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Coding the Nation. Codification History from a (Post-)Global Perspective*

> The term "code" derives from "caudex," which was simultaneously the trunk of a tree and a set of laws. It is one of several terms clustering around the idea of power being resident in a sacred tree; the Roland, at the center of the traditional village. A code, then, is etymologically and functionally the trunk around which a settlement arranges itself.
>
> Pat Pinnell[1]

I. Introduction

Codification history, a "core issue of modern legal history,"[2] has been around for several decades. During this time, its main subject, the legal code, has lived through many different, and often slightly contradictory, definitions. During the early days of the emerging discipline, Franz Wieacker sometimes referred to it as a "delightful possession of the peoples of modern Europe,"[3]

> "[a] unique, hard-won and hard-to-defend, creation of legal civilization on the Western and Central European mainland, and only there. One of the most characteristic formations of the European spirit, which displays its social and individualist character most distinctly."[4]

Wieacker's view of modern law and its codes was obviously highly idealistic, and as such has long enjoyed a "monopoly-like position in the methodology of legal history,"[5] especially in Germany. His faith in an objective order of

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1 Quoted after Duany (2004).
2 Caroni (1991) 249. Unless stated otherwise, all translations are ours.
3 Wieacker (1954) 34.
4 Ibid.
5 Senn (1982) 77.

law, whose elements and concepts could be brought to light and even offered to the world for future use by historically adept jurists, (whom he strongly preferred to historians, even those with legal training), owed much to the hermeneutical theory of Emilio Betti, who, in 1955, had presented a famous book on the topic.[6]

Besides being idealistic, Wieacker's concept of codification had an equally positivist side, as it required the

> "submission of the judge and the fellows of the law under a complete system of norms, rising consistently from singular legal rules and institutes to the highest concepts and principles."[7]

This system had been established in the 19th century by "the most advanced and self-confident class"[8] of its time, the bourgeoisie (*bürgertum*), with its keen interest in science, economics and *kultur*. The law of this society was general, abstract and rational, with a strong focus on property and obligations, rooted in Roman law and in the idea of the enlightened subject, as it had emerged in the contractualist theories from the 18th century.[9] It goes without saying that the other legal and political institutions of this particular society were equally rational. They were grouped around a strong power centre, which was not mindlessly authoritarian, but relatively benign. Contrary to many other systems of governance of the day, it was a *rechtsstaat*, whose purpose was not so much to maintain and defend an abstract constitutional order, but to provide what was owed to each one of its male and – albeit to a lesser extent – its female citizens. In order to do this, and to be able to defend the *kultur* of the nation, the state of a *rechtsstaat* had to be exceedingly powerful, both in terms of the rationalism of its structures and its military might. Thus, maintaining the law in its most rational and advanced form, the code was tantamount to maintaining the state, which in turn protected the cultural heritage of the nation. This eminently

6 Betti (1955). Cf. Senn (1982) 76–90; Wesel (1974) 348–50.

7 Wieacker (1954) 34.

8 Wieacker (1954) 46.

9 Wieacker (1967) 301–311. In the German-speaking countries, Wieacker's book, whose first edition dates from 1952, became the foundation stone of a whole new academic subdiscipline. To this day, *Privatrechtsgeschichte der Neuzeit* is taught at many universities throughout Germany, Switzerland, and Austria. Here, we have used the translated version, cf. Wieacker (1995) 239–248. For Wieacker's Weberian "inspiration" cf. Weber (1978) 866 et passim.

civilizing mission promoted a corps of academically trained jurists, the *juristenstand*, to act as the structural centre of society.

This, of course, derives from Max Weber, whose

> "overwhelmingly […] sober institutional-sociological account of how the spread of Roman law followed the rise to prominence of professionally trained jurists"[10]

inspired not only Wieacker, whose work has been deemed "unthinkable"[11] without Weber's influence, but so many other legal historians, that it has enjoyed virtual "hegemony"[12] ever since, having "received an enormous amount of acclaim among American legal scholars during recent decades"[13] and "dominat[ing] in European legal history"[14] even today. Even after Wieacker's idealist method of *privatrechtsgeschichte* had gradually made way for socio-historical approaches during the 1970s, central parts of neo-Weberian *rechtssoziologie* remained in place and continued to play a pivotal role in scholarly accounts.[15] Principal among these was the structural link between modern law and the state. Because law and the code were viewed as meaning virtually the same, democratic legislation and judge-made law *praeter codificationem* were equally perceived as unsettling disturbances of the legal order, which was ultimately threatened by "decodification."[16]

Thus, modern legal history ended up with two different strains of neo-Weberism.[17] Both were modernist and functionalist, with one a little less relentlessly so, but still holding on to the theory of rational formalism, while the structural-functionalist 'Parsonsian' strain consigned the codification to some distant past, like, in the case of Natalino Irti, to Stefan Zweig's *welt von gestern*.[18] Both had their deficiencies: While the former strain lacked insight into the self-reproductive and, in Weberian terms, deeply irrational workings of modern law, the latter appeared to misperceive codification and

10 Whitman (1996) 1850.
11 Hennis (1998) L44.
12 Ledford (2002) 385.
13 Berman (1985) 758.
14 Whitman (1996) 1850.
15 For recent examples cf. Kesper-Biermann (2009), and Jansen (2010), the former being an account of the emergence of the German power state (*machtstaat*) through the unification of its criminal laws, the latter a tour de force on the codificational genius of *rechtswissenschaft*, both German and foreign, through the ages.
16 Irti (1979) 21 et passim.
17 Berman (1987) 762 s.
18 Irti (1979) 21: "mondo di ieri," a quotation from Stefan Zweig.

re-codification as, in fact, an eminently vital and global phenomenon. Far from being obsolete – a relic from the "world of safety"[19] of yore, a victim of the "acceleration of history,"[20] a thing which "no longer occurs,"[21] a mere transitory phenomenon of the distant past, a "kodifikationszeit,"[22] which has long died out, as structural functionalism and systems theory would have it – legal codification today is alive and well.[23] Now the question arises as to how codification history and legal theory can come to terms with this fact without having recourse to the idealist, historicist and neo-positivist positions of the past.

II. The 'standard view' and its discontents

According to the neo-Weberian "standard view"[24] of codification history, as Damiano Canale called it, modern codes are thought to have originated in Europe during the second half of the 18th century. They presumably occurred in "waves"[25] – an expression coined by Franz Wieacker – first bringing up the Prussian *Allgemeines Landrecht für die Preussischen Staaten*, the Austrian *Allgemeines Bürgerliches Gesetzbuch* and the French *Code civil*, sometimes also called the *Code Napoléon*. A second wave, at the turn of the 20th century, is said to have brought on the more scientifically refined, and particularly liberal German *Bürgerliche Gesetzbuch*, and the Swiss *Zivilgesetzbuch*. The standard view maintains that during the whole of the 19th century legal codification spread throughout Europe in step with the emerging nation state, serving two main functions as the basic tool of the trade for legal professionals, and as the embodiment of a "definite conception of the nature of law and the social function of regulation by law."[26]

The code, as it is usually treated in legal history, is a Weberian ideal type.[27] Its main conceptual features are simplicity, self-consistency, and complete-

19 Irti (1979) 23.
20 Irti (1979) 26.
21 Luhmann (1995) 327 s., n. 59.
22 Brupbacher (2009) 179 et passim.
23 Cf. the examples cited in Zimmermann (1995) 103 et passim or more recently Weiss (2000) 454 and Schmidt (2009) 145 s.
24 Canale (2009) 135.
25 Wieacker (1995) 257 et passim.
26 Canale (2009) 135.
27 Weiss (2000) 455.

ness, with the alleged aim of making legal procedures more accessible and of improving the predictability of legal decisions. Its ultimate goal is the production of legal certainty. The normative source of the code is a strange mixture of sovereign legislation and legal science (*rechtswissenschaft*),[28] with the codes of the first wave rooted in the former, the more advanced codes of the second wave increasingly based on the latter. Rechtswissenschaft, of course, meant the historical school with its method of finding the 'true' law of the nation and fitting it into a system. The code is also seen as a paragon of legal positivism, which overrides all other sources of law in the same territory – the so-called codification principle.[29] Finally, it is said to establish the principles of equality and freedom, features, which according to the standard view, make the codes of the first wave precursors of constitutional orders, while those of the second wave act as the embodiment of bourgeois rule.[30] On the whole, the history of the code is generally painted as one of progressive enlightenment, the "historical process that led Europe to constitutionalism, democracy, and the rule of law."[31] Its focus is on civil codes, which are presented according to an ascending order of rationality, freedom and economic liberty. Codification of the criminal law, while clearly a side issue, is handled along the same lines as overcoming dark practices and ending up with enlightened procedures.[32] Historical instances of codification are thus consistently treated either as corroborations of a larger narrative of civilization through self-referential, rational law. Otherwise, they tend to be ignored, which, until recently, has led to the considerable history of colonial codes being almost completely left out.[33]

28 The *gesetz*, "that hermaphroditical character (*zwittergestalt*) of both being and knowledge, squeezing itself between law and science, covering both with its pernicious effects", as notoriously stated by Julius Hermann von Kirchmann as early as 1847, Kirchmann (1847) 14.

29 Dronke (1900) 703.

30 Wieacker (1954) 46. Cf. also Wieacker (1953) 10 s. This assertion can be traced back to Marx (1960) 201 s.

31 Canale (2009) 141.

32 Cf., e. g., Schröder (1991), 420 or more recently Luminati (2010). For a critique of accounts of progress in the history of penal law Schauer (2006) 358 et passim.

33 Cf., however, Naucke (1989) or more recently Benton (2002) 240 s. et passim; Martone (2002); Hussain (2003) 55–68; Likhovski (2006) 52 s. et passim; Jean-Baptiste (2008) or Kolsky (2010).

Besides the notion of uniform modernity, the Weberian paradigm in legal history suffers from a second defect, as it construes a universal concept – the code – from a particular and historically limited set of historical observations. Both the concept of formal rationalization inherent in the code and the notion of the power state (*machtstaat*) are intrinsically connected with German legal history and the foundation of Germany as a nation-state in the second half of the 19th century. While it is certainly true that, as Damiano Canale points out,

> "[a] phenomenon of the past, such as the modern codification of law, will accordingly take on historical sense only if it has 'universal meaning,' that is, if it can be conceived as the 'adequate cause' of our present beliefs, desires, values, and conceptual schemes,"[34]

it is equally important to notice that

> "on this conception of historical knowledge, we wind up ascribing to the […] codification the very sense that justifies our present idea of law and legal order, while any source or document from the past that fails to reflect our present view of what law is and what it ought to be will lose all 'historical interest' and be consigned to oblivion. In short, on this methodological approach to the history of law, history itself runs the risk of becoming a means by which to justify the present and misconceive or otherwise be ignorant of the past."[35]

Thus, the Weber paradigm, by equating codification with the structure of modern law itself, makes it difficult to explain historical phenomena such as deliberate non-codification, or the persistence or even renaissance of codificational order in the face of its structural demise allegedly occurring today. Equally difficult to assess are cases of arrested codificational development, which, according to the paradigm, must necessarily be interpreted as failures to modernize, an explanation much too narrow for the complex and manifold issues regularly involved.

These deficiencies have long been perceived among legal historians. Harold Berman has attacked central aspects of Weberism,[36] while still basically subscribing to the theory of rationalization.[37] Experts in the history

34 Canale (2009) 143 s.

35 Canale (2009) 144.

36 Cf., e. g., Berman (1985) 11–12, 337–38, 399–402, 539–41, 550–52 et passim; Berman (1987) 758–70; Berman / Reid Jr. (2000) 223, 234–37.

37 Cf., e. g., Berman (1985) 178 s.: "It was not transcendence as such, and not immanence as such, that was linked with the rationalization and systematization of law and legality

of codification – Bruno Oppetit,[38] Csaba Varga,[39] Pio Caroni[40] – have expressed similar doubts and mixed opinions. As a result, codification as a central concept of modern legal history has become blurred. Contemporary reference books term it as a "polymorphic historical phenomenon"[41] or a "complex reality subjected to continuous historical change, and therefore

in the West, but rather incarnation, which was understood as the process by which the transcendent becomes immanent."

38 Oppetit (1998) 61: "Faut-il aller plus loin et considérer que la codification, en se généralisant, marque le terme du processus de rationalisation du droit? Aurait-on atteint ici aussi ce qu'on a appelé la "fin de l'Histoire," entendue évidemment non pas au sens événementiel, mais comme achèvement du processus évolutif des institutions des sociétés humaines? […] C'est assez dire que la modernité peut être vécue différemment selon les époques et les pays et que la codification n'obéit pas à un déterminisme inéluctable. Elle exprime un droit en devenir, non un stade ultime et figé de son évolution; elle est donc exposée à des alternances d'essor et de recul, et ce d'autant plus qu'elle est tributaire du contexte général et qu'elle doit composer avec un certain nombre de données contraires à son épanouissement."

39 Varga (1991) 274: "Just as the appearance of the product as a power mastering and threatening the producer (i.e., the phenomenon of alienation) was the focal problem for Marx, for Weber this role was played by rationalization, i.e., the circumstance that the structures purporting to be the extension of liberty became independent and were turned into a power restricting this very liberty itself. The influence of Weber's age on his notion of rationality is to be found primarily in the absolutizing, even hypertrophical, significance assigned to its notional sphere."

40 Caroni (1991) 269: "Dem begriffsjuristischen Formalismus verhaftet, den die deutsche Pandektistik zum Inbegriff einer streng wissenschaftlichen Methode emporstilisiert hatte, hat dieses Modell während Generationen junge Juristen dazu erzogen, sich auf das rein Rechtliche zu konzentrieren und aus ihrem Tätigkeitsbereich Ausserrechtliches (wie z. B. das Sittliche, das Wirtschaftliche, das Politische usw.) zu verbannen. Es propagierte Abstraktion, weil es in ihr eine wichtige Voraussetzung für die Objektivität und Neutralität der Rechtswissenschaft erblickte. Und weil es davon überzeugt war, dass eine rein begriffsjuristische Anwendung oder Kombination abstrakter gesetzlicher Normen schon deswegen wirklich und gerecht sei, wenn sie den Gesetzen der formalen Logik entspreche. So kam es, dass sich die Juristen während Jahrzehnten nur noch für ihre Begriffe interessiert und all das gezielt und selbstsicher vernachlässigt haben, was sie in ihren Überzeugungen hätte verunsichern können. Dass sie die 'Rechtssoziologie' von Max Weber, die bereits zwischen 1911 und 1913 niedergeschrieben worden war und erstmals eine viel differenziertere und nicht zuletzt entmystifizierende Sicht der Kodifikationsgeschichte vermittelte, nicht zur Kenntnis nahmen, kann man ihnen demnach gar nicht übelnehmen."

41 Kroppenberg (2012) 1918.

not easily reduced to a common denominator,"[42] while experts in the field of codification history ominously call it "an open question in legal history and legal philosophy,"[43] "unclear and polysemous,"[44] or "a neutral form, an instrument to bring about a transformation of the structure and content of the law,"[45] which "has persistently been in flux over the last 200 years,"[46] its "way […] leading up to the present, from simplicity to turbulence,"[47] having "run through four millennia of legal history in very different forms," and therefore covering "extremely varied and diverse realities."[48]

The increasing lack of conceptual clarity regarding codification in legal history today is a direct consequence of many legal historians' (often unacknowledged) adherence to a set of neo-Weberian beliefs, viz. the equivalence of modern law and the positive *gesetz*,[49] the exclusive focus on functions and structures of power and knowledge, paired with disregard for non-normative manifestations as not being 'legally meaningful,' rationalization (and, equally, structural differentiation) as synonyms of uniform modernization and progress, or the notion that the ancient concepts of justice and genealogy or narratives of unity and community have somehow completely lost their legal meanings over the course of the past 300 years.

In order to overcome the neo-Weberian impasse, these beliefs must be challenged, modified and amended. Eventually, they should be supplemented with theoretical guidance which enables us to view codifications as more than command hierarchies designed to stabilize power structures or exercises in jurisprudential brilliance. If they were merely antiquated and essentially failed attempts at producing modern law – then why are they still in existence?

42 Caroni (2007) 855.
43 Canale (2009) 136.
44 Weiss (2000) 449.
45 Varga (1991) 14.
46 Weiss (2000) 470.
47 Cappellini/Sordi (2002b) VII: "La strada dei codici è dunque la strada che conduce al presente: la strada che dalla semplicità conduce alla turbolenza."
48 Oppetit (1998) 19: "Le terme de 'code' recouvre des réalités extrêmement variées et diversifiées, comme on l'a vu: la codification parcourt quatre millénaires d'histoire juridique sous des formes très différentes."
49 Cf. the incisive critique in Berkowitz (2010) 155–157 et passim.

III. The culture of codification

The answer to this question, in our view, lies in the fact that modern law is not so much a normative order, much less a universal one, as a belief system whose rules "do not just regulate behavior, [but] construe it,"[50] as Clifford Geertz maintained, its

> "imaginative, or constructive, or interpretive power [being] rooted in the collective resources of culture rather than in the separate capacities of individuals."[51]

This makes law, "even so technocratized a variety as our own" – this again from Geertz –

> "in a word, constructive; in another, constitutive; in a third, formational. A notion, however derived, that adjudication consists in a willed disciplining of wills, a dutiful systematization of duties, or an harmonious harmonizing of behaviors – or that it consists in articulating public values tacitly resident in precedents, statutes, and constitutions – contributes to a definition of a style of social existence (a culture, shall we say?) in the same way that the idea that virtus is the glory of man, that money makes the world go round, or that above the forest of parakeets a parakeet of parakeets prevails do. They are, such notions, part of what order means; visions of community, not echoes of it."[52]

Rationality, calculability and 'structurality' may well be aspects of a certain type of law, as they are certainly typical for certain notions of the political, but they do not define law. From this it becomes equally evident that structural functionalism of all sorts, including Weberian *rechtssoziologie*, do not offer 'objective' or 'value-neutral' insight into the workings of law, neither for the past nor the present, but an overly rationalistic, eurocentrically (or 'occidentally') limited and politically biased one.[53] It is, after all, due to his highly idiosyncratic and one-sided appreciation of the tradition of the social contract, Weber bases his concept of formal rationality exclusively on individualism, which effectively turns the entirety of modern law into an exercise in liberalism.[54] According to Weber, liberalism is the 'natural' political order for modern law to thrive in, because it is the only system which allows for its individualist rationalization.[55] Consequently, structural

50 Geertz (1983) 215.
51 Ibid.
52 Geertz (1983) 218.
53 Marcuse (1965) 161 et passim.
54 Weber (1978) 868–870 and the incisive critique in Berman/Reid (2000) 234–237.
55 Weber (1978) 871–873. For a critique, cf. Marcuse (1965) 178 s. et passim.

functionalism treats one particular set of policies as the default political order of modern society.[56] With certain reservations, this even applies to Niklas Luhmann's highly refined theory of social systems, where law is conceived as the stabilizing force not of institutions, but of normative expectations.[57] In the course of fulfilling its sole societal function, the production and re-production of legal certainty, law operates according to a specific kind of 'meaning' (*sinn*), the symbolically generalized communication medium of 'law' (*recht*),[58] which is related to the political medium of 'power' (*macht, rechtsmacht*).[59] For the legal system to be bound to operate and evolve meaningfully implies that what is not meaningful according to its own internal standards will not be treated as law.[60] By exerting such a 'diktat of the meaningful' – *sinnzwang*, as Friedrich Balke called it[61] – the legal system continuously confirms the societally – economically, politically, scientifically, mass medially – normalized, generically liberalist continuum, moving forever towards a receding horizon of uniform modernity, offering neither disruption nor an alternative.[62] Just like Weberism and structural functionalism, systems theory thus treats the question of the political as a foregone conclusion. It would be "simply grotesque"[63] to think otherwise – which is, obviously, an eminently political statement in itself.[64]

These preliminary, albeit tacit decisions in favour of the economic, political and cultural model of a mythical West, year of construction c. 1964, have produced a legal history with a very limited and narrow perspective of law and codification. It has proved especially unhelpful in treating colonial and post-colonial experiences as well as all kinds of legal 'transfers,' as it blocks out the imaginative and cultural in search of material structures and agendas. In our view, therefore, a useful theoretical framework must oppose the view that other dimensions of society somehow precede or even dominate law, or that it can only thrive in a liberal setting, or that it has to be rational or meaningful by definition or else not be at all.

56 Parsons (1965) 62 s. For a critique, cf. Stapelfeldt (2005) 166 s. et passim.
57 Luhmann (1995) 131; Luhmann (2006) 451.
58 Luhmann (1995) 35.
59 Luhmann (1988) 95 s.
60 Luhmann (1995) 192 s.
61 Balke (1999).
62 Stapelfeldt (2006) 224–226.
63 Welzel (1975) 348.
64 Voegelin (2009) 234.

It must, in other words, open up the narrow constraints of methodological-individualist functionalism and become a way of viewing law as a symbolic form, a matrix as well as a place of memory of the political. Law, thus, is seen as a "set of spectacles" – this quote is from Ulrich Haltern – for

> "[w]hoever looks through [them], looks at the political from a very specific point of view. The law invests the observed with a specific and particular meaning. Before it gives form to the political, it shapes our imagination of the political. Thus, law is a form of imagination, whose power does not lie in objectifiable facts, but in its ability to stabilize the political imagination."[65]

As Haltern maintains, the idea of modern law as a matrix relates to 'the political' – *le politique, das Politische* – as opposed to politics and political institutions, which play a major role in contemporary social and political philosophy.[66] Taken as theoretical guidance for modern legal history, some of its aspects may also be used to elucidate the cultural meaning of codification.

As an opposite concept to structuralism and functionalism, the political shifts the focus from the 'solid' forms of legal institutions, their scientific meaning and social impact to different aggregate states of law. 'Liquid' law, as we may call it, is, for instance, what Gottfried Wilhelm Leibniz had in mind when he proposed a just order extrapolated and codified from the laws of nature. To teach the science of natural law, he maintained, is to convey the laws of the best of all communities, while teaching positive law means adjusting the existing laws to the laws of the best of all communities.[67] Leibniz' code, therefore, is not a mere gesetz, but, in deploying a comprehensive vision of society, harks back to elementary questions of the political.[68] It constitutes society as a whole as well as being constituted by it.

The social and political constitutivity of codes in the Age of Reason is the subject of a recent work by Damiano Canale. Against the Weberian account prevailing in much of modern legal history, he treats codification not as a uniform concept along the lines of rational and individualist economism,

65 Haltern (2005) 17 s.

66 For a recent overview over various approaches to the 'political' cf. Marchart (2010), Bedorf / Röttgers (2010), and Bröckling / Feustel (2010).

67 Leibniz (1948) 614: "Scientiam Juris naturalis docere est tradere leges optimæ Reipublicæ. Scientiam Juris arbitrarii docere, est leges receptas cum legibus optimæ Reipublicæ conferre."

68 Cassirer (1902) 449 s.

but – quoting Jean-Étienne-Marie Portalis – "as a means by which 'to rebuild the social edifice from the beginning' […] once the modern state has been founded and become effective."[69] Accordingly, he looks at the Prussian Landrecht, the French Code civil and the Austrian Allgemeine Bürgerliche Gesetzbuch as "three different blueprints for this edifice, that is, three different ways of building and organizing society through the law[.]"[70]

This concept may also be applied to 19th century history, again with the French civil code as the main example and imaginary point of origin of a new societal order, characterized by universal equality and inclusion along the lines of citizenship, presented by Portalis to the legislative corps of the Republic on 13 March, 1804:

> "Today, uniform legislation has made all the absurdities and dangers disappear; civil order has cemented the political order. We will no longer be Provencal, Bretons, Alsatians, but French. *Names have a greater influence on the thoughts and actions of men than one might think*. Uniformity is not only established in the relationship that must exist between the different parts of the state; it is also established in the relationship that must exist between individuals. Previously, the humiliating distinctions that the political law had introduced between persons had also inserted themselves into civil law […] All these traces of barbarism are now erased; the law is the common mother of all citizens, it provides equal protection to all."[71]

Indeed, by calling Provencals and Alsatians French and every citizen a child of 'the law,' the code does not so much "cement" a pre-existing political order, but rather conceives a completely new one, the "imagined community"[72] of the modern nation. According to contemporary approaches to nationalism, legal codes indeed do constitute nations, which are sometimes defined as – this is from Anthony Smith –

69 Canale (2009) 148.

70 Ibid. 148.

71 Jean-Étienne-Marie Portalis as quoted in Fenet (1827) cii (emphasis added): "Aujourd'hui, une législation uniforme fait disparaître toutes les absurdités et les dangers; l'ordre civil vient cimenter l'ordre politique. Nous ne serons plus Provençaux, Bretons, Alsaciens, mais Français. *Les noms ont une plus grande influence que l'on ne croit sur les pensées et les actions des hommes*. L'uniformité n'est pas seulement établie dans les rapports qui doivent exister entre les différentes portions de l'Etat; elle est encore établie dans les rapports qui doivent exister entre les individus. Autrefois, les distinctions humiliantes que le droit politique avait introduites entre les personnes, s'étaient glissées jusque dans le droit civil. […] Toutes ces traces de barbarie sont effacées; la loi est la mère commune des citoyens, elle accorde une égale protection à tous."

72 Anderson (2006).

> "a large, territorially bounded group sharing a common culture and division of labour, and a common code of legal rights and duties."[73]

The cultural meaning of codes, thus, lies much less in their normativity than in their formativity; they tell 'us,' who 'we' are.[74] Accordingly, in a culturalist framework, they must "be transformed from documents to monuments,"[75] to borrow from Michel Foucault's concepts of archive and archaeology. The methodological approach to the culture of codification is thus not hermeneutical, but based on a mixture of the socio-historical with the history of ideas.[76]

Such an approach, again, does not offer any insight into the 'truth' of law, the code and its history, simply because such a thing does not exist. It does, however, offer a set of theoretical and methodological means of dealing with the constitutive and constituted nature and the apparent contingency of modern law. Codification may thus be construed either as an act of exception or interruption of political order,[77] which brings to mind Prost de Royer's notion of the code as a "complete recasting"[78] (*refonte absolue*) of legislation or Voltaire's famous advice "to burn the laws, and make new ones,"[79] or as a delineation between friend and foe, establishing a state of Schmittian hegemony.[80] Alternatively, the idea of codification may be seen as a normative resource, suitable for the valuation and evaluation of actual politics,[81] or as a mixture of all the above, a hotbed for imagined sociality, which has translated itself, over the past 200 years, into various forms of nationalism and other forms of collective identity. Such an approach to modern law and the code, it must be noted, is something entirely different from all sorts of *volksgeist* doctrines, as it does not look for 'roots' or beginnings of law, but for the conditions for its emergence with respect to different concepts of community. This makes the study of "invented

73 Smith (1999) 48.
74 Assmann (2005) 142 s.
75 Foucault (1969) 15.
76 Foucault (2001) 498.
77 A view of the political developed namely by Jacques Rancière, cf., e. g., Celikates (2006)
78 Prost de Royer (1781) c.
79 Voltaire (1771) 353: "Voulez-vous avoir de bonnes loix? brûlez les vôtres & faites-en de nouvelles."
80 Schmitt (1963). Cf. also Röttgers (2010) 40 et passim.
81 Bedorf (2010) 16–19.

traditions,"[82] "imagined communities"[83] and "myths and memories of the nation"[84] essential to our understanding of modern law.

IV. Coding the nation

So, what might a history of codification look like which focuses on the different roles codes play in the shaping of collective identity, nations and nationalism? In recent years, a number of studies have been conducted on this subject, with accounts of hybridity from colonial and post-colonial settings, but also from regions of the European periphery. Accounts of disputes over codification are especially interesting, because this is where differing "visions of community" are most fervently discussed. Often, the issues concern the codification or non-codification of certain parts of the law, with supporters of the code taking on the role of modernizers and its detractors promoting the status quo. Well-documented examples include Great Britain,[85] the USA,[86] and Germany,[87] less well-known hail from American Indian Nations,[88] Australia and Canada,[89] Cambodia and Indonesia,[90] Chile,[91] China,[92] Colombia,[93] Greece,[94] India,[95] Israel,[96] Japan,[97] Kenya,[98] Montenegro[99] or Turkey.[100] In continental Europe, following the French example, support for codification was often identified with fervent

82 Cf. Hobsbawm (1992).
83 Cf. Anderson (2006).
84 Cf. Smith (1999).
85 Teubner (1974); more recently Farmer (2000a); Farmer (2000b); Weiss (2000) 475–488.
86 Cook (1981); Subrin (1988); Börner (2001); more recently Masferrer (2008).
87 Berman (1994); Becchi (1999); Kroppenberg (2008).
88 Cooter/Fikentscher (2008).
89 Wright (2007); Wright (2008).
90 Donovan (1997).
91 Mirow (2001).
92 Liang (2002).
93 Rojas (1950).
94 Tsoukala (2010).
95 Menski (2008); Herrenschmidt (2009).
96 Kedar (2007a); Kedar (2007b).
97 Epp (1967); most recently Sokolowski (2010).
98 Shadle (1999).
99 Petit (1998).
100 Metin/Gelbal (2008).

nationalism. Sometimes, however, nationalist movements grouped around the idea of non-codification, as was the case in Catalonia, where a nationalist elite of lawyers and public intellectuals made non-codification a symbol of national identity and thus, according to Siobhan Harty, 'invented' the Catalan nation.[101] In other places, codification was seen not so much as a device for societal modernization by inclusion, but as a strategy for establishing self-rule and cultural hegemony. This was the case in Estonia, where the cultural reference to Roman law was used to fend off Russian domination.[102]

Switzerland, a codificational late-comer, is a very interesting case.[103] Here, a proper national codification movement only started 20 years after the modern federal state was founded in 1848,[104] with the Code of Obligations entering into force in 1883,[105] the Civil Code in 1912,[106] the Criminal Code, very belatedly, in 1942[107] – and, finally, the codes of civil and criminal procedure on 1 January 2011.[108] Swiss codification history thus has the Weber script backwards, rejecting the chronological precedence of criminal and procedural law codes over those of civil law due to their supposed simplicity and basic necessity in organizing the power state.[109] Equally, the Swiss Civil Code contradicts the standard view, in that it is, especially in comparison to its rival, the German BGB, pitifully unscientific and irrational.[110] As is well known, Franz Wieacker,[111] like many Swiss

101 Harty (2002a). Cf. also Harty (2002b); Jacobson (2002a); Jacobson (2002b); Ledford (2002); Umbach (2005).

102 Siimets-Gross (2011). Cf. also Kull (2000); Luts-Sootak (2000); Luts-Sootak (2006); Luts-Sootak (2008); Luts-Sootak (2010).

103 The following is adapted from Nikolaus Linder's forthcoming book on 'Kodifikation als nationale Selbstthematisierung. Strafrecht und Zivilrecht in der Schweiz um 1900.'

104 It is usually said to have started at the Swiss Bar Association's annual meeting in 1868, cf. Kaiser (1868). Cf. also the allocution by Carl Sailer in the following year, Sailer (1869). A few years before Walther Munzinger had published his first draughts for a Swiss law of obligations, Munzinger (1865), cf. also Fasel (2003).

105 Bundesgesetz über das Obligationenrecht vom 14 Brachmonat 1881 [= AS 5 635].

106 Schweizerisches Zivilgesetzbuch vom 10 Dezember 1907 [= AS 24 233].

107 Schweizerisches Strafgesetzbuch vom 21 Dezember 1937 [= AS 54 757].

108 Schweizerische Zivilprozessordnung vom 19 Dezember 2008 [= AS 2010 1739]; Schweizerische Strafprozessordnung vom 5 Oktober 2007 [= AS 2010 1881].

109 Weber (1978) 840.

110 Cf. the dismissive remark in Weber (1978) 886 s.

111 Wieacker (1953) 6 s.; Wieacker (1954) 46 s.; Wieacker (1995) 387–392.

scholars,[112] has explained these characteristics with Switzerland's supposedly age-old democratic institutions and the simple and folk-like mentality of the Swiss as "pious, noble farmers" (*frumme edle puren*), a national autostereotype dating back to early modern times.[113]

However, things were not as clear from the outset. When Federal Councillor Eduard Müller, in June 1885, suggested unifying criminal law to fend off "anarchist machinations in Switzerland"[114] (*anarchistische umtriebe in der Schweiz*), it was generally agreed that this would be a relatively short and unproblematic venture. Omitting all historical trappings and relying on the theoretical groundwork laid by Franz von Liszt, the new code was supposed to be a means of protecting the institutions of the state and of curing the "community of the people"[115] – the corresponding term in German was *volksgemeinschaft* – from the "social disease"[116] of crime. A most visible part of this disease were "anarchist crimes",[117] although, up to that date, no acts of violence had ever been committed by anarchists inside the Swiss borders. It was only much later, in September 1898, that the first (and only) such attack, the murder of Empress Elizabeth of Austria in Geneva, occurred.

Accordingly, Carl Stooss, a criminal law professor and high judge from Berne who was commissioned by the federal government to deliver a draught code, used the Federal Criminal Act (*Bundesstrafgesetz*) of 1853[118] as a model. This law, he maintained, was perfectly well suited, as it had been conceived according to the established rules of scientific legislation, i.e., it contained a general part (*allgemeiner teil*), and comprised mainly criminal offences against the state.[119] Thus, the draught code which was eventually published in 1893, although a complete, modern and scientific criminal code was perceived by many as overly top-down and intent on institutions of

112 Cf., e. g., Egger (1908) 43–45; Egger (1911) XIII; Tuor (1912) 12–14; Egger (1913) 36 s.
113 Ochsenbein (1979), cf. also Suter (1999) 495 et passim; Suter (2001) 85 et passim; Marchal (2004) 268 et passim.
114 Cf. Müller (1885).
115 Widmer (1992) 81, 710–11 et passim.
116 Stooss (1894a) 12 s.
117 Cf., e. g., Stooss (1894b) 269–73.
118 Bundesgesetz über das Bundesstrafrecht der schweizerischen Eidgenossenschaft vom 4. Hornung 1853 [= AS III 404]
119 Stooss (1888) 121 s. et passim.

the state. Previously, Stooss and his colleagues had designed a draught for a Federal Act regarding Crimes against Public Security in the Territory of Switzerland (*Bundesgesetz betreffend Verbrechen gegen die öffentliche Sicherheit im Gebiete der Eidgenossenschaft*) which was so extreme in its approach that it did not even make it beyond the administrative commission charged with its review. It only entered into force in a much attenuated form four years later, now labelled the Anarchist Act (*Anarchistengesetz*), and was promptly criticized for its ineffectiveness. Thus, the project of a criminal code became associated with unitarist power of the central government, modernist approaches to crime, and, above all, with regulating the arcane and sinister business of anarchism, which was generally treated as a synonym for leftist activities of foreigners on Swiss soil.

Shortly before Stooss received his mandate, Eugen Huber had been entrusted with a similar mission in the field of civil law: to compare all existing legal arrangements in Switzerland and, based thereon, to develop a draught code for the Confederation. Contrary to Stooss, Huber did not limit himself to a comparatist account, but in his seminal work on the topic, developed an integral history of Swiss private law, which harked back to the Early Middle Ages.[120] There, he maintained, in the laws of the Germanic tribes living in the territory of what was only later to become Switzerland, the country's history had really begun. The common ancestry, Huber believed, not only explained the overarching similarities in the laws of the Swiss cantons, but also created a primeval and indestructible bond of solidarity between the different parts of the country, which formerly had been inhabited by French-speaking Burgundians and German-speaking Alemanni.[121] Switzerland, according to Huber, was thus much older than the ancient legend of the *Rütli* oath implied; moreover, it was not based on a legal transaction, but was, in fact, a community linked by blood ties, rooted in a distant past, removed from the political turmoil of later periods, and much less, the present day.

The community at the centre of Huber's vision of legal order was neither the state, and most definitely not the central state and its institutions, nor the bourgeois family. What he had in mind was a form of extended and modular family which transcended the two, the model for which he found

120 Huber (1886) 35–37.
121 Huber (1893) 18–39 et passim.

in the writings of the great Swiss novelist Jeremias Gotthelf.[122] Set in the rural landscape of the Bernese Emmental, Gotthelf's novels – with titles like Money and Soul (*geld und geist*) or Zeitgeist and Bernese Spirit (*zeitgeist und bernergeist*) – depict a timeless world of becoming and passing away under the eyes of a benevolent and merciful God. Here, the conflicts and discontinuities of modernity are contrasted with natural solidarity in stable and seemingly everlasting communities. This concept of family and generic solidarity pervaded Huber's draught code, it was present in his law of persons, family law, law of succession and many other areas of law.

V. Trajectories of nationalism

The chronological precedence of the Zivilgesetzbuch over the Swiss penal code and the very special kind of codification dispute which preceded it has long been a conundrum in Swiss legal history. Stefan Holenstein, in his seminal work on Emil Zürcher, Carl Stooss' lifelong friend and collaborator, gave ten reasons as to why the seemingly trivial criminal law took so much longer to codify than the more complex and diverse civil law.[123] Among these reasons he listed strong federalist opposition to the unification, cultural markers such as the death penalty, which the reformers, against fierce opposition from the more conservative cantons, wished to abolish, personal, strategic and tactical shortcomings on the part of Carl Stooss in his contest against Eugen Huber as well as his excessive willingness to compromise, poor political leadership in favour of the criminal code and, finally, a strong resistance from the quarters of professional jurists, academic or otherwise. While these reasons appear, at least in part, worth considering, they mostly recur to either the personalities of the people involved – the 'strong' and 'resourceful' Huber versus the 'feeble' and 'clumsy' Stooss – or to institutional fortuities, namely weak political and scientific support. The cultural differences between the two projects appear more promising as a reason. Federalism, however, would seem to run against both projects, as both were planning to substitute the current law of the cantons by federal

122 Huber (1962). On Huber's 'legal Gotthelfism' cf. Lauener (2011) 38–41 et passim; on issues of Bernese collective identity with respect to Gotthelf cf. von Greyerz (1953) 212–20 et passim.

123 Holenstein (1996) 432–37.

code law. This leaves us with the question of the death penalty, whose planned abolition was indeed a major obstacle to the unification of criminal law in Switzerland.[124] But was this the real reason?

A culturalist approach, which regards the question of codification from the angle of its relationship with different notions and perceptions of community, arrives at a different answer. It would focus on the diverging approaches Stooss and Huber took with regard to Switzerland as a nation in the sense of a discursive product, or in the words of Ernest Renan, an "everyday plebiscite"[125] (*plébiscite de tous les jours*), an ever-changing, socially construed form.

The methodological impulse, here, comes from Oliver Zimmer, who, based on the work of Anthony Smith, identified an ethnic-symbolist trajectory of Swiss nationalism over the past 250 years.[126] According to Zimmer, Switzerland between 1880 and 1914, evolved into a "modern mass nation,"[127] a process which altered the prevailing form of the nation in fundamental ways. While in the final decades of the 18th century Swiss nationalism had been the notion of an enlightened elite and in the early years of the federal state had become the project of the ruling party of liberal-radicals with the nation as a unitary, politically integrated *demos* (women and Jews being consistently excluded), the ensuing years saw the rise of yet another breed of nationalism. During the 1880s and 1890s, Swiss nationalism acquired an unprecedented ethnic quality, which was accompanied by a strong interest in national history and culture, but also saw an increasing number of what one might call 'border incidents.'[128] During those years, the number of expulsions of foreign 'anarchists' and other politically dubious persons rose to unprecedented heights, while the domestic left saw its loyalty towards the nation routinely and severely questioned.[129] The first constitutional initiative in 1893 – a means of direct democratic participation which had been introduced in 1891 – introduced a ban on kosher slaughter.[130]

124 Cf. also Caroni (2008) 72.
125 Renan (1882) 27.
126 Zimmer (2003).
127 Zimmer (2003) 163 et passim.
128 The concept of border drawing in Swiss nation building is discussed in Argast (2007) 79–102.
129 Widmer (1992) 631.
130 Krauthammer (2000).

In the same year, a major eruption of xenophobic violence against construction workers from Italy occurred in Berne, followed by the so-called Italian riots (*Italienerkrawall*) three years later in Zurich, which lasted three days and cost a number of lives.[131] When, under the impression of these events and even more disturbing news about anarchist attacks from France and Italy, the *Anarchistengesetz* was about to be enacted in 1894, the good citizens of the small village of Leimbach in the Canton Aargau, sent the following petition to the federal government:

> "Mr. President of the Confederation! Esteemed Federal Councillors! The undersigned Swiss citizens are highly concerned and indignant about the fact that, as has occurred occasionally in recent times and does so even today, foreigners and suchlike people who have scarcely made themselves at home here are allowed to abuse Swiss soil for their wild agitation and goading of misguided people. We appreciate fully everything that you have done in order to purify the fatherland from unclean foreign elements. However, as the evil has put down even deeper roots, we beseech you to ensure that the competent authorities throughout Switzerland enforce with severity the laws against agitators and rabble-rousers, foreign and domestic, especially in cases of insurrection or incitement to commit crimes. Indeed, we wish and expect the supreme authorities of the Confederation, through the enactment of the proposed Anarchist Act, to enable forceful measures in the fight against the enemies of every order and every state."[132]

However, the Anarchist Act in fact achieved the exact opposite of what the citizens of Leimbach had asked their government to do. Instead of providing a means of making short shrift of all sorts of nasty foreigners, anarchists and other troublemakers, it actually gave them their day in court. In several landmark cases over the extradition of Italian anarchists in the 1890s, the Swiss Federal Tribunal consistently ruled that writing provocative articles, editing anarchist newspapers and speaking in favour of anarchism did not constitute extraditable crimes.[133] Defendants were regularly acquitted, a legal outcome which was not welcomed by criminal policy officials, prosecutors and much of the media. What took place, therefore, was a decisive change of mood with regard to the treatment of foreigners who were believed to be a public order threat. Instead of treating them according to criminal law,

131 Skinner (2000). Cf. also Fritzsche (1981); Looser (1986); Stauffer (1993)

132 "An den hohen Bundesrath der schweiz. Eidgenossenschaft in Bern," dated 11 April 1894. BAR [Swiss Federal Archive], E 21(-) -/- 1681.

133 Swiss Federal Tribunal (1891) [= BGE 17 I 450]; Swiss Federal Tribunal (1900) [= BGE 26 I 227]; Swiss Federal Tribunal (1901) [= BGE 27 I 72].

which would have required its reform and codification, police action followed by immediate deportation became the measure of choice.[134] After the fatal attack on Empress Elizabeth in 1898 and the international conference in Rome which was held in its wake,[135] this practice became the definitive standard procedure in such cases. By this time, the idea of a Swiss criminal code was already doomed. Its final demise was brought on by the advent of the German code, the *Bürgerliches Gesetzbuch*, a direct threat to the national legal order, as Eugen Huber and others[136] warned:

> "Those who stubbornly adhere to nothing but ancient rules will become negligent and lazy. Other countries do not think this way; they constantly strive to improve their conditions. Beware of the day of reckoning! Even the loneliest mountain valleys will be penetrated by industry, railways, trade. If the Federal Government does not intervene, there will be nothing left for us, eventually, but to accept a new legal regime from abroad. Whoever wishes to preserve the character of his people, therefore, must vigorously stand up for the unification of Swiss law."[137]

As these short remarks illustrate, the two draught codes offered two completely different versions of the nation. While Carl Stooss' project adopted the old top-down model of the nation as politically integrated *demos*, Eugen Huber offered a new way to integrate the mass nation as *ethnos*.[138] The deciding point, however, was that Huber's model was based on the closed form of the extended family, while Stooss' plan was based on the notion of the existential otherness of the anarchist, a figure treated by international and criminal lawyers alike as the proverbial *hostis communis*

134 Gruner (1988) 258–263. Cf. also the list of expulsions compiled in Langhard (1903) 472–479.

135 On the Rome conference in 1898 and the increased international cooperation in its wake cf. Herren (2000) 268–271.

136 Cf., e. g., also Hilty (1894) 485–486.

137 Quoted after Wartenweiler (1932) 103 s.: "Wer sich nur an die althergebrachten Ordnungen hält, steht in Gefahr, der Bequemlichkeit und Faulheit zu verfallen. Andere Länder aber denken nicht so; sie arbeiten unablässig an der Besserung ihrer Verhältnisse. Kommt einmal der Tag der Abrechnung, dann wehe uns! Auch in die einsamsten Gebirgstäler dringen Industrie, Schienenwege, Handel. Greift der Bund nicht ein, dann werden wir schließlich die neue Rechtsordnung vom Ausland annehmen müssen. Darum hat gerade der kräftig für das einheitliche Schweizerrecht einzustehen, welcher die Eigenart seines Volkes bewahren will."

138 The concepts of ethnos and demos were first introduced by Emerich Francis, cf. Francis (1965). Cf. further Lepsius (2009b), Lepsius (2009c), and Richter (1996) 56 s. With regard to Switzerland cf. Ernst (1994), and Argast (2007) 82 et passim.

omnium or *hostis generis humani* of antiquity.[139] As such, the anarchist was not a figure of simple alterity, but an 'abject,' to use Julia Kristeva's term, the thought of which was so dreadful and abhorrent that it could under no circumstances be considered as an identity-establishing device.[140] The choice, which was eventually made in the years after 1898, to proceed with the codification of civil law at the expense of criminal law, was thus not simply one of legal areas, but of what the Swiss as a nation wanted to become: a relatively open community with the ability to face and to absorb, through legislation, even alien and foreign elements; or a closely integrated, outwardly closed solidary group which dealt with strangers not in terms of law, but with the policies and procedures of an "immigration police state,"[141] as the historian Erich Gruner has drastically called it. By deciding in favour of Eugen Huber's project, Switzerland chose the latter option, thereby turning towards a trajectory of nationalism, which, through two world wars, and more recently the ascent of the largest European right-wing party in proportion to its population, has become ever fiercer and more exclusionist.

VI. Cultural legal history

This short outline had two objectives: to promote a 'culturalist' approach to modern legal and codification history in order to overcome the limitations of the current paradigm, and to give an impression of how such a concept could be set to work. It draws heavily on a number of studies which have appeared in recent years, which often place codification in a decidedly non-European and non-*rechtswissenschaft* context.[142]

At the end of this lecture, we would like to present a number of theses which form a tentative framework for the study of modern legal history and, especially, of codification history, from a global perspective. They are intended, to quote Paul W. Kahn, to move scholarship "toward thick description of the world of meaning that is the rule of law."[143]

139 Cf., e. g., GENTILI (1877) 22: "Piratis, et praedonibus nulla manent iura: qui omnia iura violant." After 1880, this concept was applied to 'anarchists,' the generic 'enemies of the state' of the period.

140 KRISTEVA (1982) 7 s. et passim. Cf. also DOUGLAS (1986) 55–57.

141 GRUNER (1988) 215.

142 Cf. supra, footnotes 84 to 101.

143 KAHN (1999) 91.

1. Modern Law is autonomous and indeterminate. It does not serve specific ends like the efficient or just distribution of resources or the allocation of political power.
2. It is not in itself a product of rational design; in Paul W. Kahn's words, it

> "was not constructed according to a systematic plan and it exhibits no single, rational order. That reason operates within the legal order – as it surely does – should not be taken to mean that the set of meanings expressed in law's rule is itself a product of systematic rationality."[144]

Codification, therefore, can be explained with sufficiency, but not with necessity as a result of economic or political influences or as a work of jurisprudential genius.[145] The fact that codification is said to make law stable, rational and calculable, and is commonly treated as a means to do so, is something different from it actually achieving this.
3. Modern law is a way of imagining the political. For this reason, codes should not be seen as imperfect attempts at achieving self-referential closure, much less as "the product of someone's or some community's effort to be something, which has been only partially achieved,"[146] but as coherent imaginations of societal order, or, to quote Clifford Geertz again, "visions of community."[147]
4. The study of modern law and codification, therefore, should not proceed from assumptions of methodological individualism, but from the community "in its appearance as a single, historical subject,"[148] as Paul W. Kahn maintains:

> "We do not first experience a unitary, historical actor that is the nation and then observe law as one of its qualities. From an internal perspective – i.e., from the perspective of the citizen – the historical unity of this community is, in large part, the rule of law as practice and belief. Of course, we also look to a shared history of political events that contribute to our sense of community identity."[149]

In this sense, the code may be regarded as *the nation of the law*.
5. This makes it equally clear that the history of modern law cannot be understood as a process of uniform modernity, much less as an idea of

144 Kahn (1999) 98.
145 Cf. Caroni (2002) 20; Caroni (2008) 73 s., and Stolleis (2007).
146 Kahn (1999) 92.
147 Cf. supra n. 52.
148 Kahn (1999) 112.
149 Kahn (1999) 113.

enlightened progress. It should be treated as a highly complex and pluriform history of invented traditions and imagined communities: "The law is not merely ongoing; it has a history. It tells a story."[150]

6. Institutions constitute but "the wax in which law's rule acknowledges, co-opts, and suppresses […] alternative forms of apprehending the meaning of self, community, and history."[151] In the political and historical imaginations lies the key to the understanding of codification as a form of legal modernity. "A cultural study of law," therefore

> "cannot narrowly limit itself to 'legal' phenomena. There is no such subset of experience. If we want to study what it means to live under the rule of law, then we must be prepared to examine the entire reach of our experience in the modern state."[152]

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150 Berman (1985) 9.
151 Kahn (1999) 120.
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