The Grounding of Codification

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INTRODUCTION

Codification, as we have known it, is a product of the enlightenment. Codes existed before, but they were skeletal, as was Hammurabi's Code,[1] or administrative/penal, as were the great Chinese codes,[2] or represented hasty compilations, as with

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[1] *See* Bernard S. Jackson, *Evolution and Foreign Influence in Ancient Law*, 16 AM. J. COMP. L. 372, 373 (1968) (referring to extensive literature on Code of Hammurabi).

[2] *See* DERK BODDE & CLARENCE MORRIS, LAW IN IMPERIAL CHINA: EXEMPLIFIED BY 190 CH'ING DYNASTY CASES 15 (1967) (stating that Chinese codes originated under political system often compared to European feudalism); GEOFFREY MACCORMACK, THE SPIRIT OF TRADITIONAL CHINESE LAW 27-31, 33-34 (1996) (discussing content and organization of

Justinian's Digest.[3] It took the boundless optimism and fierce determination of the enlightenment to launch the idea of a "modern" code, which would be complete — covering all of civil society; rational — flowing deductively from axiomatic premises; and even universal — capable of extension beyond European societies to address the essential nature of interpersonal relations and transactions of whatever time, whatever space.[4] These were the "Natural Law Codes,"[5] and they really were inspired by the idea that, in the language of Domat, "there is a universal and unchanging law which is the source of all positive laws: it is none other than natural reason."[6] So the idea was widespread,

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penal code); Alice E.-S. Tay, *The Struggle for Law in China*, 21 U. BRIT. COLUM. L. REV. 561, 563 (1987) (explaining administrative and penal nature of Chinese Codes and highlighting admiration in European enlightment for Chinese Codes).

[3] *See* A. M. Honoré, *The Background to Justinian's Codification*, 48 TUL. L. REV. 859, 860-61 (1974) (describing chaotic origin of Roman Law). For the historical diversity of earlier codes, see generally Jean Gaudemet, *Codes, Collections, Compilations: Les lecons de l'histoire: De Grégorius a Jean Chappuis*, 24 DROITS: REVUE FRANÇAISE DE THÉORIE, DE PHILOSOPHIE ET DE CULTURE JURIDIQUES 3, 15 (1996), which notes generalization of the word "code" in the eighteenth century. Maimonides in the twelfth century approached modern ideas of codification, at least in terms of structure, yet the talmudic tradition, even reworked by Maimonides, did not seek the style of universal abstraction. *See id.*

[4] Thus, Anton Thibaut argued that codification would be valid for the "eternity of time." *See* Alfred Dufour, *L'idée de codification et sa critique dans la pensée juridique allemande des XVIII^e-XIX^e siècles*, 24 DROITS: REVUE FRANÇAISE DE THÉORIE, DE PHILOSOPHIE ET DE CULTURE JURIDIQUES 45, 54 (1996); *see also* Mathias Reimann, *The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code*, 37 AM. J. COMP. L. 95, 97 (1989) (examining Thibaut's pamphlet ÜBER DIE NOTWENDIGKEIT EINES ALLGEMEINEN BÜRGERLICHEN RECHTS FÜR DEUTSCHLAND (1814)). The Forward to the draft Prussian code of the mid-eighteenth century itself announced that the code would provide a *jus certum et universale*. *See* R.C. VAN CAENEGEM, AN HISTORICAL INTRODUCTION TO PRIVATE LAW 123 n.18 (D. E. L. Johnston trans., 1992) (explaining early codification in Prussia and Austria). For the Hegelian underpinning of the idea that "true" codes would express principles of law in their universality, see Bruno Oppetit, *L'avenir de la codification*, 24 DROITS: REVUE FRANÇAISE DE THÉORIE, DE PHILOSOPHIE ET DE CULTURE JURIDIQUES 73, 74 (1996) (citing GEORG W. F. HEGEL, HEGEL'S PHILOSOPY OF RIGHT para. 211 (T. M. Knox trans., 1942)). "The main difference between [a collection of custom] and a code properly so-called is that in the latter the principles of jurisprudence in their universality, and so in their determinacy, have been apprehended in terms of thought and expressed." *Id.*

[5] *See* FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE 257-75 (Tony Weir trans., 1995) (discussing natural law codes). *See generally* VAN CAENEGEM, *supra* note 4, at 122-25 (discussing "Codes of the Enlightenment" period); J. VANDERLINDEN, LE CONCEPT DE CODE EN EUROPE OCCIDENTALE DU XIII^E AU XIX^E SIÈCLE: ESSAI DE DÉFINITION (1967) (discussing long prelude to nineteenth century codification).

[6] *Introduction* to LOIX CIVILES art. 1, *cited in* KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 90 (Tony Weir trans., 2d ed. 1987); *see also* WIEACKER, *supra*

and sometimes prevailed, that comments on the codes should be forbidden, particularly those of professors of law, since improvements on the codes were inconceivable.[7] And the French Civil Code, which inspired Stendahl, was rendered not once, but twice, in poetic form, apparently becoming still more sublime in verse.[8]

Today it requires some effort to recapture the spirit of that time, but we still live with its product in Europe and elsewhere — the ongoing European codes and their successors. Just how far have we moved, however, from the idea of law as a single, encompassing statement of natural reason? How far have we moved from the enlightenment concept of a code? Further, I will argue, than is usually thought or realized. Codes today are more widespread than they have ever been in the past, and they are multiplying rapidly; but, as the number of codes in the world expands, the notion of a code steadily loses meaning. Codes today are grounded in the particular and may serve no loftier mission than entry into the World Trade Organization. We have moved a long way from the enlightenment. The story is that of the grounding of codification.

I. GROUNDING IN EUROPE

Signs of the grounding of codification appeared ominously early in Europe. Admissions that one of the primary purposes of codification was that of unification of the law of a particular state, or of "mounting a challenge to the ancient order," do not reflect a belief in universal natural law.[9] Nor did the idea of a

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note 5, at 219, 254 (holding code provisions valid because they "followed logically" from initial premises); *cf.* Gérard Cornu, *Codification contemporaine: Valeurs et langage, in* CODIFICATION: VALEURS ET LANGAGE: ACTES DU COLLOQUE INTERNATIONAL DE DROIT CIVIL COMPARÉ 31, 41 (1981) (discussing reductive, simplifying character of codification). *See generally* Shael Herman & David Hoskins, *Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations*, 54 TUL. L. REV. 987 (1980) (presenting structure of code rationality).

[7] *See* JAMES Q. WHITMAN, THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA 55 (1990) (reporting that commentary would be superfluous because codes would be all inclusive); *see also* VAN CAENEGEM, *supra* note 4, at 123 (stating that during this time reform proposals by legal practitioners were continuously rejected).

[8] *See* Cornu, *supra* note 6, at 43 (noting linguistic quality of French Civil Code).

[9] *See* VAN CAENEGEM, *supra* note 4, at 139-41 (discussing natural law as inspiration for modern codes).

"Prussian" natural law.[10] More generally, the multiplication of different national codes, rendering operative a principle of *disunity* of rational law, provided little support for the idea of underlying unity.[11]

Because doctrinal and other interests encrust themselves on the competing forms of national, codified rationality, the national codes remain today perhaps the greatest obstacles to further European codification.[12] Professor Oppetit, in France has outlined the early twentieth century doctrinal shift, the code now seen as an "être de terroir" (a creature of the soil), a product of compromise, and an effort of equilibrium in societies historically situated.[13] In Germany, the essentially bourgeois character of the Bürgerliches Gesetzbuch ("BGB") became increasingly the object of historical comment.[14] It is now the object of an alternative commentary intended, among other things, to demonstrate its historical particularity.[15] The national codes remained, however, national monuments, and if they increasingly became situated in national contexts, this could have had the effect of increasing their importance — national monuments in an age essentially of nationalism.

However, a second stage in the process of grounding in Europe now intervenes, known as decodification. As national monuments, the codes inevitably become subject to national forces. This is not to say they are the object of immediate and frontal attack but rather, initially, of circumvention. The particular laws and regimes multiply. The common law may, or may not, be found in the codes.[16] As laws multiply so do other sources of

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[10] *See* Dufour, *supra* note 4, at 50 (citing W. Dilthey, *Das Allgemeine Landrecht, in* 12 GES. SCHRIFTEN 131 (1960)).

[11] *See generally* H. Patrick Glenn, *Harmonization of Law, Foreign Law and Private International Law*, 1 EUR. REV. PRIVATE L. 47 (1993) (noting ensuing necessity to develop private international law, itself largely overtaken by national "systems," as proof of second-order rationality).

[12] *See generally* GERRIT BETLEM ET AL., TOWARDS A EUROPEAN CIVIL CODE (A. S. Hartkamp et al. eds., 1994) (examining various issues under European civil code). *But cf.* Pierre Legrand, *Against a European Civil Code*, 60 MOD. L. REV. 44, 51-60 (1997) (explaining why European plurijurality system is superior to European civil code).

[13] *See* Oppetit, *supra* note 4, at 75 (citing Adhémar Esmein, *L'originalité du Code civil, in* 1 LE CODE CIVIL, 1804-1904: LIVRE DU CENTENAIRE 4 (1904)).

[14] *See* WIEACKER, *supra* note 5, at 379-82 (tracking effects of BGB).

[15] *See generally* REIHE ALTERNATIVKOMMENTARE ZUM BÜRGERLICHEN GESETZBUCH (R. Wassermann ed., 1990).

[16] *See generally* Edgar Bodenheimer, *Is Codification an Outmoded Form of Legislation?*, 30

law. Jurisprudence, or case law, re-emerges, theoretically as well as factually, as a major source of law. There will, of course, never be a notion of stare decisis, but this is an idea whose day has come and gone in the common law as well.[17] The codes themselves assist in the revival of case law — their so-called "general clauses" becoming entire instruments for judicial revision of the classic texts — for "emancipation" from the codes themselves.[18] The codes thus weakened, placed on a competitive level with other sources and concepts of law, they become subject to scrutiny, notably by means of reinvigorated constitutional texts and judicial review or the threat of it.

Today, the imperial, private law codes, once known as the constitutions of civil society, now undergo public law scrutiny and corresponding revision.[19] In Europe, beyond the constitu-

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AM. J. COMP. L. 15 (Supp. 1982) (examining codification movements); Luis Díez-Picazo & Ponce de León, *Codificación, descodificación y recodificación*, 45 ANUARIO DE DERECHO CIVIL 473 (1992) (describing codification movements in Europe); General Report to the 1982 International Congress of Comparative Law in Caracas, Venezuela; R. Sacco, *Codificare: Mode superator de legiferare?*, 117 REVISTA DE DIRITTO CIVILE (1983) F. Terré, *La codification*, 1 EUR. REV. PRIVATE L. 31, 40 (1993) (attributing decodification to larger crisis of legislation general features of which threatened by specialization and growth of special interests). For the growth of particular regimes in the fields of contract and tort, see Hein Kötz, *Civil Code Revision in Continental Europe: The Experience in the Fields of Contract and Tort*, 52 REVISTA JURÍDICA DE LA UNIVERSIDAD DE PUERTO RICO 235 (1983) (dealing specifically with employment relations, landlord and tenant, insurance, farm leases, building contracts, contracts for transportation of persons and goods, and banking contracts).

[17] *See* H. Patrick Glenn, *The Common Law in Canada*, 74 CAN. B. REV. 261, 268-71 (1995) (discussing evolution and decline of stare decisis in United States, Canada, and Commonwealth); H. Patrick Glenn, *Sur l'impossibilite d'un principe de stare decisis*, 18 REVUE DE LA RECHERCHE JURIDIQUE DROIT PROSPECTIF 1073, 1073 (1993-1994) (stating that stare decisis is rapidly declining in importance even though it played role in formation of common law).

[18] *See* Michel Pédamon, *Le centenaire du BGB*, 1997 RECUEIL DALLOZ 107, 109 (noting that emancipation movement did not intend to break relations with BGB); Diéz-Picazo & Ponce de Léon, *supra* note 16, at 479 (arguing that civil law is becoming "motley and confused," contrary to codifiers' intentions). For extensive use of general clauses in the new Dutch Civil Code, see Arthur S. Hartkamp, *The First Years of Interpretation — Experiences and Perspectives: The Netherlands*, *in* LES JOURNÉES MAXIMILIEN CARON 1992, LE NOUVEAU CODE CIVIL: INTERPRÉTATION ET APPLICATION 41, 45-46 (1993) (noting "open-ended concepts" and lack of hierarchy of laws in new Dutch Civil Code). On the new Dutch Code, see generally Hendrik J. Cornelis & Arjen J.P. Tillema, *Major Revisions in Netherlands Law: Adoption of New Civil Code and Implementation of EC Directives*, 26 INT'L LAW. 1075 (1992) (discussing 1992 revisions in Dutch law); Bob Wessels, *Civil Code Revision in the Netherlands: System, Contents, and Future*, 41 NETH. INT'L L. REV. 163 (1994) (outlining developments in Dutch law); Michael Whincup, *The New Dutch Civil Code*, 142 NEW L.J. 1208 (1992) (examining developments in contract law section of new Dutch Civil Code).

[19] *See generally* Pédamon, *supra* note 18 (discussing BGB revision in Germany, notably in

tions, there are also Bruxelles and the European Commission, whose decrees can be seen as eating away at the heart of the codes, "harmonizing" the law of the European states through instruments as ignoble and functional as "Directives." Directives do not seek to declare the essence of eternal human relations so much as dictate results, those which have been laboriously negotiated in the process of European construction.[20] These are difficult times for the "true" codes of Europe; but now there are also the new codes, the "pseudo" codes, which represent a third stage of the grounding of codes in Europe.

It has been said recently that European society is undergoing a process of "de-institutionalization," a process in which there is a "weakening or disappearance of norms which are codified and protected by legal mechanisms" — a "wearing away of norms" (*"les normes s'effacent"*).[21] This process, if it is occurring, is a very large one, and no effort will be made here to assess it. There has been, however, a response to it in the form of a movement that has yet to receive a formal designation but that might be known as omnicodification, multi-codification, or even "global codification."[22] The French government, thus, decided in 1996 to effect the codification of the entire corpus of French written law by the year 2000,[23] thus intensifying a movement towards systematic codification that had been developing since the mid-1980s.[24] Hence, a new vocabulary of "pseudo-codes," "codes

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light of constitutional guarantees, such as equality of spouses in marriage, and in light of Fundamental Law or *Grundgesetz*).

[20] For the process of European harmonization, itself superceding a process of unification, see H. Patrick Glenn, *Harmonization of Private Law Rules Between Civil and Common Law Jurisdictions, in* GENERAL REPORTS OF THE XIII INTERNATIONAL CONGRESS OF COMPARATIVE LAW 79 (1992).

[21] *See* ALAIN TOURAINE, POURRONS-NOUS VIVRE ENSEMBLE? ÉGAUX ET DIFFÉRENTS 54 (1997).

[22] The latter expression has been used by Guy Braibant, President of the new French Codification Commission. *See, e.g.*, Guy Braibant, *Utilité et difficultés de la codification*, 24 DROITS: REVUE FRANÇAISE DE THÉORIE, DE PHILOSOPHIE ET DE CULTURE JURIDIQUES 61, 61 (1996). The expression "global" may, however, lead to misunderstanding.

[23] *See id.* (noting that decision was "almost unnoticed").

[24] *See* Bruno Oppetit, *De la codification*, 1996 RECUEIL DALLOZ SIREY 33, 36 (tracing evolution of idea in governmental declarations that qualify existing laws as too "technical" and constituting obstacles to "access"). The multicodification movement is, thus, an element in the contemporary theoretical debate on citizenship and its exercise. For multicodification at the European level of existing European Community law, see *id.*

suiveurs," and even "codes dangereux" has emerged to designate the new body of codes whose content, structure, and style would constitute a major departure from the classic nineteenth century codes (themselves "veritable codes").[25] The Dalloz publishing house in France can now advertise twenty-five distinct codes,[26] to which has been added in 1997 the latest, the Code of Sports, which may entitle us eventually to the ruminations of a yet unknown, fin-de-siècle, jock-strapped Portalis. There are, of course, serious reasons for this process, particularly in a country such as France where there has been no process of regular revision of legislation outside of the great codes and no handy, regularly up-dated compendia such as the Schönfelder or Sartorius in Germany.[27] Yet the adoption of codification as the solution has to be measured not only in terms of the resulting intelligibility but also in terms of the nature of a code.[28] There is more doubt as to this today than twenty years ago. Codification has become multi-form and closer to the ground. The same process is occurring outside of Europe.

II. GROUNDING ELSEWHERE

The first major wave of codification outside Europe was inextricably linked to colonialism. Some codes, such as the 1866 Civil Code of Lower Canada (now Québec), were enacted during the exercise of colonial authority, though at local initiative.[29] Others, such as those of Japan and eventually Guomintang, China, were intended as means of facilitating its

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[25] *See* Oppetit, *supra* note 4, at 79; Terré, *supra* note 16, at 44; Gaudemet, *supra* note 3, at 16.

[26] *See* 1997 RECUIEL DALLOZ back cover of no. 9 (showing heading "Les Codes Dalloz: Votre Préférence" and featuring 25 red-jacketed codes in geometrically ordered presentation, available for choice).

[27] *See* H. Schönfelder, *Deutsche Gesetze*; C. Sartorius, *Verfassungs — und Verwaltungsgesetze der Bundesrepublik Deutschland.*

[28] For cautionary remarks drawn from the Québec experience of a "pluralist concept of normativity" and inviting codifiers to modesty, see generally D. Jutras, *La codification réformatrice: L'exemple du Code civil québécois*, 1997 REVUE FRANÇAISE D'ADMINISTRATION PUBLIQUE 193 (1993), and for a moderate view of codification in Europe, see generally Hein Kötz, *Taking Civil Codes Less Seriously*, 50 MOD. L. REV. 1 (1987).

[29] *See* John E.C. Brierley, *Québec's Civil Law Codification: Viewed and Reviewed*, 14 MCGILL L.J. 521, 538 (1968) (indicating reliance on French Civil Code in process of codifying much law in Québec).

departure, the new codes being intended to provide legal security following withdrawal of Western occupation.[30] Still others were enacted by sovereign, non-European states or provinces, though still largely under the thrall of European models, as with the Mexican state of Quintana Roo adopting a BGB-style civil code[31] or the drafting by René David of the Civil Code of Ethiopia.[32]

In general, however, the colonial codes represented a step away from the European models. Just as the multiplication of codes on the European continent demonstrated an absence of underlying unity, so the implanting of codification in different climes yielded a still greater variety of codes. The German-style Japanese Civil Code went through an identifiable process of "*Japanisierung*" as it became adapted to Japanese normativity.[33] The Dutch Civil Code has declined into much-amended imprecision in Indonesia, a code which may or may not represent the law.[34] European-derived codes have had to adjust to quite different legal environments, as where they have landed in common law or common-law-influenced jurisdictions such as California, Québec, or even India with its Hindu Code,[35] where judges and cases are seen as making law. If judges make law, codes

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[30] *See* ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 20-21 (1992) (discussing codification in China); KIYOSHI IGARASHI, EINFÜHRUNG IN DAS JAPANISCHE RECHT 2 (1990) (discussing codification in Japan).

[31] *See* GUILLERMO FLORIS MARGADANT, INTRODUCCIÓN A LA HISTORIA DEL DERECHO MEXICANO 135-36 (1971) (discussing Quintana Roo's adoption of civil code).

[32] *See* René David, *A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries*, 37 TUL. L. REV. 187, 197-201 (1963) (describing process of drafting Ethiopian Civil Code).

[33] *See generally* TERUYA ABE ET AL., DIE JAPANIESIERUNG DES WESTLICHEN RECHTS (Helmut Coing et al. eds., 1990).

[34] *See* SUDARGO GAUTAMA & ROBERT N. HORNICK, AN INTRODUCTION TO INDONESIAN LAW: UNITY IN DIVERSITY 7-8 (1974) (stating that Dutch civil code has been much amended since Indonesian independence in 1945, and it is no longer clear which portions are in force since new legislation does not explicitly repeal existing texts and, thus, no authoritative edition of code is in force).

[35] *See* MARC GALANTER, LAW AND SOCIETY IN MODERN INDIA 24 (1989) (citing J. Duncan M. Derrett, *Sanskrit Legal Treatises Compiled at the Instance of the British*, 63 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT 72, 112 (1961)) (describing European concept of codification brought to bear on Hindu substantive law, and describing its effect of clarity through stare decisis as "death-sickness").

cannot be an exclusive source; so the enlightenment view is necessarily adjusted, yet again.

Just as European codes faced a process of decodification in Europe, so have the European-derived codes necessarily faced the same process in a more intensified form. Codes outside Europe occupy a less exalted position; there is more activity outside them. So once again the special laws and the statutes have multiplied. In Latin America, the situation has been seen as so dramatic that an article could be entitled, lacking only the sound of a single trumpet, "*Vida, pasion y muerte de las codificaciones.*"[36] In Québec, it was said that the Civil Code of Lower Canada had come to occupy only a "secondary" position in the sources of Québec law, and its texts had become subject to more than a century of influential jurisprudence as well as the prospect of constitutional review.[37] Perhaps most strikingly, bringing the debate back to where it was in Europe at the time of the redaction of the so-called "customs,"[38] nonwritten law now challenges, once again, the codes. People variously know as "aboriginal," "native," "autochtone," or "chthonic" claim exemption from the law of the state, and its codes, in favor of ongoing application of their unwritten law. They are having some success.[39] It is at the expense of the codes.

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[36] *See* Carlos Rodriguez Pastor, *Vida, pasion y muerte de las codificaciones*, *in* LIBRO HOMENAJE A ULISES MONTOYA MANFREDI 605, 616 (Rómulo E. Lanatta Guilhem et al. eds., 1989) (explaining that Civil Code of 1936 had lost its capacity for legal application); Diez-Picazo & Ponce de Léon, *supra* note 16; Miguel Acosta Romero, *El fenomeno de la descodificacion en el derecho civil*, 40 REVISTA DE LA FACULTAD DE DERECHO DE MEXICO 37 (1990).

[37] *See* Jean-Maurice Brisson, *Le Code civil, droit commun?*, *in* LE NOUVEAU CODE: CIVIL INTERPRÉTATION ET APPLICATION 293, 301-04 (1993); Jean-Louis Baudouin, *Reflections on the Process of Recodification of the Québec Civil Code*, *in* ESSAYS IN HONOR OF PROFESSOR FERDINAND F. STONE 283, 287 (Vernon Palmer et al. eds., 1992) (explaining that Civil Code no longer stands at summit of hierarchy of rules and that Québec model of codification itself has changed). *But see* QUÉBEC CIVIL LAW: AN INTRODUCTION TO QUÉBEC PRIVATE LAW 134-35 (John E.C. Brierley & Roderick A. Macdonald eds., 1993) ("In practice . . . a radically non-hierarchical approach is adopted" though "the Code is intellectually pre-eminent").

[38] *See generally* H. Patrick Glenn, *The Capture, Reconstruction and Marginalization of "Custom,"* 45 AM. J. COMP. L. 613 (1997) (discussing past and current position of informal law).

[39] In Québec, for recognition of Inuit forms of adoption, see Deer v. Okpik, 4 CAN. NATIVE L. REV. 93 (1980) (recognizing Inuit rule of adoption of child by maternal grandparents). For a more general process of native people "picking and choosing" between native law and Western code and law, see María Teresa Sierra, *Indian Rights and Customary Law in Mexico: A Study of the Nahuas in the Sierra de Puebla*, 29 L. & SOC'Y REV. 227, 228

As there are new phenomena in Europe relating to the codification process, so there are new phenomena outside of Europe. Again, it is a question of the growth or expansion of codification and an ensuing ambiguity about the meaning of codification itself. That there is an expansion of codification is well known, as countries variously described as "developing" or "in transition" turn to codification as a means of rapid, normative ordering. Moreover, some existing codes have been revivified or are in the process of becoming so, as in the case of Québec and Louisiana.[40] Thus, we see an apparent surge in civil law influence in the world and an apparent relative decline in common-law influence. Again, however, it is a question of knowing what kind of codification is occurring and how it exemplifies the enlightenment concept of a code. When you look at some of the newest of the codes, such as those of Québec, Russia, and Vietnam, the enlightenment model does not appear to be reinforced. These codes appear even to provide some support for Wieacker's prediction that "[n]otwithstanding the present reach of European rationalism and legalism, all these new countries will eventually develop a law which will take them farther and farther from the model of the relevant European legal family."[41] We are now, and from now on, dealing with post-colonial codes.

III. DEPARTURE FROM THE ENLIGHTENMENT — THE QUÉBEC, RUSSIAN, AND VIETNAMESE CIVIL CODES

How do the Québec, Russian, and Vietnamese Civil Codes depart from the enlightenment model? They do so in almost

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(1995) (noting current treatment of "customary law" as separate from state law). For the "bilegal" villages in India using state codified law or local informal laws, see GALANTER, *supra* note 35, at 33, 49.

[40] For the debate on whether the process of partial revision in Lousiana would be producing more of a digest than a code, see generally Vernon V. Palmer, *The Death of a Code - The Birth of a Digest*, 63 TUL. L. REV. 221 (1988); Julio C. Cueto-Rua, *The Civil Code of Louisiana Is Alive and Well*, 64 TUL. L. REV. 147 (1989); Vernon V. Palmer, *Revision of the Code or Regression to a Digest? A Rejoinder to Professor Cueto-Rua*, 64 TUL. L. REV. 177 (1989).

[41] *See* WIEACKER, *supra* note 5, at 404; *see also* Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93, 97 (1995) (detailing possible weakening of east European links to continental "scholarly and statutory" legal influences).

every respect, from general philosophy through structure and style to content. They are all codes, but they are all codes of particular "terroirs,"[42] and only an expanded and even formal concept of code unites them to one another and to their European counterparts.

A. Philosophy

The Vietnamese Code is the most explicit in terms of its own philosophy, declaring in its preamble that the entire civil law of Vietnam is a "legal tool" that would have as its purpose to "enhance civil transactions and to create a favorable environment for the socio-economic development of the country."[43] The Civil Code itself (and the process here appears to be a combination of historical Confucianization as well as infusion of socialist legality) is dedicated to "ensuring a stable and healthy community life, preserving and developing traditions of solidarity, mutual affection and love, good morals and customs and the national cultural characteristics that have been established in the long history of building up and defending the country of Vietnam."[44] The Code should also, again according to the preamble, contribute to "building a socialist oriented multi-sector market economy under State management and thus to achieving the objective of creating a rich people, a strong country, and a fair and civilized society."[45] This is not the language of timeless, interpersonal relations founded on natural law; more particularly, it is not a code dedicated to their articulation.

The new Civil Code of Russia has no such hortatory preamble, but is regularly described as the "economic constitution" of the new Russia,[46] as an indication of its importance in the

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[42] *See supra* note 13 and accompanying text.

[43] *See* CIVIL CODE [CIV. C.] preamble (Vietnam). The Code came into force on July 1, 1996. *See generally* Mark Sidel, *The Re-emergence of Legal Discourse in Vietnam*, 43 INT'L & COMP. L.Q. 163 (1994) (providing background on current code); Lan Quoc Nguyen, Note, *Traditional Vietnamese Law — The Lê Code — and Modern United States Law: A Comparative Analysis*, 13 HASTINGS INT'L & COMP. L. REV. 141 (1989) (comparing traditional Vietnamese law to United States law).

[44] CIV. C. preamble (Vietnam).

[45] *Id.*

[46] *See* Alexander L. Makovsky, *Preface* to THE CIVIL CODE OF THE RUSSIAN FEDERATION *l*

"commercialization of economic relations."[47] The full commercial importance of the Code can be appreciated only in looking at its contents, but it is immediately clear that it illustrates the sense of "optimistic normativism" said to be characteristic of recent Russian and east European legislation.[48] Moreover, this optimistic and functional view of law and codes would be a sign of "cultural continuity," bridging even a transition from socialist to free market economies.[49]

The Preliminary Provision of the new Québec Civil Code gives no indication of the substantive objectives of the Code beyond stating that it "governs persons, relations between persons and property . . . in harmony with the Charter of human rights and freedoms." Implicitly recognizing the importance of other laws, yet emphasizing the importance of a codified civil law as an important feature of Québec society, the Preliminary Provision declares the Civil Code as laying down the "*jus commune*" and constituting the "foundation of all other laws, although other laws may complement the Code or make exceptions to it." The former President of the Office of Revision of the Civil Code has stated that the Code sets out a certain notion of justice, which

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(Peter B. Maggs & Alexi N. Zhiltsov trans., 1997) (noting that phrase "economic constitution" has been used to describe Russian Civil Code). The first part of the Civil Code came into force January 1, 1995; the second part came into force March 1, 1996. A third part, dealing with private international law, successions, and intellectual property is expected to be submitted to the Duma in 1998. *See generally* Lane H. Blumenfeld, *Russia's New Civil Code: The Legal Foundation for Russia's Emerging Market Economy*, 30 INT'L LAW. 477 (1996) (quoting Boris Yeltsin referring to Civil Code as economic constitution of Russian Federation); Viktor A. Dozortsev, *Trends in the Development of Russian Civil Legislation During the Transition to a Market Economy*, 19 REV. CENT. & E. EUR. L. 513 (1993) (discussing civil legislation in context of Russia's transition to market economy); Markus Schaer, *New Civil Code of the Russian Federation*, 23 INT'L BUS. LAW. 268 (1995) (clarifying key provision of Russia's new Civil Code); Mark N. Sills & Chantal C. Jauvin, *Economic Evolution and Legal Reform "à la russe,"* 2 CAN. INT'L LAW. 150 (1997); E. A. Sukhanov, *Russia's New Civil Code*, 1 PARKER SCH. J.E. EUR. L. 619 (1994) (outlining changes brought by new Civil Code). For the immediate background to the Code, see Bernard Rudden, *Civil Law, Civil Society, and the Russian Constitution*, 110 L.Q. REV. 56 (1994) (presenting new Russian Civil Code with emphasis on business ramifications); F. J. M. FELDBRUGGE, RUSSIAN LAW: THE END OF THE SOVIET SYSTEM AND THE ROLE OF LAW (1993) (outlining Russian law in context of fall of Soviet Union).

[47] *See generally* Dozortsev, *supra* note 46, at 513 (discussing trends in development of Russian civil legislation).

[48] *See* Ajani, *supra* note 41, at 103 (defining "optimistic normativism" as belief in use of law as instrument of social engineering).

[49] *See id.*

would be "temporal, relative, variable, consecrating . . . a certain manner of thought, a certain manner of life, at a given time in the history of a people."[50] It has already been suggested that its life may be relatively short.[51]

B. Structure

The structure of all three codes reflects a further departure from earlier European models, as well as the increasing specialization of modern law. The classic, tripartite Roman or French structure (persons, things, and means of acquiring things), stretched to five parts in the BGB (general part, obligations, things, family, and successions),[52] has now been enlarged to seven parts in the Vietnamese Code,[53] seven divisions in the Russian Code,[54] and ten books in the Québec Code.[55] The

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[50] *See* Paul A. Crépeau, *Les lendemains de la réforme du Code civil*, 59 CAN. B. REV. 625, 626-27 (1981) (translation by author). The Québec Civil Code came into force on January 1, 1994. For a general discussion of the development and background of the Code, see generally John E.C. Brierley, *The Renewal of Québec's Distinct Legal Culture: The New Civil Code of Québec*, 42 U. TORONTO L.J. 484 (1992); Jean Pineau, *La philosophie générale du nouveau Code civil du Québec*, 71 CAN. B. REV. 423 (1992); Baudouin, *supra* note 37, at 283; Jean-Francois Niort, *Le nouveau Code civil du Québec et la théorie de la codification: une perspective française*, 24 DROITS: REVUE FRANÇAISE DE THÉORIE, DE PHILOSOPHIE ET DE CULTURE JURIDIQUES 135, 140 (1996) (noting that apparently Québec in 1960s had accepted concept of law as "evolutive social phenomenon").

[51] *See* Serge Gaudet, *La doctrine et le Code civil du Québec*, *in* LE NOUVEAU CODE CIVIL: INTERPRÉTATION ET APPLICATION 223, 240 (1993) (stating that if society continues to evolve rapidly, Code will cease to serve society).

[52] The new Dutch Civil Code also departs from earlier models in extending itself to eight books: Persons and Family, Legal Persons, Patrimonial Law, Succession, Real Rights, Obligations, Special Contracts, and Traffic and Transport. On the Dutch Code, see Whincup, *supra* note 18, at 1208.

[53] *See* CIV. C. pts. 1-7 (Vietnam). The seven parts of the Vietnamese Code are the following: General Provisions, Property and Ownership Rights, Civil Obligations and Civil Contracts, Inheritance, Provisions for the Transfer of Land Use Rights, Intellectual Property and Technology Transfer, and Relationships with a Foreign Element. *See id.*

[54] *See* THE CIVIL CODE OF THE RUSSIAN FEDERATION, *supra* note 46, at vii-xlvii. The seven divisions of the Russian Civil Code are the following: General Provisions, The Right of Ownership and Other Rights in Things, General Part of the Law of Obligations, Individual Types of Obligations, Successions, Intellectual Property, and Private International Law. *See id.* The latter three divisions constitute Part III of the Code, which is not yet enacted. *See* Blumenfeld, *supra* note 46, at 478.

[55] *See* CIVIL CODE OF QUÉBEC [CIV. C.]. The ten books of the Québec Civil Code are the following: Persons, Family, Successions, Property, Obligations, Prior Claims and Hypothecs, Evidence, Prescription, Publication of Rights, and Private International Law. *See id.* at 7-16.

Vietnamese and Russian[56] Codes contain a general introductory part reminiscent of the BGB; the Québec Code does not. Neither the Vietnamese nor Russian Code deals with family law, though the Québec Code continues to do so.[57] In the Soviet Union, family law had received a separate codification (which continues today), as not constituting (discredited) patrimonial law,[58] so there is here also an element of "cultural continuity." The Russian Code also does not apply to land, since the Code's provisions referring to land were suspended by the Duma until enactment of a separate land code.[59] It has been said that there is "little hope that a qualified, well drafted land law or code will ever be put into effect."[60] So, we have civil codes not applying to family law and in one case not even applying to land. Their "economic" character flows inevitably from what is left. This does include intellectual property, clearly seen in Russia and Vietnam as a major element in economic relations in the future and, therefore, warranting a separate part of the codes. In Canada, intellectual property is a matter of federal competence and the Québec Civil Code was running into the wall of federalism.

C. Style

The styles of the codes are also different. The Russian Code, once enacted, will be the longest and most detailed. Its enacted four Divisions (of an eventual seven) approach the length of the entire Québec Code, with three Divisions to go and the Code itself calling for some thirteen further separate laws on such subjects as mortgages, pawnshops, partnerships of owners of

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[56] The Russian Code would be "built upon the Pandectist system," in spite of the obvious differences with it. *See* Dozortsev, *supra* note 46, at 529 ("This does not mean, however, that it cannot be deviated from or that it cannot be developed."). Borrowing institutions from Anglo-American law would, thus, be "much more difficult for Russia since frequently they do not fit into the Russian system of law." *Id.* at 520.

[57] The Vietnamese Code does, however, set out rights to marriage, divorce, and adoption; none of which are regulated by the Code.

[58] *See generally* WILLIAM BUTLER, SOVIET LAW (2d ed. 1988) (discussing Soviet family law codifications).

[59] *See* Makovsky & Khokhlov, *supra* note 46, at 51; Blumenfeld, *supra* note 46, at 506 (discussing enactment of separate land code).

[60] Sukhanov, *supra* note 46, at 634.

housing, noncommercial organizations, and so on.[61] The detail of the Code is explained, in part, by a desire to occupy the field of civil law and diminish the extent of possible interference by executive or departmental decrees. There is extensive cross-referencing. An "economic constitution," absent established practices, is not seen as composed of general principles, "rich in consequences," in the language of the original Portalis.[62] The Québec Code has 3168 articles; the Russian Code thus far 1109 and most of these "rather lengthy," often extending to four or five paragraphs.[63]

In contrast, the Vietnamese Code is approximately half the present size of the two others, with 838 articles of generally short and simple phrasing.[64] A proper civil code can clearly not be of the abbreviated "General Principles" type of the former Soviet Union and the People's Republic of China.[65] On the other hand, principles of "solidarity, mutual affection and love" apparently obviate the need for detailed regulation.[66] The Québec Code is different from the two others, however, in being expressed bilingually in French and English, leading to inevitable debate as to principles of interpretation and adequacy of language.

D. Content

There are major differences in the content of the three codes. The new Québec Civil Code replaces a nineteenth century, "bourgeois" code and its preparation was marked by major debates on "social justice." Consumers are thus protected,[67]

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[61] *See* Blumenfeld, *supra* note 46, at 484.

[62] "Féconde de conséquences" is in the original. *See* J.-E.-M. PORTALIS, DISCOURS, RAPPORTS ET TRAVAUX INÉDITS SUR LE CODE CIVIL 8 (1844) (translation by author).

[63] *See, e.g.*, CIVIL CODE [CIV. C.] art. 116 (Russ.).

[64] *See* CIV. C. (Vietnam). Article 229 states: "Joint ownership. Joint ownership is the ownership of several person over a certain property. Joint ownership includes partial joint ownership and unified joint ownership. The property belonging to joint ownership is joint property." Article 230 states: "Establishment of joint ownership. Joint ownership is established upon agreement between the owners, by law or custom."

[65] *See generally* Whitmore Gray & Henry Zheng, *General Principles of Civil Law of the People's Republic of China*, 34 AM. J. COMP. L. 715 (1986) (outlining People's Republic of China adoption of general principles of civil law).

[66] *See* CIV. C. preamble (Vietnam).

[67] *See* CIV. C. arts. 1384, 1435-1437 (Que.).

matrimonial patriarchy is definitively abandoned,[68] the "family patrimony" is subjected to obligatory equal division,[69] and privileges have been abolished.[70] There are general clauses of good faith[71] and abuse of right.[72] On the other hand, intervivos trusts have been introduced (welcomed by the commercial community),[73] hypothec has been extended to movables (yielding some compatibility with article 9 of the Uniform Commercial Code),[74] there is no recognition of de facto matrimonial unions, and a proposal for allowing lésion (disequilibrium in benefits of contracts) as a general ground of nullity was ultimately rejected. The adoption of some features of "contractual justice," notably in respect to consumers, has led to criticism that the Code is no longer a civilian code since it allegedly does not respect essential requirements of "comprehensiveness, internal coherence and gaplessness."[75]

Perhaps the most striking feature of the Russian Civil Code is the detailed regulation of some twenty-six nominate contracts, occupying over 600 of the Code's 1109 articles enacted thus far.[76] In contrast, the Québec Code explicitly recognizes some eighteen nominate contracts; the Vietnamese Code only recognizes twelve. The Russian Code is also very explicit about the legitimacy of commercial and patrimonial activity. Article 1 recognizes "the equality of the participants in the relations governed by it, the inviolability of ownership, freedom of contract, the impermissibility of arbitrary interference by anyone in private affairs . . . ." The exercise of civil rights is no longer a duty but an exercise of one's will and in one's own interest.[77] "The

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[68] *See id.* art. 392 (reiterating prior legislation).

[69] *See id.* arts. 414-426.

[70] In distribution of the proceeds of judgments, for example, in favor of lawyers.

[71] *See id.*

[72] *See id.* art. 7.

[73] *See id.* arts. 1260-1298 (relying on "patrimony of affectation" and not through recognition of legal and equitable concepts of property).

[74] *See id.* arts. 2696-2713; *cf.* maxim of French law, "Meubles n'ont pas de suite par hypothèque."

[75] *See* Catherine Valcke, *The Unhappy Marriage of Corrective and Distributive Justice in the New Civil Code of Québec*, 46 U. TORONTO L.J. 539, 579-87 (1996) (outlining problems with new Québec Civil Code).

[76] These contracts include purchase and sale, barter, gift, rent (in annuity), lease, work, freight forwarding, loan and credit, and bank deposits.

[77] *See* CIV. C. art. 2 (Russ.) (describing civil legislation as based upon equality,

quantity and value of property that is owned by citizens and legal persons is not limited . . . ," except by law and for stipulated purposes.[78] There is regulation, however, of consumer contracts,[79] broad provisions on piercing of corporate veils,[80] a notion of a "public contract" involving equality of price for all consumers,[81] and a general good faith clause.[82] Civil liability also exists as a result of court proceedings when the fault of a judge is established.[83]

The Vietnamese Code is the most skeletal of the three, yet descends to striking detail in some instances. A lengthy article provides for compensation for damage caused by cattle;[84] another provides for damages caused by falling trees.[85] There are specific articles for establishing ownership of livestock that has been lost, poultry that has been lost, and "aquatic animals."[86] As will eventually be the case with the Russian Code, there are provisions on successions and even testamentary successions, though close family members benefit from a reserved share.[87] There are extensive provisions dealing with guardianship and missing and deceased persons.[88] "Family households" are constituted as parties in civil relations.[89] The state figures largely in the Civil Code, since its purpose is to protect "the legitimate rights and interests of individuals and organizations and the interests of the State and public interests."[90] Moreover, the "establishment and fulfillment of civil rights and obligations shall

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autonomy of will, and property independence of participants); Dozortsev, *supra* note 46, at 516 (asserting that Russian Civil Code is based in part on general market economy principles).

[78] *See* CIV. C. art. 213(2) (Russ.).

[79] *See id.* arts. 730-739.

[80] *See id.* arts. 56, 105; *see also* Blumenfeld, *supra* note 46, at 500-04 (discussing debate over interpretation of articles 56 and 105).

[81] *See* CIV. C. art. 426 (Russ.) (defining public contract).

[82] *See id.* art. 6 (stating that rights and duties of parties are subject to requirements of good faith).

[83] *See id.* art. 1070(2).

[84] *See* CIV. C. art. 629 ¶¶ 1-4 (Vietnam).

[85] *See id.* art. 630.

[86] *See id.* arts. 250-252.

[87] *See id.* art. 672.

[88] *See id.* arts. 54-93.

[89] *See id.* art. 116.

[90] *See id.* art. 1.

not infringe upon the interests of the State, public interests, and the legitimate rights and interests of others."[91] There are provisions stipulating when rights of property may arise;[92] private property is the fourth type of property listed, following ownership "by the entire people," ownership of political or socio-political organizations, and collective ownership.[93] Prescription is not applicable to demands for the return of assets under ownership by the entire people.[94] "The land, mountains and forests, rivers and lakes, waters . . . ." and much more are under the ownership by the entire people,[95] though individual rights to use land may arise by allotment or lease from the state.[96] As in Russia, there is no judicial immunity from civil liability.[97]

CONCLUSION

In the great debate over codification in Germany, Savigny opposed codification on the ground that different peoples should generate their laws through historical processes that are particular to them. Savigny may have been right and may now be being vindicated, but there are indications that codification may not be the obstacle to this process that Savigny saw it to be. Codes do reflect peoples, but contemporary codes may not represent the type of code that Savigny and others had in mind.

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[91] *See id.* art. 2.

[92] *See id.* art. 176.

[93] *See id.* art. 176, pt. 2, ch. IV.

[94] *See id.* art. 169.

[95] *See id.* art. 203.

[96] *See id.* art. 690.

[97] *See id.* art. 624 (stating, "An investigative or judicial body shall be held liable for the damage caused by its authorized official while carrying out an investigation, prosecution, trial, or enforcement of a judgment.").