Codification and Legal Scholarship

*James Gordley**

Modern civil codes have two characteristics. First, they are attempts to state the basic rules of private law comprehensively and systematically. Second, they are legislative acts with an authority that is either ultimate or second only to constitutions. Because they have these two characteristics, I will argue, modern codes interfere with the work of legal scholars.

I admire the scholarship of countries that have codes. I particularly admire its systematic character. But continental scholars were systematic before they had codes. Their very success in systematizing law made modern codes possible. One cannot imagine the French Code without Domat and Pothier or the German Code without the *Pandektenschule.* I will argue that continental scholars could develop their ideas even more clearly and systematically if they did not have codes. So could the scholars in common-law countries who deal with codified branches of law.

To see whether codes help or hinder, we ought to keep in mind the task of legal scholars. While they have done many things, traditionally their objective has been to explain what the law is. Their starting point has always been authoritative statements of the law, whether in the form of decided cases, legislation, or the opinions of other legal scholars. They have then moved from these starting points to propositions about law that are not immediately obvious from their starting points.

This characteristic of legal scholarship leads a skeptic to think that the scholars must be pulling rabbits out of empty hats. They make their authorities say things that the authorities did not say in so many words and, most likely, never thought of saying. This task is possible, in my view, because of the way the human mind works.[1]

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[1] *See generally* James Gordley, *Legal Reasoning: An Introduction*, 72 CAL. L. REV. 138 (1984).

First, most human beings find it is easier to see that particular results are right than to state the rules that explain why they are right. Thus, judges decide cases in ways that they and other people think are correct; and yet, the judges may have only a vague grasp of the rules that govern them. Yet there must be such rules. If we consistently feel that certain cases should be decided in particular ways, then there must be something, whether we can name it or not, that distinguishes these cases from others which we feel should be decided differently. Legal scholars try to find such distinctions. When they have done so, they have formulated rules that, in a sense, were there all along because they describe what judges were already doing even though they themselves could not tell us why.

Also, most human beings find it easier to state general principles of justice or policy than to reconcile them with other principles. For example, it must be true, in very many cases, that *pacta sunt servanda*, that owners can treat their own property as they wish, and that no one should be enriched at another's expense. It is much harder to decide what to do when these principles conflict, as they inevitably do. It is difficult, for example, to decide whether an agreement is binding even though it enriches one party at the other's expense or to decide when an owner can use his property in a way that interferes with a neighbor's use of his own property. Legal scholars set boundaries to the scope of these principles by asking about the ultimate purposes of institutions such as contract and property. In setting these boundaries, they are once again formulating rules.

Normally, of course, legal scholars work in both ways at once. If they want to clarify the laws governing unfair contract terms or interferences among neighbors, they begin with particular decisions and try to see patterns. They also begin with general principles and try to reconcile them. The odd thing about modern codes, however, is that the authoritative starting points they usually provide are neither particular decisions nor general principles. The starting points are rules that someone has already formulated and that are supposed to deal comprehensively with every problem of private law.

In that respect modern codes differ from pre-modern "codes" such as the *Corpus iuris civilis* of Justinian or the medieval *Corpus iuris canonici*. Justinian's *Corpus* contains general maxims and a

host of specifics. When it explains how to deal with an unfair contract, it does not provide a rule. It provides the maxim that the parties can circumvent each other.[2] It also states that one who sells land for less than half the just price will have a remedy.[3] Similarly, it does not provide a rule to govern interferences among neighbors. It contains a maxim that no one can discharge anything onto another's property.[4] It adds that, nevertheless, while a neighbor has no action for smoke discharged from a nearby hearth,[5] he does for smoke from a nearby cheese shop.[6]

Texts like these raise questions without attempting definitive answers. They cry out for interpretation. That may be why interpreting them proved so fruitful. Using the texts just mentioned, medieval and early modern jurists built the doctrine of equality in exchange and developed rules of nuisance. The work of the Canon lawyers was similar. In one text Gratian collected in his *Decretum*, St. Ambrose said that, in some sense, even private property is common to everyone.[7] Another Roman text said all passengers must share their provisions if food runs short on a voyage.[8] The Canon lawyers put the general maxim together with the specific cases to arrive at what we now call the doctrine of necessity.[9] In another of Gratian's texts, St. Augustine agreed with Cicero that one who has promised to return a sword to its owner need not do so if the owner has become insane.[10] Building on that case, the Canonists formulated what we call the doctrine of changed circumstances.[11]

In these instances, specific outcomes and general maxims were a jurist's raw material. Rules were the final product. In contrast, in a modern code, the authoritative starting point is a comprehen-

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[2] DIG. 19.2.22.3 (Paul).

[3] COD. 4.44.2 (Diocletian & Maximian).

[4] DIG. 8.5.8.5 (Ulpian).

[5] DIG. 8.5.8.6 (Ulpian).

[6] DIG. 8.5.8.5 (Ulpian).

[7] GRATIAN, DECRETUM D.47 c.8.

[8] DIG. 14.2.2.2 (Paul).

[9] GLOSSA ORDINARIA to GRATIAN, DECRETUM D.47 c.8 to *commune*. Similarly, GLOSSA ORDINARIA to *id.* D.1 c.7, to *communis omnium*; GLOSSA ORDINARIA to DECRETALES GREGORII IX (LIBER EXTRA) 5.18.3 to *poenitaet*.

[10] GRATIAN, DECRETUM C.22, q.2, c.14.

[11] *See* GLOSSA ORDINARIA to GRATIAN, DECRETUM C.22, q.2, c.14 to *furens*.

sive set of rules. It looks less like raw material and more like a final product. That is the reason, I believe, why modern codes can only get in a jurist's way.

First, suppose that a code enacts a rule that is approved by nearly all the legal scholars who have considered a problem. There is no particular harm in enacting such a rule, but there is no particular benefit to legal scholarship either. The rule merely tells scholars what they know already.

Next, suppose that at the time the code is drafted, legal scholars disagree about which rule best explains a set of particular cases or best reconciles conflicting general principles. To include a rule in their code, the drafters have to accept the opinion of some scholars and reject that of others. There may be advantages in doing so from the standpoint of society at large. For example, it may be important that the law be clear or that it be uniform. But from the standpoint of intellectual inquiry, the fact that the drafting committee likes one rule better than another may not matter much. The committee does not have the time to read all the academic literature and to weigh everyone's arguments. Even if it did, for a committee to vote one rule up and the other down is as intellectually relevant as for a committee of astronomers to vote down the big bang theory or a committee of historians to enact the Pirenne thesis.

Once such a rule is enacted, however, it will necessarily have a great and undeserved influence on the work of scholars. Legal scholarship proceeds by reconciling authoritative starting points. An enacted rule becomes such an authoritative starting point. At times, legal scholars who would otherwise be unconvinced will try to show that the rule really does explain the cases it was supposed to explain and reconcile the general principles it was supposed to reconcile. But that may not be true.

Enacting such rules may, therefore, choke off inquiry as to whether the rule is adequate or not. At the end of the nineteenth century, there was a lively debate in Germany over various questions: for example, when an offer and an acceptance should become binding,[12] how a gift should be defined,[13] or when a

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[12] *See* FERDINAND REGELSBERGER, DIE VORVERHANDLUNGEN (1868); 2 BERNHARD WINDSCHEID, LEHRBUCH DES PANDEKTENRECHTS § 306 (7th ed. 1891).

[13] *See* 2 HEINRICH DERNBURG, PANDEKTEN § 161 (4th ed. 1894); 2 WINDSCHEID, *supra* note

mistake should vitiate a contract.[14] The debates became less vigorous and, therefore, less fruitful after the Code enacted answers.

At other times, scholars find it increasingly difficult to ignore the inadequacy of an enacted rule. If the rule had not been enacted, scholars would merely reject it and search for a better one. Because it has been enacted, however, scholars try to circumvent the rule without repudiating it outright. From the standpoint of intellectual inquiry, these efforts are pernicious.

In the first place, when scholars are already convinced that a rule is wrong, the energy spent circumventing it is wasted. Scholars learn nothing that they do not already know. In the second place, the very effort to circumvent the rule may hamper efforts to find a better one.

For example, scholars may try to escape an inadequate rule by seizing on its exact wording and drawing some hairsplitting distinction. Any new rule they propose must then retain the hairsplitting distinction. For example, many American scholars dislike the solution to the battle-of-the-forms problems contained in section 2-207 of the Uniform Commercial Code. According to section 2-207(2), this solution governs "additional terms" contained in the acceptance of an offer.[15] American scholars have accordingly argued that it need not apply to terms that are "different" rather than "additional."[16] Anyone from a country with a code can probably think of a dozen similar examples in which the wording of new rules has depended, not on anyone's view of the proper solution but on everyone's desire to escape from old rules.

Alternatively, scholars may circumvent a rule by bending or stretching some other rule of the code. That other rule, as bent,

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12, at § 365; Otto Lenel, *Die Lehre von der Voraussetzung*, 74 ARCHIV FÜR DIE ZIVILISTICHE PRAXIS 213, 232 (1889); *see also* JOHN DAWSON, GIFTS AND PROMISES 137-39 (1980) (describing Lenel's contribution to contract law).

[14] *See* 1 WINDSCHEID, *supra* note 12, at § 76; ERNST ZITELMANN, IRRTUM UND RECHTSGESCHÄFT (1879).

[15] *See* U.C.C. § 2-207(2) (1977).

[16] *See* Daitom, Inc. v. Pennwalt Corp., 741 F.2d 1569, 1573 (10th Cir. 1984); Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply Co., 567 P.2d 1246, 1252-54 (Idaho 1977); Gardner Zemke Co. v. Dunham Bush, 850 P.2d 319, 322-24 (N.M. 1993); RICHARD W. DUESENBERG & LAWRENCE P. KING, 3 SALES AND BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE § 3.05 (1996); JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1-3 (3d ed. 1988).

is then said to be the correct solution without any real examination of whether it is correct or not. It simply seems to be the only alternative available given the rules that have been enacted. For example, the German Civil Code does not recognize the tort principle of respondeat superior.[17] Consequently, to give more extensive relief, German courts and scholars say that when a roll of linoleum falls on a potential customer in a store, some contract-like duty has been breached.[18] The French Civil Code limits relief for an unfair price to a small number of cases specified by statute.[19] So, when a price is too high or too low, French courts say there was fraud, duress, or mistake, even when no one was lied to or threatened, and when the only mistake was to pay too much or too little.[20] Even leading French scholars say that in these cases, the courts are really giving relief for fraud, duress, or mistake.[21] Straight thinking about how contract differs from tort or about how fraud, mistake, and duress differ from mere unfairness then becomes more difficult.

To avoid these problems, the drafters would have to avoid choosing a rule whenever they fear the rule may prove inadequate. That is hard to do since their task is to draft a comprehensive body of rules. To avoid choosing a rule, they might say nothing. Or they might say something so vague that, in effect, they are enacting a general maxim or principle. Indeed, sometimes the drafters have only these alternatives. It may be that, when the code is drafted, no one sees how to formulate a clear rule.

Neither silence nor vagueness, however, contribute to legal scholarship. At best, such solutions merely permit scholars to continue to search for an appropriate solution, which, of course, the scholars could have done without a code. At worst, silence or vagueness can interfere with that search.

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[17] *See* BÜRGERLICHES GESETZBUCH [BGB] § 831; KONRAD ZWEIGERT & HEIN KÖTZ, 2 AN INTRODUCTION TO COMPARATIVE LAW 294-300 (1987).

[18] *See* Reichsgericht, 6th Sen., 7 Dec. 1911, 78 RGZ 239 (Ger.).

[19] *See* CODE CIVIL [C. CIV.] art. 1313 (Fr.).

[20] *See, e.g.*, Cass. 3e civ., Nov. 29, 1968, Gaz. Pal. 1969.J.63 (Fr.); Cass. req., Jan. 27, 1919, S. 1920.I.198 (Fr.); Cass. req., April 27, 1887, D. 1988.I.263 (Fr.); Cour d'appel, Paris, Jan. 22, 1953, Sem. jur. 1953.II.7435 (Fr.); Cour d'appel, Douai, June 2, 1930, Jur. Douai 1930.183.

[21] *See* FRANÇOIS TERRÉ, PHILIPPE SIMLER & YVES LEQUETTE, DROIT CIVIL LES OBLIGATIONS § 297 (5th ed. 1993).

Silence can interfere because it is hard for the drafters to be sure people understand exactly what the drafters did not say. If a code does not provide a certain excuse for nonperformance, performance would seem to be required by the other provisions of the code that say, in effect, *pacta sunt servanda.* French jurists still maintain that there can be no relief under the French Civil Code for *imprévision* or unforeseen circumstances simply because the Code does not provide for it.[22] Actually, it is hard to know why the Code does not do so. The natural law school of the seventeenth and eighteenth centuries had a great influence on the drafters.[23] The natural lawyers generally thought that such relief should be given.[24] Did the drafters disagree? Did they fail to include the doctrine of excuse for nonperformance because Domat and Pothier, on whom they constantly relied, happened not to mention it? Could it have been a complete oversight like the failure of the Code to regulate interferences among neighbors?

The other alternative for the drafters is to say something vague. The trouble is that it is hard to say anything, however vague, that means precisely nothing. Once even the vaguest code provision is enacted, scholars will squeeze it for meaning. One of the vaguer provisions of the French Civil Code says that "[t]here is no valid consent if consent was only given because of error, was extorted by force or procured by fraud."[25] Another article provides that a contract entered into through fraud, mistake, or duress is not simply void; an action must be brought to avoid it.[26] The drafters seem to have meant merely that the victim of mistake, fraud, or duress should bring such an action. By the mid-nineteenth century, however, French commentators had built a theory of consent on these texts. Mistake, fraud, and duress must all render

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[22] *See id.* § 445.

[23] *See* James Gordley, *Myths of the French Civil Code*, 42 AM. J. COMP. L. 459, 462-83 (1994).

[24] *See* HUGO GROTIUS, DE IURE BELLI AC PACIS LIBRI TRES II.xvi.25.2 (B.J.A. de Kanter-van Hetting Tromp ed., 1939); SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO III.vi.6 (James Brown Scott ed., 1934) (1688); SAMUEL PUFENDORF, LE DROIT DE LA NATURE ET DES GENS, OU, SYSTÈME GÉNÉRALE DES PRINCIPLES LES PLUS IMPORTANT DE LA MORALE, DE LA JURISPRUDENCE, ET DE LA POLITIQUE PAR LE BARON DE PUFENDORF, TRADUIT DU LATIN PAR JEAN BAREYRAC, III.vi.6 note 3(1729); CHRISTIAN WOLFF, IUS NATURAE METHODO SCIENTIFICO PERTRACTATUM III § 504 (1764).

[25] *See* C. CIV. art. 11109 (Fr.).

[26] *See id.* art. 1117.

consent imperfect rather than radically absent. Otherwise, they argued, the texts would not have mentioned them all together and provided, in each case, that the victim must bring an action. That conclusion inspired them to draw a further distinction between the mistakes mentioned in the Code, which supposedly render consent imperfect and a contract voidable, and other mistakes that the Code did not even mention, which supposedly destroy consent and make contracts radically void.[27] The drafting history or the early commentaries, however, do not contain the slightest reference to these ideas.[28]

The drafters could try, of course, to be even more vague. Perhaps the limit is reached by section 242 of the German Civil Code: a contract is to be performed in "good faith." This provision is applied to a series of problems that the drafters never had in mind. It is used to strike down unfair contract terms, to read in fair terms when a contract is silent, to police the use of a party's discretion under a contract, to provide a remedy when a party breaks off negotiations after the other party has relied on the conclusion of a contract, and to provide relief for changed and unforeseen circumstances.[29] It would seem that a phrase such as "good faith" is so vague that it would permit a search for solutions without distorting it. Indeed, much of the German scholarship has been acute and helpful even to non-Germans. Yet, I sometimes suspect German scholars of assuming that there really is something called "good faith" which a party has violated in all of these cases.[30] Perhaps it is so, but that should be the conclusion of an argument. It should not be accepted simply because a drafting committee in 1896, with none of these problems in mind, happened to use the phrase "good faith."

Thus far, I have described how a code can obstruct a scholar's search for a rule that more adequately describes the results to be

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[27] *See* 5 ANTOINE M. DEMANTE & EDUARD COLMET DE SANTERRE, COURS ANALYTIQUE DU CODE CIVIL §§ 14 bis, 16 bis I, 26 bis, 27 bis I-III; 24 CHARLES DEMOLOMBE, COURS DE CODE NAPOLÉON §§ 88, 124-27, 164, 171, 181-84 (1854-1882); 15 FRANÇOIS LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS §§ 450-53, 458, 484 (3d ed. 1834-1837).

[28] *See generally* James Gordley, *Contract in Pre-Commercial Societies and in Western History* § 65, *in* 7 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (U. Drobnig ed., 1997).

[29] *See, e.g.*, 2 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 242 (Kurt Rebman & Franz Jürgen Säcker eds., 3d ed. 1994).

[30] *See id.*

reached and reconciles the principles ultimately at stake. I have assumed that the search continues. Suppose, however, it stopped. One can imagine a world in which scholars thought that their entire job was either to ignore inadequacies in enacted rules or to twist the rules in the ways just described to accommodate desired results. These scholars would regard a code as a giant clothes rack and think their task was merely to hang each result on one peg or another. Once a problem had been hung on the good faith peg, they would not care what good faith means or what conflicting principles are at stake. Once relief for unfairness had been called relief for fraud, mistake, or duress, they would not ask what constitutes fraud, mistake, or duress or what should limit relief for an unfair price or how a price could be unfair. If they could avoid a disagreeable outcome by calling some terms "additional" and others "different," they would do so in the same spirit as a fairy tale character reciting a magic spell. I am not pretending we are close to that point. To the extent we approach it, however, legal scholarship ceases to be a branch of knowledge. Legal scholars no longer resemble biologists who want to know how living things work. Instead, they look like Boy Scouts who earn their nature merit badge by labeling everything in the forest without the slightest idea why it grows there.

We have not reached that point. But I do not think it an accident that a hundred years ago the typical German commentary was written by a single author and presented a unified view of every branch of private law in three volumes. Today, the typical German commentary consists of two dozen volumes and is written by several authors, many of whom write on sub-sub-sub-topics. It does not attempt a unified view. Occasionally, I even see a resemblance to the Scout Field Book I once studied for my nature merit badge.

I have argued only that codes interfere with the work of legal scholars. I understand that facilitating their work is not all that should matter to lawmakers. People sometimes need clear rules laid down in advance so they can rely on them. People sometimes need uniform rules. But one can overestimate the extent to which codes can make the law clear or uniform.[31] In any case, people

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[31] *See* James Gordley, *European Codes and American Restatements: Some Difficulties*, 81 COLUM. L. REV. 140, 141 (1981).

also need good rules: rules that distill whatever wisdom lies in the decisions of judges and that respond to whatever principles are ultimately at stake. The task of legal scholars is to find such rules. It is not made easier by pretending that a drafting committee found them already long ago.