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I. Turkish Civil Law is not only Swiss, but European in character

It is common knowledge that the legislator of modern Turkey when in 1927 codifying its civil law followed the example of the Codes of Switzerland, i. e. the Swiss Civil Code (SCC) and the Code of Obligations (SCO), both in force there since 1912. The Turkish and Swiss Civil Codes are (except for minor modifications) identical, therefore allowing the view that Turkish and Swiss private law are the same. This understanding is not only the view of the layman and of foreigners, but is also prevalent amongst the lawyers and in the doctrine of Turkey.

Said interpretation of the legal situation in Turkey is most flattering to Switzerland and to every Swiss lawyer but it is correct only, as long as we are prepared to apply the understanding of law as predominant in the heroic periods of the creation of the modern codifications, i. e. the identification of the law with the then fathered codifications or, the other way round, to reduce law to the then born codes. This concept of law is no longer valid but gives more and more room to other views.

The celebration of the birth of modern Turkey, including its westernised private law seems to be the appropriate occasion to discuss the consequences of the new understanding of law for the situation of Turkish private law which in many respects is historically exceptional. Eventually it shall be shown that Turkish law is in character Swiss, but at the same time predominantly European.

II. Law is increasingly understood as not being represented by codifications exclusively, but by legal tradition

For quite a while in continental Europe the identification of law and codification has been predominant. This approach attributed unheard authority to the codifications, reducing law to more or less well made texts labelled "codes". But in the last decades things have changed. The evolution since the coming into existence of the great codes has shown that law is a phenomenon much more complex than what can be deducted from the texts of the existing legislation, the rules of the codes not offering more than general guidelines whilst the all to numerous legal questions raised by daily life may be answered only on a higher level of law-understanding. In order to find and apply the law correctly it is indispensable to consider not only the wording of the codes, but legal tradition in a double sense. *First:* the legal tradition as existing before the act of codification, ruling details which where not preserved in the codes which necessarily generalise and abstract from details. Fundamental is the fact that the Codes, whatever dimension they may have (be they short as the French Code Civil, or verbose as the old Allgemeine Landrecht of Prussia) can never be comprehensive, i. e. cover all thinkable problems of life. *Second:* Since the coming into existence of the codes a tradition of legal practise and court decisions develops which cannot be disregarded in the future. The court decisions (hopefully inspired by sensible legal doctrine) produce evolution as well as modification of the law: By adding rules not provided for in the codes they amplify the law, by departing from what has previously been understood to be the law of the code they change the law from time to time.

That the identification of law and codes is no longer admissible becomes evidenced by the fact that in the area of the Civil Law tradition, i. e. in continental Europe (where the concept of codification of the law has its origin), the creation of codes complying with the original great and ambitious concept of codification is no longer possible. Today nobody is prepared to believe that e. g. the French Civil Code, the German BGB or the Austrian or Swiss Codes could in a foreseeable future be substituted by a new national text or by a text created collectively by the European Union: Not only foreseeable divergences of views of the legislators in the substance make such plans illusionary, but first of all the absence of any generally admitted concept of codification; there would be no agreement on what substance to include rules in a code, everybody being aware that to the unforeseeable bulk of questions raised by daily life at all events only a modest amount of answers can be provided.

The pretension attributed to codes to represent the law in its entirety does not meet reality. But justice must be given whether or not the applicable code is providing an appropriate basis for the issue. Therefore, if the code is silent, another set of rules must become applicable should the

decision pretend to be based on law. Such rules are valid law even if not contained in a code. This part of law is called most appropriately "tradition", a term making reference to two fundamental elements:

– "Tradition" connects law with the dimension of time, i. e. making clear that its sources go back to the past, and its claim to be applied goes to the future, an element missing in the notion of "code" which by its nature is abstract from time. i. e. without any reference to past and future. Law and its rules must be of general application, i. e. not consist in individual and casual decisions. Non-codified law, which necessarily is constituted by single occurrences (court decisions, establishing of rules in treaties by law-authors etc.), has no other means to grant the element of general applicability than pretending that its rules come from the past and go to the future. Such generalisation over time, or continuity, is an indispensable element of non-codified law, discontinued law being possibly created only by codification. The precondition of generalisation implies furthermore the restriction that principles presented as being exceptional and not supported by general acceptance do not become part of the legal tradition. The element of time opens the possibility to limit tradition time-wise, i. e. at its beginning, at its end or both. Obviously it would be possible in a given context to restrict the notion of a determined tradition to a determined time-period (e. g. the 17th century), to a period ending by the time of the enactment of a given code or starting with the same event. In its nicest concept tradition is without limitation, thereby implying that good law may adapt to changing circumstances but in its core remains unchanged for a considerable and unlimited period. In many contexts – and presumably in this short presentation – the range of time comprised by the term tradition is self-explanatory.

– While codes by definition are limited to the area of sovereignty of the state enacting it, "tradition" lacks delimitation in space and therefore requires specification. Tradition may be limited to the area of a national unit, but may be common to a much bigger area (e. g. the area of a language, to continental Europe or may in some contexts even have global application.

For more precision it may be worthwhile to finally state that "legal tradition" in the above sense is a remainder, a notion defined by negation, i. e. the law which is not contained in the given codes. It can mean many things. In the present context it should be understood in its largest possible delimitation, i. e. comprising all law rules, whatever their origin may be, which could, be it by direct or by so called analogous application, influence us (may we be lawyers or laymen) when looking for the actual law-rule applicable to a legal problem upcoming today. The material representing such tradition comprises the legal literature and law practice (first of all the court decisions), may they refer to the period before or after the act of codification.

III. National codifications lose ground to a supranational approach to law

The excessive authority attributed to the codes as a consequence of their being identified with the law is today not only questioned by their incapacity becoming evident to provide sufficient solutions to the problems created by every day's life. These days the European unification is reducing dramatically the importance of national boundaries, thereby necessarily questioning the predominance of the national codes which rely on them: The in Brussels persistently reiterated claim for a unification of the Civil Law of the nations participating in the EU illustrates the reduced authority of the existing codes of the member states regardless the fact that such claim has actually little chance to be realised. This evolution questions the understanding of the codifications as exclusive sources of law and implies the belief in the existence of a legal culture of supra-national character and of a common legal tradition existing since time immemorial. Thereby the actual idea to form a unified European Code of Civil Law stimulates and requires an until now unknown interest in the common legal tradition existing before the creation of the modern codes which had put an end to it. This comparative interest (be the comparison historical or inter-local) goes by far beyond the (for the time being not realistic) perspective of European unification of the core area of the European civil law. Therefore it shall involve also Swiss and Turkish researchers and law-teachers although neither Switzerland nor Turkey actually participate in the European unification.

IV. To what extent do Swiss (and therefore Turkish) codifications reflect local Swiss or common European traditions?

When comparing a national legal system with the legal tradition of a greater area, necessarily the question arises with respect to each of its details whether the rule under consideration is influenced by the supra-national tradition or constitutes an element developed in the framework of the respective national law.

To know to what extent the two Swiss codifications adopted by Turkey, i. e. the Swiss Code of Obligations (SCO) and the Swiss Civil Code (SCC), show the influence of the supranational continental law tradition or represent legal solutions as developed inside the area of today's Switzerland is a question so comprehensive and general that an answer (which necessarily would consist of thousands of remarks clarifying the background of any and every detail of the SCC and the SCO) cannot be provided in the present text. Only a few general observations may be presented.

Codes never rise out of a legal desert; they presuppose a basis of legal culture and a background of juridical science and theory. In the first

part of the nineteenth century such a basis of autonomous character could not come into existence in a small area such as Switzerland, all the less as at that time said area was predominantly agrarian and as such providing little incentive to develop a class of lawyers having profound professional training. The juridical culture in the 19th. century could only consist in the participation of Swiss lawyers in the legal culture of the neighbouring countries. Personalities such as FRIEDRICH LUDWIG KELLER (1799-1860) and JOHANN CASPAR BLUNTSCHLI (1808-1881), both originated in Zurich (in the early 19th. century still a very small city) studied in Germany and became legal authorities in their home town contributing to the foundation of the University and its Law Faculty (1833). BLUNTSCHLI has direct involvement in our problem being the main author of the "Privatrechtliches Gesetzbuch" (PGB) for the Canton of Zurich of the years 1854/56 which did not only receive wide international attention with noticeable impact in Germany but was the most influential model for the SCO and SCC, therefore being part of the historical background of the actual Turkish codes. By mid-century both KELLER and BLUNTSCHLI made an important career in Germany as law Professors and legal writers, even participating in German politics, their deeds giving evidence of the close intellectual connection of Switzerland with the German area. – The main author of the old SCO of the years 1881/83, WALTHER MUNZINGER (1830-1873), had studied in Berlin as well as in Paris; he was teaching at the Bern Faculty i. a. French Law, and his draft of the SCO shows considerable influence of the French tradition. EUGEN HUBER (1849-1923), best known of all Swiss authors in Turkey, was for four years Professor in Halle (Germany) before accepting a chair at the Bern Law Faculty when in 1892 being invited to draft the Swiss Civil Code. As a rule Swiss students of law, whenever they could afford it, performed a substantial part of their studies at German Universities; a tradition which came to an end only in the nineteen-thirties. Altogether the involvement in the legal culture of central Europe of Switzerland as well as of the personalities directing the several procedures of codification is evident, and likewise evident the integration of the Swiss codifications in the framework of the continental legal tradition.

When trying to allocate the content of the Swiss codes either to authentic national Swiss law-sources or to the law-tradition common to all countries of Europe the assumption will be realistic that the latter (i. e. the European) influence is – contrary to the actually prevailing view – by far more important than that of national character. Said rule is, as may be added, not restricted to the Swiss codes but applies also to a codification such as the German Bürgerliches Gesetzbuch (BGB) which is to a much larger extent than realised by the today's German lawyers indebted to the French Code Civil, to the Zurich PGB and to the old SCO of 1881/3 (see below). Undoubtedly the SCC, considerably more than the SCO, includes a large amount of details which are authentic, i.e. reflecting local law-traditions

or being original creations of EUGEN HUBER. But even when considering details of minor importance the assumption of their being of local (national) heritage can be erroneous: The Art. 719/III and Art. 725/II of the SCC making reference to swarms of bees have been praised as typically Swiss and symptomatic of the legislator's realism and love for details. But looking closer to the history of codification one realises that swarms of bees swarm not only in the SCC but in many European codifications (see e. g. ABGB of Austria § 384, Código Civil of Spain art. 612/I, II, German BGB § 958, Italian Codice Civile art. 924) as well as in many codifications.of other continents (see e. g. the Civil Codes of Argentina, Art. 2545 and Brazil, Art. 593 par. III), the origin and cause of this swarming being the Institutes of JUSTINIAN, book II/1,14 and 15 dealing with the matter.

The most important authentic contributions of the authors of the Swiss codes and their personal merits are *first* the formal presentation of the code-texts, *second* the wise selection of the one to adopt from diverting solutions offered by the then existing codes and literature, and *thirdly and finally* their having avoided shortcomings and mistakes of other codes, substituting questionable mechanisms by better solutions.

It is not questioned that the legislative technique and language of the Swiss Codes, that of the SCO as well as of the SCC, is hardly surpassed by other codes. Inspired by the example of the French Code a model has been developed realising a convincing balance between acceptable legislative simplification and comprehensiveness in substance as far as necessary. The systematic is easy to understand; more than most others the Swiss code may aspire to be consulted and understood even by laymen.

Important progress has been made in the law of obligations by evolving the heritage of the French Code Civil (FCC). Remarkable is e. g. that the SCO gives immediate effect to the declaration of the thereto entitled party to terminate a contract as a consequence of non-performance (SCO Art. 107) whereas the FCC art. 1184/III only admits dissolution of the contract by judicial decision. The same situation exists with respect to the termination of a *sales-contract* for defects of the delivered object (FCC art. 1648; SCO Art. 205) or rescission of the contract for *lésion* (FCC art. 1674; SCO Art. 21).

In general the SCO and the SCC in its basic elements are close to the German BGB, although this code is different in style and in the substance of many details. The similarities may be more the consequence of the lawyers designing the Swiss codes being thoroughly familiar with the German tradition than that of influence by the existing text of the BGB or the drafts to it. Nevertheless the position of the SCO in relation to the BGB needs special attention. The SCO and the SCC, both becoming effective as per 1st. of January 1912, create the impression that the SCO is

subsequent to the German BGB of 1900. That is correct for the SCC but not for the SCO. The fact is falling more and more into oblivion that the actual SCO is based on the original Code of Obligations of the years 1881/83 preserving its elementary features. Therefore most German lawyers cannot be aware of the fact that a series of very fundamental elements of the BGB are clearly influenced by if not copied from the SCO of 1881/3:

– The rule of § 326 BGB allowing to rescind a contract if the other party fails to offer performance in due course did not exist in previous codifications in German language nor in the "Dresdener Entwurf" (Draft to a German Law of Obligations; 1866). This solution was first introduced to a modern codification by the SCO of 1881/83 and from there taken over by the German legislator, forerunners being the *condition résolutoire*, art. 1184 of the FCC and §§ 1401 s. of the Zurich PGB (1854/6) which in turn influenced the German Commercial Code of 1861 (sales contract, §§ 354-356; for more details see BUCHER, p. 419 ss. in "Pacte, convention, contrat", mélanges en l'honneur de Bruno Schmidlin, Geneva 1998).

– *Error* (and other cases of defective consent) is not nullifying the contract as in the tradition of Roman Law and all previous codifications including the FCC, the Austrian Allgemeines Bürgerliches Gesetzbuch (ABGB) and even the "Dresdener Entwurf" of 1866 (Art. 59). Instead of constituting nullity it only creates a cause for annulment by the erring partner, a solution better meeting the needs of early clarification of the legal situation in questionable contracts. This innovation was suggested for the first time by MUNZINGER (Art. 33 of his draft of 1870 to a Swiss Code of Obligations) and became law subsequently in Art. 18 of the SCO of 1881/83 (actually Art. 23 of the SCO). §§ 119-124 of the German BGB are clearly following the example established by the old SCO.

Other elements of the BGB have their model and example directly in the PGB of BLUNTSCHLI: The innovation to separate the entrusting of the power of representation from the contractual relationship of the parties (i. e. abandon the then generally accepted model integrating the power of representation in the contractual relationship between the authorising and the authorised person; see ABGB of Austria §§ 1002 ss. and even more explicit the Art. 1984-2010 of the French Civil Code integrating the rules of representation in those of the *mandat*-agency), goes back to §§ 949-954 of the Zurich PGB which introduced that system for the first time. It was subsequently adopted by Art 83-91 of the "Dresdener Entwurf" from where it passed to the BGB (in German literature these merits are attributed to German authors).

On the other hand the fact is worth being noted that the authors of the Swiss codes successfully resisted the temptation to follow the German evolution, i. e. the example of the legislator of the BGB, with respect to some of their decisions which are fundamental but questionable and today

mostly qualified as being unlucky. In the present context three examples may be mentioned:

– The Swiss legislator renounced to install the notion of "Rechtsgeschäft" as a key element of contract law and handling of private law relations in general, this notion being on one hand highly abstract and missing any specific relation to practical problems as its content, on the other ambiguous and contradictory. The model followed by all other codifications to decide on the relevant issues in the context of contract avoids many difficulties caused by said notion.

– "Verzug" (*mora, demeure*, a kind of *default*) presupposes under the BGB a fault of the non-fulfilling debtor: This prerequisite is neither adequate in the context of interests for delay nor does it fit the possibility of § 326 to terminate the contract for default of the debtor.

– In the context of the contract-type of "Auftrag" (mandate) the legislator of the BGB slavishly followed (and even overstated) the Roman law by establishing the condition of the mandate to be gratuitous, a rule depriving this important type of contract of practical application and leaving the members of the liberal professions, lawyers, doctors, bankers and other groups, without an adequate contractual basis of their professional activity.

V. The antagonism between the traditions of the continental Civil Law and the Common Law

Finally we have to determine what constitutes the so called "continental" or "European" law tradition of which the Swiss law is a part.

The modern civilised world, as far as its law systems are concerned, may be divided in two parts: the group of the English speaking countries on one hand, all the remaining countries on the other (some interesting intermediate, "mixed" systems or archaic local traditions do not require consideration in the present context). Although these days the theory is prevalent that the differences of these two systems are diminishing and in the outcome of minor importance, the undersigned takes the opposite view and thinks that notwithstanding similarities on the surface and a process of mutual influence the existing differences are fundamental. The more fundamental the legal issue under consideration, the greater the given divergences. This is explained by history. The diverging evolution of the two systems started when the Normans, having conquered England, established strict rules and order including a well organised framework of law-courts there. This event was new and unique for the Middle Ages, a situation in total opposition to what was then known in Europe.

In Europe the political power was split in innumerable fractions excluding the emergence of reliable court-systems. Substantive law, as far as determined, was of local applicability only; its diversity hindered its

being developed or taught properly. The universities as created since the 12th century did not teach local law which where of limited intellectual interest and doubtful practical importance. Their teaching subject was Roman law, which admittedly had, in the first centuries of its being taught no validity and direct applicability. This law was presented as a historical subject but at the same time as an imaginable model of an ideal law, which could come into existence in a better future. For the majority of the students the studying of Roman Law may have been simply a means of education in a non-ecclesiastical subject and a medium of intellectual training. Whereas on the continent education in the actual applicable law hardly existed, in England, a caste of barristers emerged forming professional groups (the *inns of court*) who took over the professional formation and subsequently even received the competence to elect the judiciary. This legal education provided by the inns was focused on law-practice exclusively, thereby giving emphasis to its procedural aspects whereas substantive law was of less importance and by tradition considered to be simply the reflex of the existing procedural remedies. Roman law was taught at the English Universities but had, as well as any kind of a thereto related theory, no importance for the application of law and was therefore of no interest to the practitioner of law (Canon Law, originating in the Roman tradition and applicable in succession and family- or maritime matters – "wills, wives and wrecks" – before the Admiralty Courts, makes an exception to said rule but eventually had no permanent influence on the English legal tradition in general).

In the outcome, the law tradition as created in England (and subsequently adopted in its outline in the colonies) is determined by the practitioners' approach to law. Theoretical legal treatises having a decisive influence on the substantive law as realised in courts do not exist nor is legislation present which in its importance could be compared with codes of the continental tradition: The substantive law is basically contained in the court decisions which are binding; by the maxim *stare decisis* they constitute in their entirety the legal system. – On the continent we have the opposite situation: By tradition, Court decisions have no influence on the creation and development of substantive law. Creating and developing law has been (and still is) the task of the legal theory, i. e. legal teaching and legal writing: The Civil Law tradition of the continent cannot be understood without the stupendous phenomenon of the reigning legal theory there, represented on one hand by innumerable law faculties attracting fabulous numbers of students and on the other a prolific mass production of law books. It was again this tradition of legal theory which created the concept of codification, providing the basis for the drafting of the great codes of private law which up to these days are deemed to be the decisive source of law. It is only very recent that these codes are loosing ground insofar as court practice starts claiming attention and establishing itself as a secondary source of law.

In our days the antagonism of the basic structures of the two legal systems (mostly called "Civil Law" and "Common Law") continues to dominate the global legal scenery. It consists in the fact that one of them is determined by legal theory which has a background of a tradition of two millennia and being actually reflected to a large extent by codifications, whereas the other gives no room to theory but is relying mainly on the experience of court practice gathered during a couple of centuries.

Simplifying the picture one may say that the English speaking countries adhere to the system of England of which they were formerly colonies, while the other areas follow the tradition of continental Europe. This is obvious for the countries being former colonies of Spain, Portugal or France (i. e. mainly Latin America), but the same is true for most parts of the near and the far East as well as for the countries having been formerly part of the Soviet empire. Whereas the adoption of the Common Law-system is practically restricted to former colonies of England, the same is not at all true for the modern Civil Law tradition: it was created in Europe during almost a millennium and gained in the last three centuries acceptance world-wide. The fact that Japan, old China, Korea and other empires of the far east adopted codes following that tradition, shows that this concept of law was not introduced as a consequence of perseverance of former colonies but as a result of free choice. That is also the situation of Turkey having never been dominated by a foreign power implanting its legal system there.

Turkey, by choosing Swiss law as a model for its own codes, declared at the same time its determination to integrate itself into the community created by the European Civil Law and integrated itself into the tradition of the Civil law area. Turkey therefore must adhere to the elements characteristic for said tradition. This country seems to be determined to preserve the great cultural heritage of the continental European civil law. That being so, it is bound to follow the approach to law that is dominated by legal theory and science. To adopt the approach to law as prevalent in the English speaking world which renounces to a large extent to reliance on theoretical thinking would constitute a breach with a tradition which is its own since three quarters of a century.

VI. Some conclusions as to the future of the Civil Law, its being developed and taught

The above references to the past should allow some conclusions for the future. As the development of the Civil Law up to its actual status was determined by the evolution of the underlying legal science and theory, the history of continental law is the history of the thereto-related science and theory. What is the actual situation of this discipline, what are its tasks and actual aims? The most spectacular element appearing in our days and changing the ideas of contemporary society and even of lawyers

(by tradition a conservative breed) may be labelled as "internationalisation": an increase of information with respect to other countries, an increase of uniformity of thinking and lifestyle. The consequences for the lawyers-community in Europe: The need to get acquainted with foreign legal systems and even to familiarise with plans to give up national laws in favour of unified laws, will result, so we dare hope, in an increased interest for foreign law. Such an interest necessarily leads back to the past, i. e. to times preceding the "nationalisation" of European law and antecedent to the creating of national codes. It was the period of "nationalised" law, which put an end to the previously existing common legal culture; the search for a future common legal culture cannot but start from the one existing in previous centuries. The actual evolution favours a change of the thinking and academic habits of the lawyers-community: They are invited to a more comparative approach to law and to an increased integration of past evolutions into the understanding and interpretation of the today's law. This evolution could on longer ranges have even more impact in Turkey because there – as will be explained below – the understanding of the law was perhaps more than elsewhere focused on the national codes and neglecting the historical basis of the actual (code-) law.

Every act of codification constitutes a long-term risk to legal science and investigation, which are in danger to reduce themselves to an interpretation or even rephrasing of the legal texts – not only neglecting the historical background of the codified law and therefore partly missing to understand the *raison d'être* of the existing codes, but disregarding something even more important than the understanding of the codes: the anticipated exposition of possibly upcoming practical legal problems even if those are not covered by codified law offering solutions to them. Historical experience shows that in the twentieth century in France the legal literature dedicated to the FCC could not maintain its previous standing; the German literature of the last years is not sufficiently reassuring that it will be able to maintain its previous standards and will not degenerate to an uncritical and mainly technical reporting of actual court decisions and recent legal writing. To sum up: History provides some evidence that the creation of a civil code constitutes a shock and long-term threat to our discipline, the science of law.

If this is true, the legal researchers in Turkey suffered two shocks and a double threat: The act of national codification, i. e. the creation of the Turkish Civil Code was only one of two events, because the adopting of the Swiss Code led back to the event of the Swiss codification. If the Turkish lawyer tries to overcome the bar to the past established by his national codification, he does not find himself in an ambience of pre-codification, but in the Swiss procedure of codifying law: His search for the substance as existing before codification and providing the basis for codification must surmount two barriers separating the actual code-law

from its pre-existing legal background. That may explain that the Turkish scientific tradition is perhaps more unhistorical (i. e. disregarding the tradition preceding the process of codification) than that of Switzerland or Germany.

Swiss lawyers knowing about the scientific endeavours of their Turkish colleagues are surprised and deeply impressed by their thorough knowledge of the actual Swiss literature and court-decisions. The situation is flattering both to the courts of Switzerland and to the legal authors of this country. That cannot hinder the undersigned to plead for an increased dedication (be it by reducing the time devoted to the Swiss aspects of their law) to the supra-national and common European law-tradition which is the basis and a constituting element of the Swiss codes and therefore also of the Turkish codes.

The material inviting to be considered when looking to the common sources of Swiss and Turkish law may be outlined as follows. If we concentrate mainly on the law of obligations and contracts the legal tradition influencing the Swiss codification (i. e. mainly the SCO of 1881/3), its main source is the German tradition of the 19th. century and to a lesser extent French law. In the area of today's Germany two lines concurred: The Roman Law-tradition as represented by the doctrine of the "Pandects" on one hand, on the other the then existing codifications (the Handelsgesetzbuch, some Codes of particular States and, most important, the "Dresdener Entwurf für ein Obligationenrecht" i. e. the Draft of Dresden for a Code of a German Code of Obligations published in 1866). The French tradition relevant for the Swiss codes was represented by the literature to the FCC of the 19th. century.

More profound investigation will not restrict itself to the mentioned material near at hand. More radical research will take into account that both lines of tradition, i. e. the German as well as the French, cannot be understood without looking into the materials of the preceding centuries. Then Roman Law was dominant, almost exclusively in the German tradition, but – contrary to a widespread view – also in the French tradition. In Germany authors like CARPZOV (1595-1666), VINNIUS (1588-1657) or VOET (1647-1713), the latter two of Dutch origin, have been amongst the most influential, in France JEAN DOMAT (1625-1696), author of "Les loix civiles dans leur ordre naturel" ("The Roman Law principles put in an order as taught by natural reasoning") and ROBERT JOS. POTHIER (1699-1772), i. a. the author of a renown "Droit des Obligations". In addition, for the Law of the Coutumes, one has to look to the short "Institutes Coutumières" of LOYSEL (round 1600) and BOURJON, who was not only providing a systematic presentation of the principles of all then existing coutumes but inspired the authors of the Code Civil to the three-partition of its text (Consultation of Roman Law authors of previous generations such as those of the late sixteenth century, e. g. CUJACIUS and DONELLUS, or three

centuries back, AZO, ACCURSIUS, BARTOLUS or BALDUS, will be exceptional only). – In order to show that an understanding of the actual French code is not possible without going back to its Roman sources two examples may serve: The possibility of legal representation when concluding contracts is introduced to the code by inclusion in the *mandat* (CC art. 1984-2010), which rather strange concept can only be understood by knowing that the Roman law tradition rejected altogether representation ("procuration" in the French text) by the rule *alteri stipulari nemo potest*, whilst *mandatum* was a well established type of contract. The unlucky "effet translatif" of contractual obligations, i. e. the effect to transfer title in the moment of the conclusion of the sales-contract, was not only against the (Roman Law-founded) tradition of the European continent in general, but also against traditional French law. As the undersigned recently tried to show in ZEuP (Vol. 1998, p. 615-669) this surprising substitution of an old and until then not questioned rule for a new system in the Code of 1804 is the attempt to recast the old Roman rule *periculum est emptoris* (the risk is with the emptor). It is self-evident that not only French law, but even more its German counterpart cannot be understood without considering the legal literature of the centuries preceding the acts of codification.

The undersigning cannot refrain from putting a personal footnote to express his view that in a long-term perspective maintaining the previous standing and level of legal culture both in continental Europe as in Turkey will not be possible without an increase of attention given to classic Roman law both in the curricula of the Law Faculties as well as in legal writing. The actual trend of internationalisation of our lives indirectly favours Roman Law which actually in many places is of popularity previously unknown: One of the facts evidencing this allegation is the book of REINHARD ZIMMERMANN, The law of Obligations – The Roman Foundation of the Civilian Tradition (1st ed. 1990) which had and still has incredible success in the area of Civil Law and not less in that of Common Law. This comprehensive publication is perfectly appropriate to provide the render with insight into the background of the actual law of obligations as it may add a supplementary dimension to his understanding of law in general.

Promising signals (as said success of ZIMMERMANNs *magnum opus*) exist so that actually in Germany as well as in Switzerland amongst the young generation of lawyers in academic research there is more interest in understanding the historical background of modern law. In the area of Latin speaking countries the connection to the past has never been as seriously interrupted as in Germany and Switzerland (France, where an unhistorical approach to law is deeply rooted for over a century is an exception

to the other countries of Roman language). Certainly, in the future more should be done in all these places to understand the past. Turkey, as I tried to show, has good reasons to go the same way. A last remark: Turkish Law may now or in the future have the chance to become a model for other countries: We think primarily of some areas of the former Soviet empire. Not knowing how far actually the Turkish influence reaches: A comprehensive knowledge of the historical background of the Turkish legal system could not only contribute to an even better understanding of their own law by the lawyers of this country but could make this law better understandable and more attractive to others.

VII. Final remark: The concept of codification as promoted by Eugen Huber and being realised in the SCC

Accepting the view that all codes and also the Swiss and Turkish codes cannot pretend to represent the entirety of law but presuppose the collateral existence of an unwritten, but none the less real and effective law tradition, is diminishing the prestige and importance of the codes. This view inevitably lessens the historic weight of the reception of the Swiss codes in Turkey. The position as developed in these lines is apparently apt to reduce the prestige of the Swiss codifications and that of the author of the Civil Code, EUGEN HUBER. Be that as it may: Whatever prestige the Swiss Codes and their author have, it is not the consequence of said reception only but in all events most well deserved. On the contrary: when the community of lawyers begins to question the validity of the traditional (and in the ideology of codification itself comprised) identification of law and codification today, this position has been anticipated by EUGEN HUBER, pretending for "his" code application only in cases "which come within the letter or the spirit of any of its provisions" (SCC Art. 1 par. 1, English translation by IVY WILLIAMS). This relativism with respect to the importance of codes was at the last turn of centuries much ahead of time, impressing the legal community of that period. The ideas developed here can therefore claim to be in line with the understanding of the nature and impact of the codes by EUGEN HUBER.