Ius Gentium: Comparative Perspectives on Law and Justice

Volume 104

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*Ius Gentium* is a book series which discusses the central questions of law and justice from a comparative perspective. The books in this series collect the contrasting and overlapping perspectives of lawyers, judges, philosophers and scholars of law from the world’s many different jurisdictions for the purposes of comparison, harmonisation, and the progressive development of law and legal institutions. Each volume makes a new comparative study of an important area of law. This book series continues the work of the well-known journal of the same name and provides the basis for a better understanding of all areas of legal science.

The *Ius Gentium* series provides a valuable resource for lawyers, judges, legislators, scholars, and both graduate students and researchers in globalisation, comparative law, legal theory and legal practice. The series has a special focus on the development of international legal standards and transnational legal cooperation.
Michele Graziadei · Lihong Zhang
Editors

The Making of the Civil Codes

A Twenty-First Century Perspective

Springer
Over the past twenty years, many countries around the world have promulgated new civil codes or have revised their civil codes. After prolonged work, the People’s Republic of China enacted its first civil code in 2021. It appears that codification, far from losing momentum, is alive and well in our epoch, although the mythology surrounding the first civil codes is by now a thing of the past.

This is a propitious moment to bring to the attention of readers a wide-ranging examination of the state of the art concerning civil codifications around the world. Although this book does not cover every significant experience, the essays collected in it offer our readers a substantial set of contributions on civil codifications, for a total of 16 jurisdictions. An introduction and three thematic essays complete the overall picture. Remy Cabrillac’s essay provides a general reflection on civil codifications; Sabrina Lanni’s contribution discusses how some recent civil codes cover environmental issues, and a final essay by the late Rodolfo Sacco addresses the relationship between the civil codes and their interpreters. Our views on the subject are presented in the introduction to the volume.

The first idea to produce a volume like this took shape during a conference organized by the editors on the making of the civil codes, which was held at the University of Torino in 2016. The papers collected in this volume do not issue out of that conference but have been produced independently for this publication, with the exception of the contribution by the late Rodolfo Sacco, which is the speech he delivered at the closing session of that conference. Rodolfo Sacco passed away in March 2022, as we were working to complete the typescript for publication. Many of his ideas were a source of inspiration for the editors of this book.

We are immensely grateful to the distinguished colleagues who have joined for this collaborative project. They have patiently waited for the production of this book during the pandemic, while the final conference around this project that we intended to announce as a surprise for them could not be organized. Their commitment to the production of the book has been a formidable encouragement all along the way.

While the work on the book progressed, we contracted many debts with those who helped us to prepare the typescript for publication. We therefore wish to express our gratitude to Michael Gardiner, legal officer at the Newfoundland and Labrador
Court of Appeal, who edited several of the contributions to this book, and to Davide Caudana, Marco Giraudo, and Elisa Verra, who provided editorial assistance by checking consistency with the house style. We are also grateful to Ms. Lydia Wang, editor for the Social Sciences, Springer Asia, for her unfailing support and to Ms. Shalini Shelvam and Ms. Karthika Purushotha, who oversaw the preparation of the typescript for publication. The financial support provided by the Law Department of the University of Torino through its excellence programme (2018–2022) funded by the Italian Ministry of Education, University and Research, and by the Collegio Carlo Alberto, Torino, is gratefully acknowledged.

Torino, Italy
Shanghai, China

Michele Graziadei
Lihong Zhang

April 2022
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## Abbreviations

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<tr>
<td>ABGB</td>
<td>Allgemeines bürgerliches Gesetzbuch</td>
</tr>
<tr>
<td>ADC</td>
<td>Anuario de derecho civil</td>
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<tr>
<td>Am J Comp L</td>
<td>American Journal of Comparative Law</td>
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<tr>
<td>AÜHFD</td>
<td>Ankara Üniversitesi Hukuk Fakültesi Dergisi</td>
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<tr>
<td>BCEHC</td>
<td>Boletín del Centro de Estudios Hipotecarios de Cataluña</td>
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<tr>
<td>BGB</td>
<td>Bürgerliches Gesetzbuch</td>
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<tr>
<td>BOA</td>
<td>Boletín Oficial de Aragón (Official Journal of Aragón)</td>
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<tr>
<td>BON</td>
<td>Boletín Oficial de Navarra (Official Journal of Navarre)</td>
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<td>Br J Can Stud</td>
<td>British Journal of Canadian Studies</td>
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<td>BW</td>
<td>Burgerlijk Wetboek</td>
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<td>C d D</td>
<td>Cahiers de Droit</td>
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<td>c.c.</td>
<td>Codice civile</td>
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<td>C.C.Q.</td>
<td>Civil code of Quebec</td>
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<td>Can Bar Rev</td>
<td>Canadian Bar Review</td>
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<td>CC</td>
<td>Civil Code</td>
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<td>CCC</td>
<td>Chinese Civil Code; Argentinian Civil and Commercial Code</td>
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<td>CC Cat./CCC</td>
<td>Catalan Civil Code</td>
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<td>CCJC</td>
<td>Cuadernos Civitas de jurisprudencia civil</td>
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<td>CCRO</td>
<td>Civil Code Revision Office</td>
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<td>CN</td>
<td>Constitución de la Nación Argentina</td>
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<td>Colum J Asian L</td>
<td>Columbia Journal of Asian Law</td>
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<td>D. lgs</td>
<td>Decreto legislativo delegato</td>
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<td>Dalhousie LJ</td>
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<td>DCC</td>
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<td>DCFR</td>
<td>Draft Common Frame of Reference</td>
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<td>DOGC</td>
<td>Diario Oficial de la Generalitat de Cataluña</td>
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<td>DP</td>
<td>Draft Proposals (of Japan’s Civil Code (Law of Obligations) Reform Commission of Japan)</td>
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<td>EC</td>
<td>Constitución española</td>
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<td>ECC</td>
<td>European Economic Community</td>
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<td>Abbreviation</td>
<td>Full Form</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>European Court of Human Rights</td>
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<td>ERPL</td>
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<td>FTA</td>
<td>Free Trade Agreement</td>
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<td>GRUR</td>
<td>Gewerblicher Rechtsschutz und Urheberrecht</td>
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<td>Hong Kong LJ</td>
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<td>IJLI</td>
<td>International Journal of Legal Information</td>
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<td>InDret</td>
<td>InDret. Revista para el análisis del derecho</td>
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<td>ISTAT</td>
<td>Istituto Nazionale di Statistica</td>
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<td>İÜMHE</td>
<td>İstanbul Üniversitesi Mukayeseli Hukuk Enstitüsü</td>
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<td>J Civ L Stud</td>
<td>Journal of Civil Law Studies</td>
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<td>JCL</td>
<td>Journal of Comparative Law</td>
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<td>JO</td>
<td>Journal Officiel</td>
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<td>JT</td>
<td>Journal des Tribunaux</td>
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<td>KCC</td>
<td>Korean Civil Code</td>
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<td>l.</td>
<td>Legge ordinaria</td>
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<td>LC</td>
<td>Legislative Council (Housei Shingikai) of Japan</td>
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<td>Melbourne University Law Review</td>
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<td>Minroku</td>
<td>Daishin’in Minji Hanketsuroku (Records of the Great Court of Judicature Civil Cases) of Japan</td>
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<td>Minshû</td>
<td>Saikô Saibansho Minji Hanreishû (Collection of the Supreme Court Civil Cases) of Japan (Between 1922 and 1946)</td>
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<td>MoJ</td>
<td>Ministry of Justice</td>
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<td>MÜHF</td>
<td>Marmara Üniversitesi Hukuk Fakültesi</td>
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<td>NBW</td>
<td>Nieuw Burgerlijk Wetboek</td>
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<tr>
<td>NPC</td>
<td>National People’s Congress</td>
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<td>OECD</td>
<td>Organization for Economic Co-Operation and Development</td>
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<tr>
<td>OHADA</td>
<td>Organisation pour l’harmonisation en Afrique du droit des affaires</td>
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<td>Osgoode HLJ</td>
<td>Osgoode Hall Law Journal</td>
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<td>PECL</td>
<td>Principles of European Contract Law</td>
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<td>PRC</td>
<td>People’s Republic of China</td>
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<td>Abbreviation</td>
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<td>RabelsZ</td>
<td>Rabels Zeitschrift für ausländisches und internationales Privatrecht</td>
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<td>RC</td>
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<td>RCDP</td>
<td>Revista Catalana de Dret Privat</td>
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<td>RDC</td>
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<td>RDS</td>
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<td>RDUS</td>
<td>Revue de Droit de l’Université de Sherbrooke</td>
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<td>RGD</td>
<td>Revue générale de droit</td>
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<td>RIDC</td>
<td>Revue internationale de droit comparé</td>
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<td>RJB</td>
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<td>RM Themis</td>
<td>Rechtsgeleerd Magazijn Themis</td>
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<td>RSFSR</td>
<td>Russian Soviet Federative Socialist Republic</td>
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<td>SPC</td>
<td>Supreme People’s Court</td>
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<td>USSR/SSSR</td>
<td>Union of Soviet Socialist Republics</td>
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<td>WG</td>
<td>Working Group</td>
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<td>WiRO</td>
<td>Wirtschaft und Recht in Osteuropa</td>
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<td>WPNR</td>
<td>Weekblad voor Privaatrecht Notariaat en Registratie</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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<td>ZEuP</td>
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<td>Zivilgesetzbuch</td>
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<td>ZJapanR</td>
<td>Zeitschrift für Japanisches Recht</td>
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<td>ZPO</td>
<td>Zivilprozessordnung</td>
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<td>ZSR</td>
<td>Zeitschrift für Schweizerisches Recht = RDS</td>
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On Civil Codes: A Twenty-First Century Perspective

Michele Graziadei and Lihong Zhang

Abstract Civil codes are an effort to provide stability and coherence to several areas of the law. Despite the growing complexity of contemporary societies, codification as a legislative technique has not been abandoned. Codification is, however, just one option on the table. This introductory chapter explores why this option has been so successful, though the mythologies surrounding the first civil codifications are by now behind us, and much has changed both in society and in legal theory since the time those first codes were put into force.

1 The Force of an Idea

Codification, once more, really? Why should a new book be devoted to a topic that has already been widely covered by so many important contributions? This introductory chapter provides some reflections that may help answer this question and put this book into perspective.

The theme underlying this collection of essays is that civil codes—both old and new—represent an attempt to provide stability and coherence to several areas of the law, offering a comprehensive approach to the regulation of a whole set of civil relations by setting coordinated rules applicable to them. Although codification

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typically serves these purposes, it is also true that legal change will still occur over time, even though a civil code has been enacted. The challenging task of balancing conflicting legal principles and demands is not over once a code is enacted. The search for stability, coherence, and adaptability continues in various ways after a code civil enters into force, for example when innovations are introduced into the law without amending the code. Eventually, the code as it was enacted turns out to be just a milestone along the road to new legal developments.

The question for us is, therefore, how stability and change are managed in the presence of ongoing legal development under the civil code of a country. The problem was already familiar to the drafters of the French civil code. A few famous lines from the preparatory works of the French civil code by the eminent Jean-Étienne-Marie Portalis show clear awareness of this:

A code, however complete it may seem, is no sooner finished than thousands of unexpected questions present themselves to the magistrate. For these laws, once drafted, remain as written. Men, on the other hand, never rest. They are always moving; and this movement, which never ceases and whose effects are variously modified by circumstances, continually produces some new fact, some new outcome.

Many things are therefore necessarily left to the authority of custom, to the discussion of learned men, to the arbitration of judges.¹

The papers collected in this volume provide an interesting and up-to-date set of new responses on this point. These various responses have matured in countries that have experienced different socioeconomic and political trajectories, such as Argentina, Brazil, China, Japan, Russia, South Korea and Switzerland, or that by now are members of the European Union, such as Belgium, France, Germany, Italy, Hungary, The Netherlands, and Spain. Codification may be achieved under different political regimes.

At the end of a long intellectual journey, we will not try to sum up the findings by each contributing author who was so kind to join in the effort. We prefer to let them speak with their own voices. Rather, our task is to present in a concise way our thoughts on these issues in a modest attempt to cast some light on them.

It should be clear from the outset that this volume does not cover those projects that in recent decades explored the possibility of a uniform civil codification for Europe. Instructive as they are, both for their ambitions and their limits, that part of the story relating to the codification of civil law is mostly left out of this book. The conditions for civil codification in a multinational, culturally diverse space like the one constituted by the European Union present issues that are different from those prevailing at the national level, where the value and costs of reducing legislative particularism in civil and commercial matters are usually debated against a different background.

Nevertheless, many of those projects have been a source of inspiration for national reformers of the law. Reform efforts both inside and outside Europe have considered them, along with other nonbinding legal texts, such as the Principles of European Contract Law and the Unidroit Principles on International Commercial contracts.

¹ Portalis (1801).
All these international legal materials illustrate how some of the tasks of codification are accomplished by other means in a transnational setting.\(^3\)

Having made this choice, namely, not to discuss codification at the EU level, the codification landscape in European countries is still evolving under the pressure of EU legislation and the case law of the European Court of justice. Provisions incorporated into the civil codes of the European countries that derive from EU must therefore be interpreted and applied in conformity with it. National civil codifications in Europe thus are integrated at the EU level to an unprecedented level because EU law by now covers a whole range of disparate matters, from package travels to product liability, to transactions on digital platforms, etc... It has often been remarked that EU legislation presents a challenge to the national civil codes because of its pointillistic and ad hoc character.\(^4\) The other face of the same coin is the concrete risk that EU law is interpreted in light of national legal concepts and categories, rather than as a law that has its own ends, as it should be, although in the elaboration and interpretation of EU law comparative law has a definite role to play.\(^5\)

The European Convention of Human Rights and the jurisprudence of the Strasbourg Court tasked with its application are also taken into account when considering the limits to purely national approaches to codification in Europe. Their influence on national law is particularly visible in areas such as family law.

National codifications in Europe are therefore now under the shared roof of supranational norms. The European situation has no exact parallel in other contexts, given the level of integration experienced by the countries belonging to the EU, and yet national experiences across the world often speak of cosmopolitan attitudes and of the impact of international trends on codification processes. One could quickly come to the conclusion that this is the visible effect of accentuated globalizing trends. Although these trends are present on the contemporary scene, the history of codification shows that borrowing, adaptation, and contamination, along with a measure of original creation, were there from its very beginning. The first civil codes were drafted on the basis of a variety of materials mostly drawn from the Roman law sources, which did not have a national character; they also reinstated several (non national) customary rules and in doing so took advantage of the available legal literature. Subsequent civil codifications have benefitted from a close examination of previous codes, whether enacted at home or abroad; more recent codifications have drawn from international conventions and soft law texts as well.\(^6\)

Our epoch is defined by an increased recourse to legislation to govern disparate fields of the law, including those areas of the law that have been codified. This is due to the growing complexity of contemporary societies, to the major role of the contemporary State in the regulation of the economy, and in arbitrating or recognizing the claims of the various constituencies and organised interests. Nonetheless, the civil

\(^3\) For an excellent discussion Jansen (2010).

\(^4\) See, e.g., Roth (2002).


\(^6\) Mirow (2001).

\(^7\) See, e.g., Guo et al. (2021) and Pietrunko and Richter (2020).
codes have maintained their importance among the source of law in a high number of jurisdictions all around the world. The most populous country in the world—the PRC—is, for the moment, the latest country to join the club of countries that opted for codification, with its civil code of 2020. This achievement confirms once more that codification is one of the most powerful techniques in the hands of a legislator.

On what grounds is this power based?

One would look in vain for a single, compelling answer on the point. Legislators have often refrained from taking upon themselves the task of setting out the law applicable to the whole range of civil and commercial relationships. Codification of the law is, after all, just one option on the table, and a relatively recent option when considering the history of law through the ages from a global perspective.

Furthermore, the common law world still offers the view of large tracts of the law relating to civil and commercial relationships that are not enacted in the form of a code. They are mostly left to the care of judges and commentators, with the occasional intervention of the legislator. This happens despite the great amount of attention given in common law jurisdictions to the possibilities offered by codification, its merits and defects. In continental Europe, the laws of the Nordic countries (Finland, Denmark, Iceland, Sweden, Norway) developed without following the path of the neighbouring countries. They all avoid comprehensive civil codifications, taking a rather sceptical view of their utility.

Law reformers have often launched codification as a reaction to the unbearable disorder of the law, its lack of intelligibility, or its inaccessible nature. Similar motives already feature at the entry door of one of the world’s most famous legal compilations, namely, the Digest of Justinian:

…I we have found the whole extent of our laws which has come down from the foundation of the city of Rome and the days of Romulus to be so confused that it extends to an inordinate length and is beyond the comprehension of any human nature.

Unsurprisingly, the urge is then to remedy similar defects and to provide a single statement of the law, which should be free from discrepancies, repetitions, and contradictions. This is not the occasion to consider whether Justinian’s Digest lived up to the challenge, but to note that similar statements are often found in the preparatory works of compilations and codes of all ages, including the Chinese civil code of 2020 as a resounding call for action.

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8 For the thesis that we live in an age of decodification see Irti (1999). This stimulating diagnosis has sparked an international debate. The evidence collected since the first publication of Irti’s book shows that codification is far from dead. As Cabrillac’s contribution to the present volume makes clear, codification is still enjoying an excellent state of health, although the ethos of codification has changed since the epoch of the first civil codes. See as well on these points Vargas (2011); Sacco (1983).

9 Pirie (2021).

10 See, e.g., Giliker (2021) and Weiss (2000).


13 More on this in Mantovani (2016)
Since the Enlightenment, the idea of an accessible, orderly set of laws gained ground in Europe. Eventually, by the beginning of the nineteenth century, the impulse to provide a single set of laws to govern civil relations for the whole the polity carried the day with the French (1804) and the Austrian (1811) codifications. Order and intelligibility are usually one of the principal justifications given for the codification effort, but the desire to pursue similar goals is not enough to have a codification, however. Justinian’s Digest does not qualify as a codification, although the Emperor intended to bring (more) order to the law. To pick a twentieth century example, the drafters of the English Law of Property Act 1925 worked to remedy the messy state of English property law, to make it more certain and intelligible. The resulting text is not a codification either. It is too rich in detail, and it still requires sound knowledge of the previous practice of the law to master it.

To move beyond similar commonplace observations, one rapidly comes to the conclusion that a comprehensive, systematic statement of the law, such as that which is found in a civil code, is available only if the way toward that ultimate goal has been carefully prepared. All the powers of a legislator cannot deliver on this, unless a systematic treatment of the law is made available to it, typically because scholarly works have laid the foundations for satisfying this need. The point has been aptly made by James Gordley: “…continental scholars were systematic before they had codes. It was their very success in systematizing the law that made the codes possible”.

The second element of continuity between the old and the new law entrusted to the civil codes is the assumption that authoritative texts are the source of the law. For centuries, jurists educated at the universities have been trained to find the law in the text of Justinian’s compilation (and in the Corpus juris canonici, as far as canon law was concerned). The importance of customary law in medieval and modern Europe was immense, but the tendency to put customary law in writing reveals how even custom in the end falled prey to the mindset of lawyers educated at the universities and their ability to work with texts. Obviously, the raise of printing was a formidable push in the same direction.

Contemporary observers may quickly label this posture as the quintessential, foundational mythology of the civil law tradition. Mythology it is, because during the entire epoch of the ius commune the law did not cease to change and evolve in different directions, to experience a variety of cultural influences, and to adapt to the new material conditions of life in society. However, much is lost if the crucial point is missed: it was a mythology with a purpose—hence it is appropriate to approach

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17 On this last point, see, e.g., with respect to the relation between Roman law, commerce and industrialisation in nineteenth century Germany: Whitman (1990, 221 ff).
the phenomenon as a form of ideology.\textsuperscript{18} By following this path, jurists trained at the universities established for themselves the same type of technical legitimation that is claimed through expertise in the form of high learning (\textit{scientia})—they indeed represented themselves as the lights of the \textit{scientia iuris}—Rechtswissenschaft, science du droit, an objective form of knowledge of the law.\textsuperscript{19} The anchoring of jurists to the ontological plane, namely, the self-representation of \textit{scientia iuris} as knowledge built on a compact nucleus of nonnegotiable values, waranted by certain texts, historically lent credibility to the legal profession and conveniently protected it from political criticism to a large extent, and above all enable them to work even when centralised state structures were yet to emerge.\textsuperscript{20} To put it in a line, the jurists knew how to ‘naturalise’ their notion of the law. Public law, however, was never wholly tied to the same premises; it emerged later as a system of law, and to this day it is only partially codified.

With the advent of the modern codification movement, the text was still, once more, at the centre of the scene, commanding, if possible, even closer attention, but it was no more ruling as an old monument of the antiquity in the name of legal science. The source of its legitimation had changed, becoming an act of positive legislation.

Here we have a turning point. In Europe, the first civil codifications represented both the culmination of the scholarly dominance of legal development and a break with the previous tradition.\textsuperscript{21} The pithy propositions that make up a code are quite different from those collected in Justinian’s compilation. The former are on their face much less open to discussion and argumentation than the latter, being cast as a set of rules.\textsuperscript{22} For the first time in the entire history of the civil law, the legislature stepped in to claim competence to govern the entire subject matter of civil relationships, marriage and successions included, for the whole polity. By doing so, the code implicitly—perhaps beyond the intention of its makers—emphasized the national, rather than the universal dimensions of the law, as an expression of political will.\textsuperscript{23}

\textsuperscript{18} For this framing: Orestano (1982) and Kroppenberg and Linder (2014) are less explicit, but their argument points in the same direction. A similar analysis can be developed as well by reflecting on judicial style in civilian and common law jurisdictions: see Lasser (2004).

\textsuperscript{19} On this strategy: Wieacker (1996), and for a critique of its standard presentation Tuori (2020). For a more complex reconstruction, which integrates the various components of the medieval legal order: Grossi (2010) and the authors cited in the previous note.

\textsuperscript{20} See, the literature cited in fn. 19 and Luongo (2018).

\textsuperscript{21} This aspect is emphasized by Paolo Grossi, who holds the French civil code to be the apogee of unprecedented ‘absolutistic’ tendencies, which turned legislation into the pre- eminent source of the law: Grossi (2010). On patterns of continuity of the law after the entry into force of a new codification see, e.g., with respect to the German civil code: Zimmerman (2001).

\textsuperscript{22} See Gordley (1998).

\textsuperscript{23} Some codes proclaimed faith in nationalism as well. For example, the Italian Civil Code of 1942, art. 12 (preliminary title), provides: “In applying the law one cannot attribute to it any other meaning than that made evident by the proper meaning of the words according to their connection, and by the intention of the legislator. If a dispute cannot be decided with a specific provision, it refers to the provisions governing similar cases or similar matters; if the case still remains doubtful, it is decided according to the general principles of the legal system (‘ordinamento giuridico’) of the State.”. The
The references to reason and equity in the preparatory works of the French civil code, as well as the homage paid by § 7 of the Austrian Civil Code of 1811 to the principles of natural law, still reflected those old universalistic tendencies. However, the choice to enact the code in the vernacular language, rather than in Latin, conveyed a new message: that there was a strong link between the law and the territorial power that enacted it. In the nineteenth century, the civil code is the expression of a wider effort of the State to set a modernising, rational plan for society, in which the raising bourgeoisie has a major role to play.24

Nevertheless, continuity with a number of solutions going back to the old law and its doctrines was warranted, when compatible with the new political and economic order, even when the code intended to provide a fresh start, as the French civil code did, by proclaiming the abrogation of all the previous sources of law.25

The power of the code was thus related to its rational plan or to its systematic character, to the accessibility of it, thanks to the resulting simplification of the sources of the law, and to the possibility of reading the law in the modern language as part of a message that rendered the code the law of the nation. The force of the idea is clearly intelligible at this point: it is the force of formalism writ large. A civil code is not meant to last just a few years; it is a declaration of the law that is cast in a form that should be durable because it is of a high level of generality. The idea that the code is also a complete statement of the law—albeit a fiction—is a fiction that falls in line with assumptions backing the authority of the code.

Before proceeding to the discussion of these ideas, one further point must be highlighted. Even in nineteenth-century Europe, codifications were adopted in very different contexts and pursued different philosophies. For example, at first, in many European countries, codification implied the reception of a foreign code rather than the elaboration of an original text. In the same period, outside Europe, in Asia, the elaboration of a code implied, first of all, the creation of a whole new terminology to translate alien legal concepts and the rapid acculturation to the intellectual background of Western law, as happened in Japan, during the Meiji period.26 Under colonial or semicolonial conditions, the code did not apply to the entire population of a country either (and even in Europe the application of the code could be contested in some contexts, e.g. in some parts of the countryside).27

The ideal of a continuity between the letter of the code and the works of its interpreters in all these contexts was a mere hypothesis, not necessarily warranted by

24 Canale (2009).
25 Article 7 of the French Civil Code provides: “From the day on which these laws are enforceable, the Roman laws, ordinances, general or local customs, statutes, regulations, cease to have the force of general or particular law composing this code.”
27 Bell (2014).
the facts. The translation of foreign legal literature into the local languages—where and when it occurs—is a poor surrogate for the initial lack of original works produced by the local jurists. In these contexts, the civil code hardly carries with it the same symbolism that it gained elsewhere and the law may show hybridity, adaptations, and contaminations.

2 The Code Is Dead, Long Live the Code

In the previous section, we sketched a genealogy of civil codes. A reflection on the present relevance of civil codifications invites the following question as well: when do codes die?

There are famous pictures representing the birth of codes and scholarly articles dedicated to failed codification projects, but the final chapters in the lives of civil codes are seldom discussed, although the death of codification in general has been predicted with a certain emphasis.

It is tempting to say that a first factor determining the death of a code is simply its old age. With the passage of time civil codes become decrepit too. The incremental change that is initially deemed compatible with them, in the end, disfigures them. Although old codes are “in force”, their vigor is much diminished, the letter is still there, but the spirit is often gone. A system that was once codified then turns out to be uncodified: codification silently unravels over time, and the code is virtually dead, as it no longer speaks to reality.

Prior to several both recent and less recent reforms, the oldest code of Europe, the French civil code, risked this fate. France has always been presented as a leading civil jurisdiction, putting great faith in codification as a legislative technique. However, by the close of the last century, the French civil code was rapidly losing ground to the law formed outside it and to the weight of its own judicial application on a massive scale. New theories and rules sanctioned by judicial practice and by academic writings found no direct support in the code and yet submerged it. Under these conditions, the code had lost its raison d’être. This danger was just as apparent in Belgium, and Belgium quickly proceeded to reform its civil code as well. For the same reasons, the German civil code has undergone a vast reform of the law of obligations in 2002. This was the occasion to incorporate into the code new statutory provisions to bring the code in line with doctrinal and judicial developments, as well as to integrate consumer contract law of European origin into the BGB and

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28 Those of study the history of the French civil codification in nineteenth century Europe know, for instance, that its interpretation in the German lands beyond the Rhine was guided by conceptual approaches different from those prevailing in the same epoch France. Looking beyond Europe, both the case of Japan and China are telling. On the legacy of Legalism and Confucianism in the Chinese experience with codification see the chapter by Zhang in this book.
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to undertake reforms going beyond consumer law. The German legislature accom-
modated tendencies emerging at the European and international levels concerning
general contract law as well. After this reform, new provisions were introduced in
the code in recent years, such as those dealing with medical treatment contracts and
those concerning the implementation of European directives on consumer rights,
mortgage credit, and package travel. The most recent additions to the code in the
field of contracts concern architect and engineering contracts (§§ 650p ff.). The
reform process is evident in other parts of the code as well; for example, the law on
foundations was amended in 2021.

A closer look at the life of civil codes to detect factors at the origins of their
obsolescence highlights at least three elements affecting the vitality of a codification
in the absence of reactions to outdateness, usually in the form of recodification.

The first is a change in the values that dominate certain aspects of social life. The
protection of fundamental human rights, in particular, of personality rights, in recent
codifications is a case in point. The dedication of a specific book of the new Chinese
civil code to the protection of personality rights provides a good example of this
dynamic.31

Family law is a typical instance in this respect. Family law experienced change on
a large scale between the second half of the twentieth century and the first decades
of the twentieth century in many countries. In this period, family law inherited from
the past, based on the inequality of the spouses, was repealed to lay down completely
new foundations for it in a wide number of jurisdictions. A legal revolution has taken
place, and it is still ongoing, concerning, e.g., the role of gender in its relation with
family law. Until this wave of reforms, the codes that enacted the old law were mere
relics from the past in the eyes of the new generations who rejected them. To provide
another example of legal change related to the onset of new values with respect
to the area of patrimonial relationships, the birth of consumer law in the twentieth
century is connected to a new assessment of private autonomy and its role in market
relationships; the ideology of contract prevailing in the nineteenth century, extolling
the sanctity of contracts, was eventually abandoned.

The second factor of change is the emergence of new material conditions of life
in society. This may bring with it new law to remedy a legal regime that turns out to
be dysfunctional. Pressure on civil codes are abundant.

The average life span in European societies has increased dramatically in the last
century. This poses entirely new problems for the law of succession. When the first
civil codes were enacted, the rules on forced heirship usually benefitted minors or a
young people. Today, it is not unusual for a daughter or a son aged 65 (or more) to
succeed to parents aged 85 (or more). Traditional forced heirship rules working under
these conditions take on an altogether different socioeconomic meaning. Hence, the
need to amend the laws governing succession upon death.

Consider as well the advent of modern traffic in the twentieth century: compulsory
automobile insurance soon became a necessity. Similarly, the large-scale develop-
ment of industrial activities is at the origins of the provisions of the civil codes on

31 See Prof. Wang’s chapter in this book.
emissions among neighbouring properties. One could go on in the same vein to illustrate, for example, how the introduction of electricity as a new source of energy posed several legal puzzles to codifiers. Presently, the rise of artificial intelligence and automated contracting through platforms is leading to the creation of new rules that will have to be accommodated into civil codes sooner or later, while self-driving cars are on the legislative agendas of many countries. Assisted reproduction techniques, and other disruptive technologies in the field of life sciences, also impact traditional civil law rules in a number of ways.

Third, a code may suffer desuetude because it provides rules that are ill designed, as happens when the code fails to intercept the needs of those who should use it.

Consider the evolution of the rules on the taking of security over movables. They provide a nice example of the evolution of legal practice outside the framework provided by the Code. In Germany, the codal rule that requires the handing over of goods to a creditor to give security for credit (BGB § 1205) was quickly sidestepped by legal practice, with the support of decisions rendered by the Supreme Court just a few years after the German civil code was enacted.32

With the benefit of hindsight, one can conclude that BGB § 1205 is a dysfunctional provision because it effectively prevents the debtor from creating a security right over goods (usually raw materials) that the same debtor must transform in the production process. The law of security thus rapidly began developing along lines different from those provided for by the Code. In an area of the law that is dominated by formalism, such as property law, private autonomy played around the code with relative ease.

When the code begins showing obsolescence, the typical reaction is to reform it. The number of new provisions that are incorporated into old civil codes shows that obsolescence is no fatal illness, if cured. Like an old palace, a code can be renovated. This is usually the preferred course of action.

The growth of an entire new set of rules can also be accommodated into a new, separate code, with a rationality of its own. The enactment of a consumer code in several countries (e.g., France, Italy, Spain) is a clear example of this dynamic.

The substitution of an old code with an entirely new code is the fruit of more ambitious plans. Among other countries, Italy, Québéc, and the Netherlands made this choice in the twentieth century. Once more, the response to obsolescence of an old codification is a fresh effort directed at codification. In both cases, the new codifications could draw inspiration from an increased plurality of sources, exploiting the most recent advances of legal science at the time. The nineteenth-century visions of private law underlying the German and French civil codes have been left behind by these codifications. A new complete codification is thus perhaps the best evidence of the growth of a new legal consciousness; but a new legal consciousness does not necessarily lead to abandoning codification as a technique to set out the law.

32 The first of these decisions is RZ 8 November 2004, RGZ, 146. The Court thus confirmed a line of decisions preceding the entry into force of the BGB. Kötz (1987) shows that the possibility to ‘take the civil codes less seriously’ is far from rare in several contexts.
3 The Letter and the Meaning of a Code

Civil codes are texts sanctioned by state authority. Thus far, we have implicitly assumed that these texts have the ability to constrain their interpreters. We have also assumed that this quality is not everlasting, nor to be taken for granted as an empirical fact. However, what about the general, philosophical question raised by similar remarks: do texts, even if sanctioned by authority, constrain interpreters? Alternatively, to put the same question in slightly more provocative terms: are sceptics justified to think that jurists all too often must be pulling rabbits out of empty hats when interpreting the civil codes?

As far as the law is concerned, general questions such as these are better answered after inspecting the historical record.

The history of the civil law tradition in Europe would be inexplicable if the legal professions had not managed to gain strong legitimation as a social force managing legal change over time. This legitimation was gained thanks to the capacity of jurists to distance their theoretical and practical activity directed at preventing or solving disputes from the sheer exercise of unbridled political power. In the civil law world, the texts they worked with became one of the strongholds of the notion of legality which embodies such ideal. This foundation expressed (and is) a commitment to be bound by the relevant texts, whether they are sanctioned by tradition alone, or by a democratic legislature, under a constitution.\(^{33}\) Still, in either case, those texts do not speak without an interpreter. Agreement by jurists on a certain opinion establishes its authority. Judicial pronouncements weight in the same matter because they are deliberated by (independent) decision makers after hearing the reasons advanced by both parties in a dispute. The attribution of meaning to the provisions of a code (more generally: to legislative enactments) is a social act that is governed by conventions in all codified systems. The local legal culture may be more or less inclined to allow an open discussion of them. The code itself may speak or remain silent about them.\(^{34}\) In any case, over time, methods of interpretation change, and the culture of the interpreter of the code changes as well. Nonetheless, those conventions are far from imaginary. As John Merryman noted: “...to understand a contemporary civil law system you have to know where it comes from and what its image of itself is... In most of the civil law world legal professionals believe in that image. Even those who do not believe in it often feel compelled to act as though they do”\(^{35}\). With this remark, a profound truth is unveiled. There is an element of subjectivity and creativity in every act of interpretation, although one may wish to deny it, or may even be bound by convention to deny it. These remarks do not dispense lawyers from looking for a theory of interpretation of law under the code, but rather help to build a better

\(^{33}\) For brilliant analysis of the notion of ‘commitment’ and its role in furthering comparative projects Valcke (2018).

\(^{34}\) Guzmán Brito (2011).

\(^{35}\) Merryman (1987). On judicial styles as the manifestation of such assumptions see the important contribution by Lasser (2004). Sacco’s pioneering, profound work on legal formants and cryptotypes is very much relevant here. See on this his chapter in this book.
comparative understanding of it by leading to an ethnography of it. In 1948, Roscoe Pound concluded that legal systems need to be studied functionally as instruments of social control and that legal precepts and the interpretation and application thereof need to be developed “with respect to the social ends to be served”. This is still broadly true today, and lawyers have lost their legitimation time and again when they have lost sight of this need.

A further point to keep in mind is that texts are not all the same. The authority of the text varies with its quality. Codifications can be judged on the basis of formal criteria, although different drafting styles legitimately reflect different professional ideals and assumptions about the law. Text with a high degree of generality—such as those providing the rules on extra contractual liability contained in many civil codes—allow for massive integration of meaning and for a good amount of discretion in determining the outcome of a litigation. References to ‘good faith’, ‘reasonableness’, ‘public policy’, ‘good morals’, and the like perform similar functions. Even in the presence of such formulas, the fundamental principle of justice that extols equality requires that similar cases be decided in a similar way. This principle puts a heavy argumentative burden on those who support the application of a different rule with respect to similar facts because an exception to the rule must be justified.

In several contemporary legal systems, this justification is sometimes upheld by constitutional arguments. The open-ended nature of many constitutional provisions is an invitation to develop cogent arguments for or against a certain solution. Since many contemporary constitutions are rich repositories of values, they do provide a way to approach the interpretation of the code that is liable to influence its application, although this is by no means a universal rule. On the other hand, if the constitution is understood mostly as a political document, the code may help to entrench values that would otherwise fail to obtain recognition at the political level. The recent Chinese codification of personality rights in its civil code looks like an attempt to move in this direction and is telling about the rich debates behind the making of the Chinese civil code.

### 4 The Reasons for a Lasting Legacy

Codification is by now a quintessential component of many legal systems. Its legacy is profound, although the views about codification and its contexts have changed over time.

In this introduction, we have argued that civil codifications should be read against the background of a legal tradition. Civil codifications provide the texture of the general law applicable among subjects in civil matters. For centuries, jurists trained

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36 Pound (1948).

37 See, e.g., Sajo and Uitz (2005), Barkhuysen and Lindenbergh (2006), and Oliver and Fedtke (2007).

at the universities in the West have found this frame of reference in a text (and then, perhaps even more often, to be honest, in the interpretations developed over that text). The contemporary function of the code is still to lay down that general texture of the law, to offer an authoritative representation of it.

Traditions can grow spontaneously and exhibit original traits; they can be imitated or invented. They can be betrayed, if necessary. The story of codification across the world draws upon all these possibilities. In any case, civil codes as propositional enactments of the law call for interpretations. They are not self-sufficient, even when they proclaim they are.

Just as constitutions do not live without constitutionalism, civil codes are put into practice by lawyers who understand their language, their doctrines, their policy choices, and who are trained for this. The sheer manifestation of political will is not enough to create these skills and capacities (although it can destroy them). More is needed to create them, and this is why lawyers receive specific training in the law. Any attempt to limit their call by ignoring the complexity of their standing (e.g., by turning them into bureaucrats, or mere servants of power, public or private) risks backfiring in terms of the credibility of their work.

A high level of coherence between the text of the code and these components of the law that make its interpretation is not to be taken for granted, however. The text as written is a fact, its meaning, as it results from the work of its interpreters, evolves over time. Adherence to new values, new theoretical views and new societal demands typically creates distance between the text and its interpreters. A wide gulf between them emerges when the foundations of the code are alien to the local professional culture and to society at large.

The perception of fault lines in the tradition leading to the codes has become sharper over time. The illusion that a text in the form of a civil code will defeat the complexity of the law once and for all has finally vanished. Codifications will challenge their interpreters. They will have to confront the problem of how to balance or coordinate conflicting legal principles, deal with issues that the code failed to address, or did not cover brilliantly. However, the seductive ambiguity of codification remains, and this new awareness only makes it more intriguing in the end.

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