiciary. Specifically, the question is whether the legislature should work out a very detailed code formulating rules for all possible cases, leaving very limited freedom to the judiciary in interpreting the rules, or whether the legislature should not foresee all cases and does not restrict judges in applying the general rules.[49]

In countries of transition, the question seems more complex. The question of formulating rules depends very much on the professional expertise of the drafter, on the information the drafter has of the social and economic conditions, and the level of knowledge and experience of lawyers and judges who apply

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[46] *See* Grazyna Skapska, *No Hope? An Essay on Globalization Theories and the Legal Institution Building Process in Postcommunist Europe*, 35 DROIT ET SOCIÉTÉ 47, 58 (1997) (arguing that success for newly developing democracies is linked to globalization of law process).

[47] *See* Attila Harmathy, Paper Presented to Annual Conference of the Society of Public Teachers of Law (Sept. 1997) (on file with author) (regarding Hungarian situation).

[48] *See* Joachim Ahrens, *Theoretische Grundlagen für die Transformationspolitik in Rußland*, 42 OSTEUROPA-WIRTSCHAFT 1, 30-31 (1997) (describing casual relation between Russia's legal institutions and its transformation policy); Eugene Huskey, *The Making of Economic Policy in Russia*, 22 REV. CENT. & E. EUR. L. 365, 385-86 (1996).

[49] *See, e.g.*, André Tunc, *The Grand Outlines of the Code*, *in* THE CODE NAPOLEON AND THE COMMON-LAW WORLD 19, 24-26 (Bernard Schwartz ed., 1956) (noting role of litigation in interpreting codes); Aubrey L. Diamond, *Codification of the Law of Contract*, 31 MOD. L. REV. 361, 381 (1968) (explaining that traditional common-law view of codification is that judiciary's role is to interpret law); Hein Kötz, *Taking Civil Codes Less Seriously*, 50 MOD. L. REV. 1, 9 (1987) (discussing German debate over optimum degree of detail in code).

the rules. The aspects are conflicting and the best solution can be different according to the special features of a given field of problems.

D. Mentality of Citizens

A very important problem is the content of the codes' rules. It is not a special problem of codification but a general one of legislation. Legislation is not free from public opinion or from the values accepted by the society. In a period of transition, social values become uncertain and change. The mentality of citizens does not change quickly. Therefore, the legislature must take into consideration what is acceptable for the population if it does not want to formulate rules that will not be applied in practice.

E. Theoretical Basis

Codification is a complicated task needing a good theoretical basis. In the complex work of codification, legal theory must be involved because the exclusion of the legal theory results in low level and inefficient legislation. However, the participation of representatives of legal theory in drafting does not necessarily mean high level and modern drafting.

On the occasion of the anniversary of the German Commercial Code, Karsten Schmidt has emphasized that traditional theories must be reconsidered and drafters of new rules must be bold as well as careful in analyzing new solutions in order to meet new needs while maintaining unity of the legal system.[50] There are dangers of failure in both directions. One of the dangers is the willingness to change rules often without a careful examination of the consequences of regulation. Particularly in the field of economy, there is a political aim to work out new rules hastily, in compliance with changing conditions. Experience has shown that a great number of laws were produced lacking coherence and resulting in uncertain and unpredictable situations.[51] The other danger is the conservatism of legal theo-

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[50] *See* Karsten Schmidt, *Woher — wohin? ADHGB, HGB und die Besinnung auf den Kodifikationsgedanken*, 161 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT 1, 12 (1997).

[51] *See* Bruno Oppetit, *L'expérience française de codification en matière commerciale*, 1990

ry. This danger is particularly great in a period of fundamental, political, and economic change when, according to the German experience, many people do not understand what the new needs are, and theoreticians are likely to stick to theories worked out by them or those to which they are accustomed.[52] It can be observed that in several countries, traditional disputes survive and continue despite the changed circumstances.[53] This is the case with the dispute over the need for an economic code that became, under new circumstances, a dispute over enacting a separate commercial code.[54]

CONCLUSION

The undesired results, unnecessary conservatism and unnecessary new rules, can be avoided if the experience of other countries is studied. There has hardly ever been greater need for comparative research than in drafting codes in countries of transition. Studying foreign legal systems and regulations can help not only to find models but at the same time to find remedies for the undesired possible effects of codification pointed out by Bruno Oppetit. The perils of codification are, among others, considering the code a unique legal source of solving problems, becoming isolated even within the legal system and seeing nothing else but a single code, and forgetting about the fact that law is not the only order of authority.[55] Comparison by its nature broadens the horizon. In Hungary, there is a tradition of studying foreign legal rules before working out a draft of

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RECUEIL DALLOZ SIREY 1, 3 (focusing on French experience with respect to codification in business setting).

[52] *See* Gerd Roellecke, *Stabilisierung des Rechts in Zeiten des Umbruchs*, 50 NEUE JURISTISCHE WOCHENSCHRIFT 434-35 (1997).

[53] *See* V. A. Dozortsev, *One Code or Two?*, 2 PARKER SCH. J.E. EUR. L. 27, 46-47 (1995) (discussing dual codes as result of conditions that no longer exist in countries that maintain them).

[54] *See id.* at 27-28 (summarizing competing arguments for and against charting separate commercial code); Knapp, *supra* note 33, at 643-47 (describing legislative dilemmas surrounding integration of commercial code into civil code).

[55] *See* Bruno Oppetit, *De la codification*, 1996 RECUEIL DALLOZ SIREY 33, 38 (listing both positive and negative aspects of codification).

an important act of civil law or of a code of any other branch of law. Under the present conditions, the importance of comparative law has grown considerably, and it is reflected in legal education.