

# On the vocation of our age against codification: on civil codes in the information society

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Editors:  
J.M. Milo  
J.H.A. Lokin  
J.M. Smits

# Tradition, Codification and Unification

Comparative – Historical Essays on Developments in  
Civil Law



## OF THE VOCATION OF OUR AGE AGAINST CODIFICATION: ON CIVIL CODES IN THE INFORMATION SOCIETY

### 1. Introduction

Codification is alive and well.<sup>1</sup> With the introduction of new civil codes in jurisdictions such as the Netherlands (1992), Quebec (1994), Estonia (2002) and Romania (2011), with new codes adopted by the parliaments of the Czech Republic and Hungary (both to enter into force in 2014), and with a Civil Code for China under way,<sup>2</sup> the belief in presenting the law in a comprehensive systematisation by national states seems to be as important today as it was 200 years ago. In this contribution, I will investigate whether this belief in codification is still accurate. It is at least surprising that an institution that was invented more than two centuries ago for the age of nation-states, and for societies completely different from ours, still has such a prominent place in the civil law tradition. I will argue that the most important function of codification, namely to provide information about the law, can today be achieved in a much better way than through state-made systematisations. This should not come as a surprise: the information age has already transformed important parts of society and there is no reason why codification would not also be affected. When Von Savigny asked in 1814 whether the time was ripe *yet* for codification, his answer was a resounding “no.”<sup>3</sup> I argue that today the time is *no longer* ripe. This does not mean that codification will not

\* Jan Smits is professor of European Private Law at Maastricht University and Research professor of Comparative Legal Studies at the University of Helsinki.

<sup>1</sup> Cf. Franz Bydlinski *et al.* (eds.), *Renaissance der Idee der Kodifikation*, Wien 1992 and Oliver Remien, “On the Trend Towards Recodification and Reorientation in Private Law and Business Law”, *Electronic Journal of Comparative Law* vol. 12.3 (December 2008).

<sup>2</sup> Liang Huixing (ed.), *The Draft Civil Code of the People’s Republic of China: English Translation*, Leiden 2010.

<sup>3</sup> F.C. Von Savigny, *Of the Vocation of our Age for Legislation and Jurisprudence*, translation by Abraham Hayward of *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (1814), London 1831.

survive. However, it is not the best possible way of dealing with the problem that it aims to address.

The substantiation of this wide-ranging claim will be divided into three parts. Firstly, building upon previous work,<sup>4</sup> I will briefly recapitulate the historical reasons for codification and why its most important function (that of managing information) can in my view no longer be satisfied in today's globalising society (section 2). Secondly, traditional alternatives to codification will be explored. The great number of common law countries in the world and the existence of countries without codes within the civilian tradition,<sup>5</sup> such as Scotland and South Africa, demonstrate that civil codes are not indispensable. However, it may be that these jurisdictions also lag behind in providing information in the best possible way (section 3). Accordingly and thirdly, alternatives to codification inspired by new techniques of information management will be discussed (section 4). The link to Von Savigny will be substantiated in a brief conclusion (section 5).

## 2. Codification and its Functions

In a ground breaking article published in the 1969 issue of the *Tulane Law Review*, the French legal historian Jean Maillet asked why states aim to lay down the law in comprehensive collections of rules.<sup>6</sup> He distinguished three historical functions of codification that can also help us to understand present efforts to codify or recodify the existing law.<sup>7</sup>

First and foremost, codification by states is seen as a means to expose the law, so as to present the existing or desired law in a comprehensive, rational and systematic way. The reason behind this aim is undoubtedly to enhance the accessibility and predictability of the rules governing the life of the nation's citizens.<sup>8</sup> When Jeremy Bentham famously wrote "a complete digest: such is the first rule. Whatever is not in the code of laws, ought not to be law. Nothing ought to be referred either to

<sup>4</sup> See the references in fn. 7.

<sup>5</sup> See on the civil law tradition e.g. John H. Merryman, & Rogelio, Pérez-Perdomo, *The Civil Law Tradition*, 3<sup>rd</sup> ed., Stanford 2007 and Robin Evans-Jones (ed.), *The Civil Law Tradition in Scotland*, Edinburgh 1995.

<sup>6</sup> Jean Maillet, "The Historical Significance of French Codifications", *Tulane Law Review* 44 (1969-1970), p. 681 *et seq.* This does, of course, not mean that codification could not also have other functions.

<sup>7</sup> The following is based upon Jan Smits, "Kodifikation ohne Demokratie? Zur Legitimität eines europäischen (optionalen) Zivilgesetzbuches", in: Christian Joerges and Tobias Pinkel (Hrsg.), *Europäisches Verfassungsdenken ohne Privatrecht – Europäisches Privatrecht ohne Demokratie?*, ZERP-Diskussionspapier 1/2011, p. 119 ff.; id., *Private Law 2.0: On the Role of Private Actors in a Post-National Society*, The Hague 2011; id., "Codification in Europe and China: what makes contract law special?", in: Lei Chen & Remco van Rhee (eds.), *Towards a Chinese Civil Code: Comparative and Historical Perspectives*, Leiden-Boston 2012, p. 257 *et seq.*

<sup>8</sup> See also Jacques Vanderlinden, *Le concept de code en Europe occidentale du XIII<sup>e</sup> au XIX<sup>e</sup> siècle – essai de définition*, Bruxelles 1967.

custom, or to foreign law, or to pretended natural law, or to pretended laws of nations”<sup>9</sup>, he sought to remedy the problem that existed in his time, which was that everyone did not have access to the law. To promote this, in Bentham’s terminology, “cognoscibility”<sup>10</sup> of the law was also one of the main reasons behind the enactment of the Code Napoléon. This becomes immediately apparent if one visits Napoleon’s tomb at *Les Invalides* in Paris. One of the 12 reliefs made by Pierre-Charles Simart that surround the tomb is devoted to the Code Civil. It emphasises two things: the simplicity of the Code and the fact that the law had finally become intelligible for everyone.<sup>11</sup> This motive is still a prominent one today: when the Dutch enacted the main part of their new Civil Code in 1992, one of the foremost reasons for this enactment was to make the whole of Dutch private law more consistent again, and to do away with the masses of case law that had to be consulted before one could establish one’s rights and obligations.<sup>12</sup> Also the present debate about the future of European contract law is primarily initiated by the European Commission’s concern that the European *acquis* is too fragmentary and, therefore, needs to be reorganised in a more coherent way.<sup>13</sup>

The second function of codification has long been to unify the law. This unification historically aimed to achieve two different goals. On the one hand, codification sought to eliminate territorial diversity, abolishing diverging laws within one nation. The main reason for this type of unification was to serve the economic good: unification of law would promote trade.<sup>14</sup> This motive cannot only be seen in the codifications of the nineteenth century, it is still used today. In the 2010 draft for a comprehensive codification of Chinese private law, it is admitted that the present situation in China is not ideal: the existing separate regulations on General Principles of Civil Law, Contract Law, Law of Real Rights, Marriage Law, Adoption Law and Inheritance Law would lead to coordination problems that are supposed to endanger the needs of the market economy, especially in an increasingly unified

<sup>9</sup> Jeremy Bentham, “General View of a Complete Code of Laws”, orig. 1802, in: John Bowring (ed.), *The Works of Jeremy Bentham*, vol. III, Edinburgh 1839, p. 205 *et seq.*

<sup>10</sup> In a letter to the American President James Madison in 1811: John Bowring (ed.), *The Works of Jeremy Bentham*, vol. IV, Edinburgh 1843, at p. 454.

<sup>11</sup> The two texts read: “Mon seul code par sa simplicité a fait plus de bien en France que la masse de toutes les lois qui m’ont précédé” and “Code Napoléon: justice, égale et intelligible pour tous.”

<sup>12</sup> See E.M. Meijers, “La réforme du Code Civil Néerlandais”, 1948, in: *Verzamelde Privaatrechtelijke Opstellen* 1, Leiden 1954, p. 161: “Il faut, de temps en temps, mettre de l’ordre dans une matière, qui est en train de devenir une masse chaotique.” For a general account of the codification movement in Europe: J.H.A. Lokin & W.J. Zwalve, *Hoofdstukken uit de Europese codificatiegeschiedenis*, 3<sup>rd</sup> edition, Den Haag 2006.

<sup>13</sup> This motive can already be found in the first Communication (...) on European Contract Law, COM (2001) 398 final. See more recently the Green Paper from the Commission on policy options for progress towards a European contract law for consumers and businesses, COM (2010) 348 final.

<sup>14</sup> For an account of how trade and nationalism are related: Jan Smits, “What do Nationalists Maximise? A Public Choice Perspective on the (Non-) Europeanization of Private Law”, *European Review of Contract Law* 8 (2012), p. 296 *et seq.*

national market.<sup>15</sup> The European Commission uses the same reasoning when it spells out the need for a more uniform contract law to enhance the European economy, no doubt prompted to do so by the only limited competence of Article 114 of the Treaty on the Functioning of the European Union. On the other hand, codifications have also served in the past as a way to unify the status of people. In particular the Napoleonic code was aimed explicitly at creating equality between citizens through the abolition of privileges of the nobility and the clergy (which is the reason why the Code Civil is sometimes described as the true constitution of France<sup>16</sup>). This desire of unification was of course closely related to the rise of nation-states. The German politician Johannes von Miquel put this in clear wording in the *Reichstag* in 1867: "The demand for legal unity is a necessary precondition of a nation-state."<sup>17</sup>

The third function of codification lies in the desire of the national legislature to modify the nature of the law itself: the prevailing laws were no longer to be based on custom (as in feudal law), on foreign law (such as Roman law), on religious law (such as canon law) or on supposed natural law (as Jeremy Bentham continuously emphasised). Instead, law became the product of the nation-state and therefore a democratic matter. The main concern was one of legitimacy: by requiring law to pass through the national parliaments, the citizens who were to be subjected to the prevailing rules also became their authors.

This functional analysis allows us to consider whether the civil code should still be at the centre of our legal universe or that, instead, to (re)codify the law is a doomed search for what is lost.<sup>18</sup> It is not difficult to argue that the second function, that of ensuring one law for one market, is no longer a relevant motive for national codification. A uniform law for the territory of a state may be conducive for domestic transactions within that state, but the more international the market is, the less important this reasoning becomes. Moreover, the exact relationship between uniform law and international trade remains a point of discussion.<sup>19</sup> I have argued elsewhere that the third function must also be put into perspective: in a post-Westphalian world, new forms of legitimacy outside the familiar concepts

<sup>15</sup> Liang Huixing (ed.), *The Draft Civil Code of the People's Republic of China*, *op cit*, Preface.

<sup>16</sup> Jean Carbonnier, *Droit civil: Introduction*, 20<sup>th</sup> edition, Paris 1991, 123: "le Code civil reste la constitution la plus authentique du pays."

<sup>17</sup> Quoted by Michael F. John, "The Politics of Legal Unity in Germany 1870-1896", *The Historical Journal* 28 (1985), p. 341 *et seq.*, at p. 342.

<sup>18</sup> Cf. Olivier Moréteau, "De revolutionibus: the place of the Civil Code in Louisiana and in the legal universe", in: Jimena Andino Dorato, Jean-Frédéric Ménard & Lionel Smith (eds.), *Le droit civil et ses codes: parcours à travers les Amériques*, Montréal 2011, p. 1 *et seq.*

<sup>19</sup> See Jan Smits (ed.), *The Need for a European Contract Law: Empirical and Legal Perspectives*, Groningen 2005, Stefan Vogenauer & Stephen Weatherill (eds.), *The Harmonisation of European Contract Law*, Oxford 2006 and Gary Low, "How and Why we are (not) bothered by the Costs of Legal Diversity: A Behavioural Approach to the Harmonization of European Contract Law", *European Review of Private Law* 18 (2010), p. 285 *et seq.*

developed for the nation-state need to be found.<sup>20</sup> This is particularly true for (parts of) private law, a field that existed long before the rise of the nation-state and that found its legitimacy for a long time in the fact that it was applied in practice.<sup>21</sup>

The focus of this contribution will be on the first function of codification, namely it's the aim to enhance the accessibility and predictability of the law. With this function it is emphasised that codification is a means to *manage* information. The question is whether this function is still satisfied in the best possible way by national codification. This must be doubted. Today's law is increasingly characterised by a plurality of sources that can never be fully grasped by one systematic set of rules.<sup>22</sup> In the European Union, the European legislature is increasingly active in the field of consumer contract law and other fields. Over the last twenty years, the European legislature has issued almost twenty directives in the field of private law that have all been implemented by the (current) 28 member states.<sup>23</sup> These formally binding rules are accompanied by several sets of soft law rules that were prepared with the support of the European Commission. The Draft Common Frame of Reference of European Private Law is the most important example.<sup>24</sup> These rules were drafted with a view to their future application by private parties, legislatures and courts. At the international level, the United Nations Convention on Contracts for the International Sale of Goods (CISG) governs relationships between commercial parties. Even more important than these official laws are the types of voluntary rules that have come into existence. These entail not only the "*lex laboris internationalis*" and "*lex sportiva internationalis*", but also norms adopted by corporate networks (the most important examples being codes of conduct for corporate social or environmental responsibility), rules of standardisation organisations for technical standards (such as the "*codex alimentarius*") and other types of self-regulation. These norms are highly relevant for specific groups of actors and are important in predicting their behaviour. The monopoly of the State in setting the law has thus resulted in the lack of coordination in a multi-layered private law with various architects working on the same legal building at the same time. This is a clear threat to the accessibility and predictability of the law. In

<sup>20</sup> Smits, "Kodifikation ohne Demokratie? Zur Legitimität eines europäischen (optionalen) Zivilgesetzbuches", *op cit.*

<sup>21</sup> See Nils Jansen, *The Making of Legal Authority: Non-legislative Codifications in Historical and Comparative Perspective*, Oxford 2010, claiming that it is often the profession that provides rules with the necessary authority, not the legislature; see for example at p. 43: the "abstract authority of a text giving expression to a legal norm consists in the legal profession accepting it as an ultimate source of the law."

<sup>22</sup> See in more detail Jan M. Smits, "The Complexity of Transnational Law: Coherence and Fragmentation of Private Law", *European Review of Private Law* 20 (2012), p. 153 *et seq.* and previously Smits, "Codification in Europe and China: what makes contract law special?", *op cit.*

<sup>23</sup> See for a recent overview e.g. Reinhard Zimmermann, "The Present State of European Private Law", *American Journal of Comparative Law* 57 (2009), p. 479 *et seq.*

<sup>24</sup> Christian Von Bar & Eric Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference*, München 2009.

addition, private actors increasingly choose another law than their own.<sup>25</sup> They can make all kinds of strategic decisions motivated by what law they believe to be better. A party can for example choose to incorporate a company as a limited liability company according to English law (Ltd.), or conclude contracts with business partners in Italy and Sweden and ensure that German law is applicable to these contracts. An Italian woman wanting to marry her Polish girlfriend can do so by concluding a same sex marriage in Canada. Also nation States accept this possibility of choice and increasingly promote their own laws.<sup>26</sup> However, while big companies are usually aware of these possibilities, smaller firms and individuals are not.

Those who are versed in the law may not always be aware of this problem. As a result of their training, lawyers are usually able to find their way through the law by consulting the available legal literature. Legal academics in turn systematise the applicable rules, leading to a unity of discourse among practitioners and scholars. As Rubin says: “legal scholars not only analyse the work of judges, but they also tend to think of themselves as judges, and to speak like judges”.<sup>27</sup> However, in practice codification greatly influences the academic discourse, thereby limiting the scope of the rules examined. In the continental legal tradition textbooks largely follow the order of the national Civil Code, making it difficult to also consider European influence and private regulation. More importantly, one of the goals of codification has always been not only to inform trained lawyers about the law, but also to allow citizens to learn about their rights and obligations. As Pollock wrote: “Codes are meant not to dispense lawyers from being learned, but for the ease of the lay people and the greater usefulness of the law.”<sup>28</sup> The mere fact that this goal is difficult to achieve by way of codes does not mean that it must be abandoned.

The conclusion from the above is clear. While historically an important function of codification is to provide information about the existing law to the various actors involved in the fabric of the law, the growth of sources and enhanced possibilities for choice render this function increasingly meaningless. Jeremy Bentham complained in the late 18<sup>th</sup> Century that the law was only accessible to a small group of people. The situation today is not very different: most citizens are just as ignorant of the possibilities the law offers them to shape their own lives as the

<sup>25</sup> See, however, Stefan Vogenauer, “Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence,” *European Review of Private Law* 2013, p. 13 *et seq.*

<sup>26</sup> See Erin O’Hara & Larry Ribstein, *The Law Market*, Oxford 2009; cf. Smits, *Private Law 2.0*, *op cit.*

<sup>27</sup> Edward L. Rubin, “The Practice and Discourse of Legal Scholarship”, *Michigan Law Review* 86 (1988), p. 1835 *et seq.*, at p. 1859. See also Jan Smits, *The Mind and Method of the Legal Academic*, Cheltenham 2012, no. 10.

<sup>28</sup> Frederick Pollock, 1878, quoted by J.H. Baker, *An Introduction to English Legal History*, 3<sup>rd</sup> edition, London 1990, p. 252.



people that Bentham lamented. This raises the question whether alternative means of managing information are available.

### 3. Beyond Codified Jurisdictions: the Common Law and Mixed Jurisdictions

It does not require much explanation that codification is only one of the possible means of managing legal information. Outside of codified systems other methods are used to keep the law intelligible. The aim of this section is to look briefly at these other methods and to establish whether they are better suited than codification to ensure the accessibility and predictability of the law.

Common law jurisdictions traditionally keep the law intelligible by relying on the doctrine of precedent. As Van Caenegem made abundantly clear, each jurisdiction gives a different weight to the various sources of law.<sup>29</sup> While codified systems (in particular in the French legal tradition) rely on the legislature to enact the relevant rules, common law jurisdictions leave it to the courts to gradually develop the law. Precedent is seen as a way to keep the resulting mass of case law manageable. Traditionally, this “organic” method of law making is regarded as a much more democratic process than the making of the civil law, either by considering it as some form of reasonable custom or by emphasising the public deliberation in common law adjudication.<sup>30</sup> However, it is far from it that precedent is the only method used to manage for example English law. Since the early times of English common law, attempts were made to present the law in a coherent way. This was done both through descriptions of the existing law (such as the one by Glanville) and through law reports (in the form of Year Books). Moreover, the method used to decide cases, namely by way of case-to-case-reasoning, was learned in practice. This practical wisdom allowed experienced practitioners to find their way in what was once described as “something of a nightmare since it was difficult to get an overview of the whole system.”<sup>31</sup> As in civil law jurisdictions, this made it difficult for laypeople to understand the law.

In the last century, systematisation by way of legislation has intensified. The English Law Commission, created in 1965, has the task “to take and keep under review all the law (...) with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies (...) and generally the simplification and modernisation of the law”. This fits in with the dramatically increased systematisation efforts by English academics, perhaps best characterised by Lord Goff as a “search for principle.” To him, the best codification is the work of jurists, rather than of legislators. This “codifying literature” does not

<sup>29</sup> R.C. van Caenegem, *Judges, Legislators and Professors*, Cambridge 1987.

<sup>30</sup> See recently e.g. Matthew Steilen, “The Democratic Common Law,” *The Journal Jurisprudence* 15 (2011), p. 437 *et seq.*

<sup>31</sup> G.H. Samuel, *The Foundations of Legal Reasoning*, Antwerp 1994, p. 72.

bind, but it does summarise the law by way of concise provisions, making the law more accessible for professionals.<sup>32</sup>

This emphasis on systematisation can also be seen in mixed jurisdictions. In the legal systems of South Africa and Scotland the doctrine of precedent is – at least in practice – not very strong and the main guarantee for ensuring that the law stays manageable is to give an important role to a systematising legal science. In Scotland there is a long academic tradition that rivals any in the civil law countries. South Africa has long been more influenced by common law thinking, but today also relies heavily on academic literature in keeping the law intelligible.<sup>33</sup>

The outcome of this brief survey is that the common law and mixed jurisdictions do not fare any better than the civil law in making the law accessible to a wide audience of both professional lawyers and jurists and laypeople. Increasing plurality of sources and of possibilities for choice of law clauses are just as little reflected in these jurisdictions' presentations of law as in civil law countries. It is beyond doubt that academic systematisation efforts help to make the law accessible, but these are almost entirely directed towards the legal community: other academics, judges, legislatures and legal practitioners may profit from these, but they do not necessarily make the law more intelligible to the public at large. This is equally true for various other techniques that State institutions use to overcome the problem of contradicting, unstructured and inaccessible laws. These "law-collecting techniques"<sup>34</sup> are well known. In their most rudimentary form, they consist of the mere publication of annual collections of statutes (such as the Dutch *Staatsblad*, German *Bundesgesetzblatt* and American *Statutes at Large*) or of case law (such as <[www.rechtspraak.nl](http://www.rechtspraak.nl)> and <[www.legifrance.gouv.fr](http://www.legifrance.gouv.fr)>).<sup>35</sup> A more advanced form is to consolidate the existing law by putting existing statutes in a more coherent order. The best example of this is the United States Code, which categorises US federal laws in 51 titles and is published every six years by an office of the House of Representatives. The French Code de la Consommation is another example of an official compilation of existing statutes.<sup>36</sup> Private initiatives, such as the American restatements of the law<sup>37</sup> and sets of European principles,<sup>38</sup> are other types of law-collecting techniques that may help professional lawyers in learning about the currently existing or desired law.

<sup>32</sup> R. Goff, "The Search for Principle, Maccabean Lecture in Jurisprudence", 1983, in: W. Swadling and G. Jones (eds.), *The Search for Principle*, Oxford 1999, p. 313.

<sup>33</sup> See in more detail Jan Smits, *The Making of European Private Law*, Antwerp–Oxford–New York 2002, p. 151 *et seq.*

<sup>34</sup> Jürgen Basedow, "Transjurisdictional Codification", *Tulane Law Review* 83 (2009), p. 973 *et seq.*

<sup>35</sup> Traditionally, the publication of case law is outsourced to commercial publishers (as in case of the Dutch *Nederlandse Jurisprudentie*, published by Kluwer and of the German *Entscheidungen des Bundesgerichtshofes*, published by Beck).

<sup>36</sup> Basedow, *op cit.*

<sup>37</sup> Available for 25 different fields of the law: see <[www.ali.org](http://www.ali.org)>.

<sup>38</sup> Cf. Von Bar & Clive (eds.), *Draft Common Frame of Reference*, *op cit.*

#### 4. Alternatives to Codification: Towards Legal Information Management

If codification can no longer do what it set out to do historically, the question is justified whether we should not aim to develop alternative ways to make the law accessible. In my view, codification is primarily an instrument of information management: a way to collect and manage information from various sources and to distribute this information to various audiences.<sup>39</sup> In a recent book, Ann Blair makes abundantly clear that the problems of information overload and of dealing with inconsistent and chaotic information are not new and that techniques to manage these problems go back to the Middle Ages.<sup>40</sup> In the broader picture of ordering information by way of indexes, references, florilegia, digests and compendia, codification is only one possible technique.

In my view, the presently used means to provide information about the law do not sufficiently take into account the possible alternatives. The most surprising thing is probably the only limited use that is made of new technologies in providing access to the law. As Richard Susskind has argued, legal empowerment of citizens consists foremost of raising legal awareness, in particular for those who lack the funds for professional legal assistance. Technology can play an important role here by providing online information.<sup>41</sup> I believe that successful legal information management depends on three main factors: *which* information is provided, *how* it is presented and *who* provides it.

First of all, it is clear that any novel type of information management should avoid the problem of national codification that it is almost entirely focused on national law.<sup>42</sup> The legal information to be provided is only useful for a general audience if it does not only include national law, but also any other type of applicable rules such as general conditions of retailers and codes of conduct. It should also provide clear overviews of possibilities for legal action, either through the state courts or through alternative dispute resolution, as well as information about possibilities for the inclusion of choice of law clauses.

Secondly, this information should be organised in a way that makes it intelligible for an audience that lacks knowledge of any theory of sources of law. The problem

<sup>39</sup> Barbara C. McNurlin & Ralph H. Sprague, *Information Systems Management in Practice*, 7<sup>th</sup> edition, Upper Saddle River 2008.

<sup>40</sup> Ann M. Blair, *Too Much to Know: Managing Scholarly Information before the Modern Age*, New Haven 2011.

<sup>41</sup> Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services*, Oxford 2010, p. 238 ff. and id., *Tomorrow's Lawyers: An Introduction to Your Future*, Oxford 2013.

<sup>42</sup> See e.g., P. Leith & K. McCullagh, Developing European Legal Information Markets based on Government Information, *International Journal of Law and Information Technology* 12 (2004), p. 247 ff.

with current presentations of law is that they not only tend to make a sharp distinction between legislation and case law, but also between national, European and international sources. This greatly reduces the usefulness of existing websites that provide at best an incomplete picture of the applicable laws.<sup>43</sup> A more innovative type of presentation should avoid making a sharp distinction between the various types of sources. Moreover, as is also emphasised by Susskind, it should not be organised by way of the conventional legal categories such as contract, tort and property, but rather be based on “life events that citizens will immediately recognise as matching their position or predicament.”<sup>44</sup> This could be done by using categories such as “I have been fired” or “I have a dispute with my landlord.”<sup>45</sup>

An important problem of providing information on complex matters is that the intended audience may not be able to assess it in a meaningful way. A way to solve this is to rely on the experiences of users of legal systems or of experts by way of screening, signalling and ranking.<sup>46</sup> Existing comparison websites and product reviewing<sup>47</sup> sites provide insightful examples of how legal information can be presented. They could offer rankings of jurisdictions based on their attractiveness for parties and share experiences of users of these legal systems with others.<sup>48</sup> Each user could thus add more value to the common network of users of the rule in question. The challenge is to develop criteria for making such rankings that will be accepted by everyone.<sup>49</sup>

The third factor is concerned with which actors should provide information about the law. The problem with leaving this to the institutional suppliers of law (such as the State) is that these are not able to give an objective account of the laws they create. Moreover, they are not in the best possible position to give a complete overview of existing private regulation, general conditions and the like, let alone provide information about European legislation and foreign laws to be made applicable by way of choice of law. Commercial publishers and established lawyers, on the other hand, should not be exclusively entrusted with this task either as their

<sup>43</sup> A good example is the website <<http://europa.eu/eu-life/consumer-rights>>. It provides information about “shopping in the European Union”, but only mentions the rights of consumers as a result of European legislation.

<sup>44</sup> Susskind, *The End of Lawyers? op cit*, p. 243.

<sup>45</sup> A good example is provided by <<http://www.lawontheweb.co.uk>>.

<sup>46</sup> See in more detail Jan M. Smits, ‘Party Choice and the Common European Sales Law, or: How to Prevent the CESL from Becoming a Lemon on the Law Market,’ *Common Market Law Review* 50 (2013), p. 51 *et seq.*, at 59.

<sup>47</sup> Cf. e.g. <[www.pricerunner.co.uk](http://www.pricerunner.co.uk)>, <[www.kelkoo.com](http://www.kelkoo.com)>, <[www.epinions.com](http://www.epinions.com)> and <[www.booking.com](http://www.booking.com)>.

<sup>48</sup> See Omri Ben-Shahar, ‘The Myth of the “Opportunity to Read” in Contract Law,’ *European Review of Contract Law* 5 (2009), p. 1 *et seq.*

<sup>49</sup> One method of comparing jurisdictions is to look at the extent to which they ease doing business: see World Bank Doing Business 2013, available at <[www.doingbusiness.org](http://www.doingbusiness.org)>. An overview of criticism can be found in e.g., Michael G. Faure & Jan M. Smits (eds.), *Does Law Matter?*, Oxford 2011.

incentive is to make information only available to those who are willing to pay for it. In my view, the gap left by States and traditional providers of legal services should therefore be filled by private actors wishing to act in the general interest. This leaves much room for “law entrepreneurs”<sup>50</sup> willing to develop alternative models of providing legal information to the general public. In an optimal scenario, different models would compete with each other, leaving it to users to decide upon their usefulness.

## 5. Between *Volksgeist* and Codification: the Paradox of Von Savigny

Von Savigny opposed codification in what has become one of the most famous legal writings of the last two centuries.<sup>51</sup> Law would be grounded in the consciousness of the people (the *Volksgeist*) and codification would cut the organic link between a people and its law. Only after careful historical study of how the law has come about, one would be able to create a comprehensive codification that does justice to the unique qualities of the people to whom it is directed. The paradox is that, despite this apparent focus on the needs of the people, it was through the influence of Von Savigny that the law became a matter for the elite. The writings produced by the highly trained legal academics of the Historical School were surely not aimed at laypeople. The result of this influence is still visible today. Benjamin Lahusen recently described the situation in Germany in the following way: “In der wissenschaftlichen Rechtskultur Deutschlands kommunizieren Rechtstechniker mit anderen Rechtstechnikern; das Publikum des Rechts sind die Juristen. Das ist die unweigerliche Nebenfolge einer Jurisprudenz, die die ausschließliche Zuständigkeit für die Verwaltung von Rechtswissen einer sorgfältig ausgewählten geistigen Elite zuschlägt.”<sup>52</sup> The same could be said of any other modern jurisdiction. This calls for a different way of presenting the law to the general audience: not by way of national codification or through legal science, but by creating alternative models of legal information management.

<sup>50</sup> Cf. Larry E. Ribstein, “Law entrepreneurs”, Truth on the Market blog, 24 May 2010, available at <<http://truthonthemarket.com/2010/05/24/law-entrepreneurs>>.

<sup>51</sup> Von Savigny, *Of the Vocation of our Age for Legislation and Jurisprudence*, 1814, *op cit*.

<sup>52</sup> Benjamin Lahusen, *Alles Recht geht vom Volksgeist aus: Friedrich Carl von Savigny und die moderne Rechtswissenschaft*, Berlin 2013, p. 149.