中国法治论坛
CHINA FORUM ON THE RULE OF LAW

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中国与波兰的比较

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总　序

改革开放迎来40年，引发了许多的回忆与思考。其中，有关法治建设与法学发展的回顾、梳理、总结以及在此基础上的期待与展望，成为认真致力于法治进步与法学繁荣的人应为之事、共为之举，并由此引发了许多学术话题，举办了许多学术活动，形成了许多学术成果。确实，回顾也是一种创新，因为每一个携带思考的回顾都不仅仅是一个往日重现的过程，其间必定含有叠加或更新的阐释与评价，赋予学术因素的回顾尤其如此。

有规划地激发或促进法治建设与法学发展的回顾及展望，曾是“中国法治论坛”系列出版的最初动因。那是在2003年，中国社会科学院法学研究所决定将20世纪70年代末以来（也就是改革开放以来）组织出版的具有重要文献价值的学术文集再行出版，以强化法学研究的连续性和反思性。在当时具有很大学术影响力和社会引导力的法学专题讨论，诸如，改革开放初期逐次兴起的人治与法治问题、法律面前人人平等问题、1982年宪法起草问题，以至法律的阶级性问题，20世纪90年代以来的人权问题、社会主义市场经济法律体系问题、依法治国问题、司法改革问题、加入

WTO 与中国法治发展问题等，都是在中国特色社会主义建设的关键节点上关涉改革与法治的重大问题。法学所在组织这些法治理论研讨中，充分发挥了论题倡导与成果集萃作用，相关文集的出版以及其后的重新出版，也都发挥了应有的学术传播与评价作用。

顺便说一句，“中国法治论坛”系列创设的 2003 年并不是一个特别的年份，只因是法学所成立 45 周年而被法学所人特别提起。“中国法治论坛”系列的出版规划当时得以实施，多少有一些纪念的意思在里面。但是，“中国法治论坛”确实是一个好名称，其作为法学科研成果发表的平台载体别有昭示价值，因此被保留至今，用于法学所组织的研究项目或学术会议的论文集系列上。

“中国法治论坛”系列创设以来，承蒙学界同行支持，至今已陆续出版了 30 多部论文集，规模相当可观，成为国内持续时间较长、学术质量较高、学术影响较大的系列丛书。十几年来，“中国法治论坛”系列已经形成了如下特征。一是现实性。突出当代依法治国的重大理论和实践问题，紧扣时代主题，紧随我国经济社会发展和法治进程，出版了改革司法、科学发展观与法治建设、人身权与法治、依法治国与廉政建设、依法治国与司法改革等专题文集。二是前沿性。立足法治进步与法学发展潮头，把握法治实践与法学理论动向，进行前瞻性研究，集中讨论了诸如国际人道主义法及其实施、全球化与多元法律文化、社团的法律问题、妇女权利、少数人的权利等专题。三是国际性。“中国法治论坛”系列结集出版的很多就是国际合作项目或国际会议的学术论文，其中许多是国外法学研究者在中国首发的学术成果，有的文集则是法学所和国外法学专家共同编辑而成。这也是本论坛的突出特点。

2018年是改革开放40周年，也是法学研究所建所60周年。“中国法治论坛”系列能够与改革开放同行，能够彰显法学所为中国法学繁荣和法治进步做出的贡献，作为“中国法治论坛”系列的组织者和编辑者，为此感到特别欣慰。与此同时，也为“中国法治论坛”系列在依法治国新时代如何发挥更大作用而倍感压力。毋庸讳言，在法学核心期刊对学术论文稿源的巨大吸纳力下，“中国法治论坛”系列如何集萃优质成果以保持应有的学术水准，是办好“中国法治论坛”系列的关键问题。仔细分析一下，可以发现“中国法治论坛”系列仍有与核心期刊争彩的优势。其一，“中国法治论坛”系列具有专题优势，其上发表的论文选题集中，不须兼顾学科平衡而致选题分散。在其上刊载文章，不仅能够从特定文章上知晓特定作者的理论观点，也能从全部文章上掌握论题的研讨状态，如专题之下的论题分布、观点异同及学术对垒。其二，“中国法治论坛”系列具有时效优势，可以将作者对法治理论与实践的最新观察及思考及时予以发表，使其在学术创新竞争中居于争先地位。由此作者不必因过于精雕细琢而失去及早展示真知灼见的机会，也不必因核心期刊发表之路的排队拥挤而嗟叹相同观点被别人抢先发表。其三，“中国法治论坛”系列具有国际交流优势，中国学者可以在其上与国外同行对等开展学术对话，由此可以近距离地衡量其在国际交流中的专业能力与学术水平。在当下，国外法学研究者少有在我国的核心期刊发表学术论文的，而“中国法治论坛”系列正可弥补国内学术载体的这一内容缺陷。正因如此，“中国法治论坛”系列有信心在以法学核心期刊为主导构筑的学术载体阵营中，占有并占住一席之地。

无论法学研究的任务多么艰巨，无论学术竞争的态势多么严

峻，我们将牢记宗旨、保持特色、发挥优势，继续办好“中国法治论坛”系列。特别是在策划选题、精选论文、传播推广等方面，我们将集思广益，进一步采取创新优化措施，把“中国法治论坛”系列办成有吸引力和影响力的学术平台。

在依法治国新时代，法学研究面临从未有的广阔视野与发展前景，法学研究者肩负继往开来的学术使命与学者责任。让我们共同努力，锐意进取，为中国的法治进步与法学繁荣提供优质的理论支撑和智识支持。

陈　甦

2018 年 12 月 30 日

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第一部分

法典化与立法理念、立法技术

In Defence of Decodification: A Discussion of the Concept and Its Consequences

Tomasz Giaro[*]

[Abstract] Whereas the process of codification consisted in installing civil codes at the heart of continental private law systems, which begun to revolve around their codes, decodification amounts to the opposite movement of eclipsing the code from this position of privilege. However, decodification does not mean that the code becomes completely superfluous nor that it may be wholly ignored. It means only that the civil code loses its traditional central place within a continental legal system. Outside of national law the decodifying effects are with increasing frequency displayed by European law. European regulations and directives intervene to the national civil code without manifesting a necessary minimum of systematic approach and without demonstrating any care for its substantial coherence. Also the private international law of particular countries acquired the function of higher law (*lex superior*) which contributes to a decodification of the national code. Last not least, several pieces of European model legislation may be applied in the role of so-called optional instruments with equally decodifying effects. In summary, decodification is not a kind of illness affecting a legal system; it is rather a normal or even salutary stage of its development which makes it more elastic and ready for new transformations.

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1. Decodification as a historical necessity

The phenomenon of decodification, discovered in 1979 by the Italian civil law specialist Natalino Irti, emerged very probably some decennia earlier. ① Decodification means in principle the movement of a legal system in a direction opposite to the movement of codification. Whereas codification consisted in installing civil codes at the heart of continental private law systems, which begun to revolve around their codes, decodification amounts, to the contrary, to the process of eclipsing the code from this position of privilege. This effect is due to numerous pieces of special legislation on the one hand, and to the direct application of the constitution on the other hand. ②

Special statutes of private law, dedicated to company, banking and energy law etc., refuse to recognize the superiority of the civil code. They form rather separate statutory microsystems having different contents, principles, constructions and terminologies. As far as the constitution is concerned, already Leon Petrażycki (1867 –1931) affirmed that it is within the civil code that the true fundamental laws (*Grundgesetze*) of the country are contained. ③ In the same sense, the French *Code Civil* of 1804, which protected equality, freedom and property of the citizens, could be qualified by Jean Carbonnier (1908 –2003), with good reason, as 'a true constitution of France.' ④ Only the recent phenomenon of the direct judicial application of the constitution deprives the civil codes of their constitutional function. ⑤

Obviously, in countries that possess codified civil law, the phenomenon of decodification is frequently given a negative connotation. As a matter of fact, this

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① Leone Niglia, *The Struggle for European Private Law, A Critique of Codification* (Hart Publishing 2017) 54.

② Natalino Irti, 'Leggi speciali (dal mono-sistema al poli-sistema)' (1979) 25 *Rivista del Diritto Civile* 1, 141.

③ Leon Petrażycki, *Die Lehre vom Einkommen* (H. W. Müller 1895) vol 2, 470; cf Tomasz Giaro, 'La Civilpolitik di Petrażycki' (1995) 23 Index 106.

④ Jean Carbonnier, *Droit civil, Introduction* (20th edn, PUF 1991) 123; Rémy Cabrillac, 'Le Code civil est-il la véritable constitution de la France?' (2005) 39 Themis 245 – 59.

⑤ John H Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3rd edn, Stanford University Press 2007) 152 – 54.

phenomenon denies the very process of codification as the cardinal feature of legal systems in continental Europe and Latin America. That is why decodification is often considered as something like a defect or even an illness of the legal system. A German civil law specialist and comparative lawyer Erik Jayme assured hundred years after the German civil code (BGB) came into force that 'the problem of decodification, known to France and Italy, has not yet emerged in Germany.'① This affirmation must be considered slightly disconcerting in reference to the country where, already in 1958, the Supreme Court in the *Herrenreiter*-judgment (BGH 14 February 1958, BGHZ 26, 349) based the legal protection of personality not on the German civil code, where in fact such a protection traditionally failed, but directly on the federal constitution of 1949.②

Of course, at this particular moment of European legal history, as the *Herrenreiter*-judgment and the entire series of similar decisions of the German Supreme Court (*Ginseng*, *Fernsehansagerin and Sorayacase*) was released, i. e. in the 1960s, the book of Natalino Irti still remained to be written. However, I am convinced that in legal life there may exist numerous things that have not yet been christened and therefore lack a proper name. If we are not willing to engage exclusively in research of historical legal terminology, we may, or even we must, follow Ernest Gellner, *Words and Things: An Examination of, and an Attack on, Linguistic Philosophy* (Victor Gollancz 1959) —concentrate on things and not on words.

The violent outcry against decodification is, thank God, not the only observable reaction of the continental legal scholarship to this phenomenon which is—let me stress this obvious feature—of empirical nature. As a matter of fact, a Polish legislative commission recently designated decodification as 'a negative phenomenon accompanying the law-making,'③ hence as a more or less normal or

① Erik Jayme, 'Die Bedeutung des Allgemeinen Teils im System des BGB' in *I cento anni del codice civile tedesco* (Cedam 2002) 818; cf Benjamin Herzog, *Anwendung und Auslegung von Recht in Portugal und Brasilien* (Mohr Siebeck 2014) 654.

② Thomas Raiser, 'Richterrecht heute' in Norbert Achterberg (ed), *Rechtsprechungslehre* (Carl Heymanns 1986) 627 - 28; Tomasz Giaro, 'Rechtsanwendung, Rechtsfortbildung und römische Rechtsgeschichte' in *Ricerche dedicate al prof. Filippo Gallo* (Jovene 1997) vol. 3, 503 - 504.

③ Kamil Stolarski, 'Antykruchość a obawy przed światem po dekodyfikacji' ['Antifragile and the Fear of the World after the Decodification'] in Franciszek Longchamps de Bérier (ed), *Dekodyfikacja prawa prywatnego* [*Decodification of Private Law: A Sketch to its Portrait*] (Wydawnictwo Sejmowe 2017) 249.

even usual occurrence. Indeed, decodification seems to be simply inevitable in legal history: sooner or later it will change with its overwhelming force every codification. Even the so-called recodification cannot help to bring us back to the paradise lost of codification.

As a matter of fact, the recodification is never—contrary to the diverging opinion of some scholars, mostly of German origin①—a simple rebuttal of the decodification-thesis② or a proof of a 'renaissance of the codification idea.'③ A re-codified civil code will be always forced to live in a new legal environment dominated by the phenomenon of decodification as an 'epoch-making upheaval.'④ In other words, recodification does not definitely abolish the consequences of decodification, being unable to ensure the 'total recovery' of the previous system.

On the other hand, decodification does not mean that the code becomes completely superfluous nor that it may be wholly ignored. It means only that the civil code loses its traditional central place within a legal system. However, it does not disappear; it only moves from the centre to the periphery of the system. In consequence, the code becomes less important and less frequently applied. As the object of application appear rather numerous special laws concerning banking, transport etc. on the one hand, and the constitution, which starts to be directly applied in the civil law courts on the other hand.⑤ Special laws form a number of microsystems which, even in a terminological sense, do not depend directly on the code. In this way, despite its original unity, the system becomes multicentric or pluralistic.

We have observed at the outset that as a necessary stage in the development of the continental legal model, its decodification will happen sooner or later. The decodification of French commercial law, sometimes designated more directly as

① Except Jan P Schmidt, 'Kodifikation' in *Handwörterbuch des europäischen Privatrechts* (Mohr Siebeck 2009) vol 2, 989; id, *Zivilrechtskodifikation in Brasilien* (Mohr Siebeck 2009) 146.

② Thomas Duve, 'Verbraucherschutzrecht und Kodifikationsgedanke' (2002) 12 IURA 797.

③ Matthias Reimann, 'Die Erosion der klassischen Formen' (2006) 28 *Zeitschrift für Neuere Rechtsgeschichte* 216 fn 28.

④ Susanne Genner, *Dekodifikation* (Helbing & Lichtenhahn 2006) 200.

⑤ Mateusz J. Nocuń, 'Konstytucjonalizacja prywatnych praw podmiotowych' ['Constitutionalization of Private Subjective Rights'] (2015) 61 *Studia Iuridica* 251 - 82.