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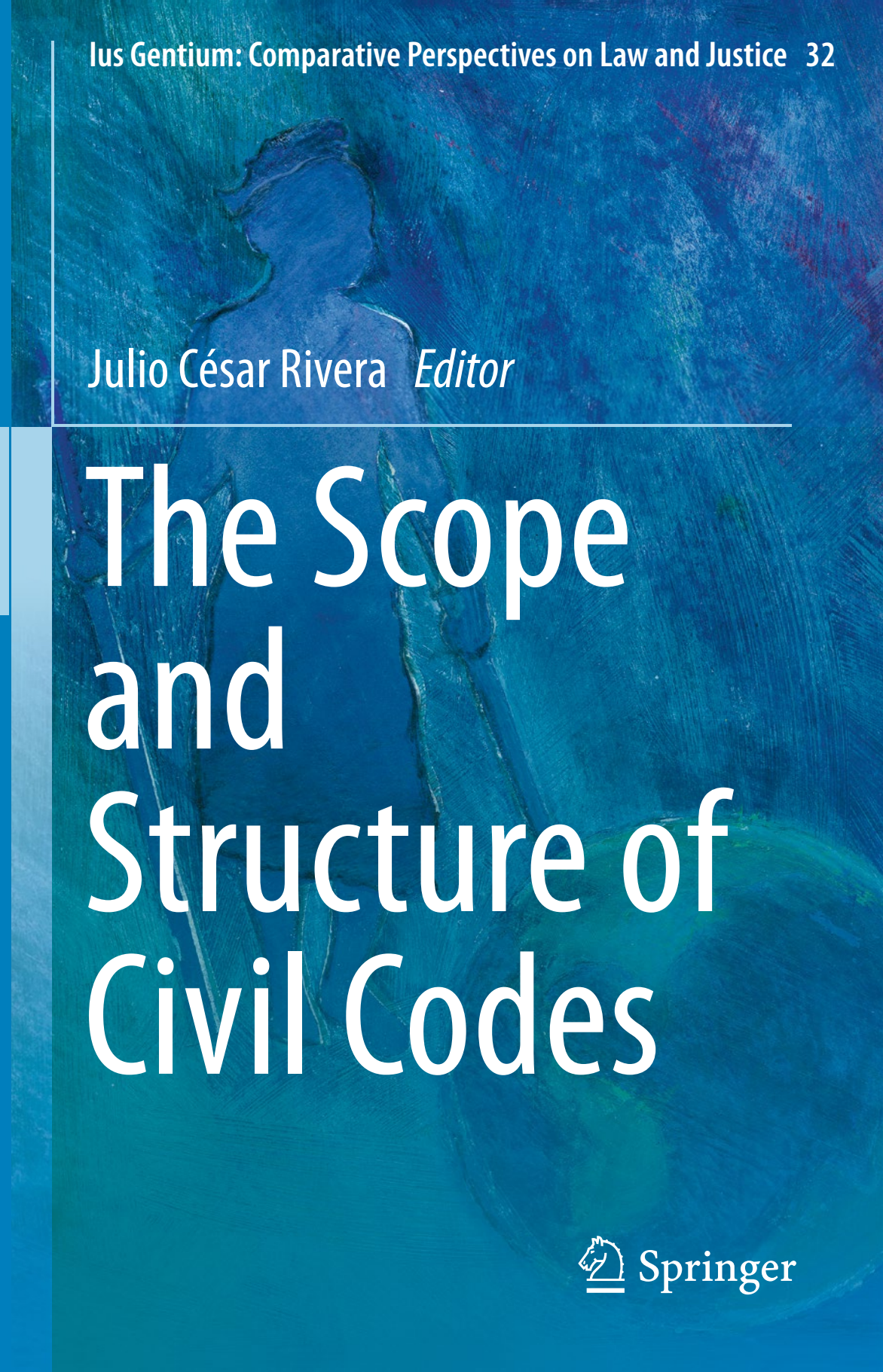

Julio César Rivera *Editor*

The Scope and Structure of Civil Codes

Springer

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IUS GENTIUM

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The Scope and Structure of Civil Codes

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Preface

This work has its genesis in the Second Thematic Congress of the International Academy of Comparative Law, held in Taiwan in May 2012.

The subject matter of this Congress was "Codification", and the subject of the panel regarding the civil codes was: "*The scope and structure of civil codes. The inclusion of commercial law, family law, labor law, consumer law*".

The essays that make up this volume are based on the National Reports presented in the panel, but are not necessarily identical, for the subthemes have been reformulated; considerations, arguments and conclusions from the debates that took place at the Congress were incorporated and minor or accessory details that may not result interesting for the audience were suppressed.

Hence, the comparatist paper *The Scope and Structure of Civil Codes* opening this volume is not a mere reproduction of the General Report presented at the Congress, but it is a re-elaboration written in light of the essays from all the collaborators. Nevertheless, the essay makes reference to the National Reports, specifically for countries that did not present contributions for this volume. The National Reports will be published by Taiwan University.

An original work has been shaped from this material seeking to respond questions ranging from the philosophical, political or economic justification for legislation under the form of civil codes, to essentially practical matters such as the content of contemporary codes and their relation with the rest of the national and supranational legal frameworks.

The comparatist analysis allows to envision that countries often offer similar and on occasions totally diverse solutions to the same problems; and yet this is not an impediment to begin by noting a conclusion: the announced death of the codes has not occurred, and on the contrary its survival is seen in the countries that adopted codification as a method of legislative expression during the nineteenth and twentieth centuries, as well as in the growing interest it attracts in countries that are getting closer to world markets. Furthermore, even countries whose tradition and peculiar

legal culture do not adhere to the codification method use alternative methods that result in an approximation to that product, the code, that has quite accurately been qualified as one of the most important fruits of the human spirit.

Buenos Aires, Argentina Julio César Rivera

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As editor of this volume, I am grateful to each and every author of the works that are included herein. Particularly I am obliged to acknowledge Prof. Maxeiner's contribution, whose initiative made possible the support from Springer publishing.

Further, I would like to express my gratitude to Laura Piedrahita, a lawyer who has been for years collaborating with my research works, and whose excellent performance in the English language allows me to overcome the shortcomings in that field.

Likewise I must acknowledge the support of Eleonara Bianchi, lawyer and public translator in English, who also revised my papers before and after the Taiwan Congress.

And fundamentally, I would like to manifest my appreciation to the International Academy of Comparative Law for having honored me with the responsibility of performing as General Reporter for the panel that explored the theme developed in this book.

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Part I
A Comparative Approach to the Scope and Structure of Civil Codes

Chapter 1
The Scope and Structure of Civil Codes. Relations with Commercial Law, Family Law, Consumer Law and Private International Law. A Comparative Approach

Julio César Rivera

Abstract In May 2012, the International Academy of Comparative Law held in Taiwan the Second Intermediate Thematic Congress with the general theme "Codification". Naturally, one of the topics was the codification of civil law, which included the history of codification in each participating country and its evolution, the current status of the codification method, and the role of the civil code and its relation with constitutional, international and other branches to which civil law is closely linked.

Therefore, the National Reports included as an introduction a general overview of the legislation on private law, with a description of the historical, economic, political, and social context in which such codes were enacted and the description of their original contents. Following, they outlined the evolution of codification, comprising the processes of "decodification" and "recodification"; the current status of the method of codification of private law, the relation of the civil codes with other branches of law such as private international law, consumer law and its consolidation or separation from commercial law or family law. The National Reports also informed about the relation between the codes and constitutional law and supranational law, which is a relevant chapter in the evolution of the role of the codes in the various nations; they also referred to current processes to update the codes and concluded by covering the role and present status of civil codification.

This material was supplemented with Reports from countries not familiar with the private law codification tradition, such as those belonging to the common law tradition. In these cases, the National Reports examined the status of legislation in the areas that are commonly covered by the civil codes in the civil law countries (e.g. contracts, family) as well as attempts to codify certain areas of the law.

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As is the practice in the Congresses of the International Academy of Comparative Law, the General Report included a comparative analysis of all the contributions made by the countries. This paper has been prepared on the basis of such General Report and we have divided it into two parts: the first covers the reasons for codification, the criteria behind its expansion, and its current status despite the decodification processes which took place especially during the twentieth century. The second part covers the contents of the current civil codes and its relation to constitutional law and supranational law, as well as with the various areas of what in the civil law family is known as private law (commercial law, family law, consumer law, and private international law).

Keywords Civil codes • Private law • Codification • Decodification • Recodification • Civil codes relations with other branches of law

1.1 First Part. The Codification Era. Origin and Expansion of the Method. Decodification and Recodification of Private Law

1.1.1 Introduction. Codification. Origin, Importance and Reasons

1.1.1.1 Origin. The Expansion of the Method. Influence of the Napoleonic Code

Causes of the codification movement. Castán Tobeñas states that in general the codification movement has been the effect of three causes: (1) the philosophical and legal doctrines of the eighteenth century, mainly represented by the Natural Law School, which, based on the idea of the existence of an ideal and universal Law revealed by human reason, aimed at a legislation inspired in rationalist principles and translated into concrete formulas; (2) The French Revolution which, having destroyed all the past political institutions, and affirming the new principles of freedom and equality of citizens, urged the reconstruction of the whole public and private Law; (3) The formation of the new modern nations that needed to be reinforced by the territorial unity of the Law.[1]

Later codification was consolidated as an effect of the French Revolution; afterwards, it rapidly developed as a result of the Napoleonic Code (1804) which has had a remarkable diffusion and influence on the codification of countries of the most

[1] Castán Tobeñas, José, *Derecho Civil Español Común y Foral*, tomo Primero, volumen Primero, 12ª edición, revised by José Luis De los Mozos, Reus, Madrid, 1984, ps. 214/215.

diverse cultural and legal traditions[2]; and, finally, codification became an instrument for the affirmation of national identity.[3]

1.1.2 Reasons for the Expansion of Codification

The reasons for the expansion of codification as a method of legislative expression are varied and may differ from country to country.[4]

In Europe, it is known that Napoleon himself took his code to the countries he occupied, but it is true that once the imperialistic adventure was over, the codification process did not end.[5] As it occurred in other continents – particularly in Latin America – the codification process was observed not only as a rational expression of an up to then dispersed legislation hard to understand, overcome by new social and economic realities, but as an instrument for national cohesion[6] and for the exercise of state monopoly in the creation of laws. As a result, the countries in occidental Europe either enacted their own civil and commercial codes during the nineteenth century, or, plainly and simply, maintained the Napoleonic Code with

[2] V. Vogel, Louis, "Le monde des Codes civils"; Kerameus, Konstantinos, "L'influence du Code Civil en Europe centrale et orientale"; Jahel, Selim, "Code civil et codification dans les pays du monde árabe"; Goré, Marie, "L'influence du Code Civil en Amérique du Nord"; Wald, Arnoldo, "L'influence du Code Civil en Amérique latine"; Hoshino, Eiichi, "L'influence du Code Civil au Japon"; all in *1804–2004. Le Code Civil. Un passé. Un présent. Un avenir*, Université Panthéon-Assas (Paris II), Dalloz, Paris, 2004. The subject was already widely covered in the centenary of the Napoleonic Code: v. *Le Code Civil – 1804–1904, Livre du Centenaire*, reedición, Dalloz, Paris, 2004.

[3] The 1811 Austrian Civil Code has also been influential in the codification process; even the Argentine Civil Code has adopted a few rules from that Austrian Code.

[4] It is said that: "The undeniable influence of the Napoleonic Code in nineteenth century is a mixture of complex phenomena, where the strength of weapons and ideas, the case of profound "reception" and of superficial adoption of the French model, the progressive signals of decline and the persistence of an image are all mixed": Halpérin, Jean-Louis, "Deux cents ans de rayonnement du *Code Civil des Français"*, en *Codes et Codification*, Les Cahiers de Droit, volume 42, nº 1 y 2, March–June 2005, Faculté de Droit Université Laval, Quebec, ps. 229 y ss.

[5] Furthermore, in some countries the Napoleonic Code did not only survive but the recipient proved to be more faithful to the original text than France itself; it was the case of Belgium.

[6] A very well-known Spanish publication reads: "The *historical and political* aim of the Spanish codification was to unify as substantially as possible our national Law, still affected by the breakdown caused during the Spanish *Reconquista*": Castán Tobeñas, ob. cit., lug. cit., p. 260. In Argentina, one of the greatest nineteenth century constitutionalists considered the Code to be a serious contradiction with the federal regime adopted for the organization of the State. (Alberdi, Juan José, *Obras Completas*, volume VII, Bs. As., 1887, ps. 80). But the Civil Code was also regarded as an extraordinary element for national cohesion that permitted to overcome outdated, disperse and chaotic legislation; it allowed for the development of local legal literature and the modernization of the teaching method, which in many areas solved the problems of *Derecho Castellano* and Spanish-American law (*Derecho Indiano*). Thereby, obstacles to the disposition of property were eliminated, such as censuses, ecclesiastical benefits, and linkages; equality among sons was established with the abolition of the right of primogeniture; and by giving sons the quality of forced heirs, the division of property was facilitated.

minor changes; even in Germany the discussion over codification itself and the Napoleonic Code gathered authors such as Savigny, Hegel, Marx and Von Stein.[7]

In Latin America, the codification process was seen as a way to become independent from Spanish-American law (*Derecho Indiano*), name given to the law enacted in the metropolis – Spain – to be enforced in the Indies (America); and as the affirmation of their national identity and political independence. It also coincided with the philosophical ideas of the Creole intellectuals and politicians of the time, resulting in every constitution of Latin American countries including provisions for the enactment of Codes, tendency which continued to progress throughout the nineteenth century.[8] The adhesion of these codes to the Romano-Germanic family was a natural consequence due to the education received by the jurists of the time on the foundations of Roman Law and the Seven Divisions of Law of Alfonso X, the Learned (*Siete Partidas*) – which were applied in the times of colonies and even survived on certain matters after the independence. The Napoleonic Code was a source of inspiration for many subjects, partly due to its strong Roman influence, especially in the sphere of contract law and obligations[9]; the American codifiers – as many jurists in all latitudes – have many times unknowingly reproduced the rules of Roman Law, since they have done it through intermediaries such as Domat, Pothier and the Napoleonic Code.[10]

However, the identification of national independence and codification is not exclusive of Latin American countries; likewise, Greece – independent from the Ottoman Empire in 1821 – embarked into the codification of the national civil law as the first revolutionaries (1821) agreed on a clause in the Constitution which envisaged the enactment of a Civil Code to be passed by the "*most distinguished wise and virtuous Greeks*". Eventually in the face of the vicissitudes of history, the Civil Code was finally enacted in 1940 and enforced in 1946, 124 years after the commencement of the debate.

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[7] Halpérin, ob. cit., explains how, once the Napoleonic invasions ceased, the Code falls into an object of condemnation, it is abandoned in many States in which it had been adopted, but the most remarkable issue is the Code's resistance to the hostile forces inflicted against it, which contributes to its survival in many places such as the Netherlands, Geneva, and a few Italian States; or to local codes being passed taking it as a model: Parma, Kingdom of the two Sicilies; and it is still upheld by citizens of places near France, Renania and Jura Bernés: ob. cit., ps. 236/237.

[8] The first Code of all Latin American countries is the Haiti's Code (1825); the State of Oaxaca enacted its Civil Code in 1827 and Bolivia codified its civil law in 1830 (Santa Cruz Code), but the main codes in the area are the Chilean Code (1855) of strong influence on the codes of other American countries (Ecuador, Colombia, Venezuela and some Central American Countries) and Argentina (1869) which also had influence on, for example, the Uruguayan Civil Code and was plainly and simply adopted by Paraguay.

[9] V. Gautier, Pierre-Yves, "Sous le Code Civil des Français: Rome (l'origine du droit des contrats)", en *1804–2004. Le Code Civil…*, quoted, p. 51.

[10] Gautier is expressive on the point when he states: "*…il ne faut pas oublier Labéon, Celse, Martine, Africanus, Proculus et Sabinus, Javolenus, Julien, Pomponius et tant d'autres; tous ces noms sont tombés dans la poussière des millénaires, mais les juristes de 2004, lorsqu'ils cherchent une règle dans le code civil ou un ouvrage moderne, utilisent encoré leurs idées souvent sans le savoir*": ob. cit., p. 53.

Czechoslovakia gained its independence as a result of the fall of the Austro-Hungarian Empire and the 1811 Austrian Civil Code remained in force long after for the country was not institutionally prepared for the independence. And even though the idea of amending the Austrian code soon gained force and was indeed embodied in the 1937 Draft, the reform could not come into force due to the German invasion and the Second World War.

On some occasions, the codification process enabled the maintenance of the cultural profiles of political institutions, which had lost independence throughout the course of history as they were absorbed by States which as a whole belonged to another cultural and legal tradition. Indeed, in Quebec and Louisiana, the codification of the civil law can be clearly explained by their bonds with French culture and law; their incorporation to Canada and the United States did not force them to give up the idea of codification; thus, the Civil Code reflects – especially in the case of Quebec – an obvious identification with the feeling of belonging to a nation[11] and to a cultural and legal tradition. The peculiar inclusion of these two models in the frame of countries with uncodified law will be subject of analysis in this paper owing to the excellent essays from these jurisdictions comprising this volume.

As in the case of Turkey, codification has also been the result of highly revolutionary processes carrying deep social transformations. The essay written by Ergun Özsunay illustrates this rigorously. And as the essay from the Czech Republic suggests, to a certain extent, this is what happened in countries that separated from communism since 1989.

Another codification case is given by a colonial authority imposing a Code. That was what occurred in Macau, where the Portuguese Civil Code was in force for many years, though, as it will be also illustrated, coexisting with the culture, institutions and the law of the Chinese people, which makes it a very interesting case of study.

And finally in the case of Japan, it may be argued that codification was necessary to sustain modernization and Westernization; in this sense, the Japanese Civil Code was the result of the acceptance of Western civilization.[12]

1.1.2.1 The Continuance of Codification in the Early Twentieth Century

To sum up, the nineteenth century was the codification century of civil law and the model most demanded was the French. The twentieth century began under the influence of the German Civil Code and a few years later, the Code of Obligations

[11] The character of "Nation" of Quebec has recently been expressly acknowledged by Canada, to be more exact on 27th November 2006 the House of Commons in Canada passed a motion introduced by the Prime Minister Stephen Harper stating that: "Que cette Chambre reconnaisse que les Québécoises et les Québécois forment une nation au sein d'un Canada uni." / "That this House recognizes that the Québécois form a nation within a united Canada."

[12] See Professor Ishikawa's essay.

of Switzerland. The German Code influenced many codes of the twentieth century, such as the Brazilian Civil Code of 1916, the Greek Code of 1940,[13] as well as the Japanese Code of 1896,[14] the Portuguese Code of 1966 and, through it, Macau's Code.[15] In addition, it should be emphasized that the German dogmatic approach influenced the replacement of the Italian Code by its 1942 Code.[16]

Moreover, the Swiss Code of Obligations was adopted by Turkey with minor changes as a way to modernize and occidentalize the law in the emerging State. The Civil Code in force in Taiwan from 25th October 1945 was inspired in the German Civil Code and the Swiss Code of Obligations.[17]

1.1.2.2 The Importance of the Civil Codification

During the nineteenth century a statement by a French professor gained popularity: "I don't teach Civil Law. I teach the Civil Code". Years later, Dean Carbonnier described the Napoleonic Code as "the civil constitution of the French people", expression repeated by many others with a slight change when they say it is "the economic constitution of the French people". Many years later, specifically in 1968, when the Argentine Civil Code Reform Law was passed, the Minister and distinguished Professor of Civil Law Guillermo Borda stated that "*at the risk of being considered heretical, I am tempted to say that the Civil Code is more important than the National Constitution itself, because the Constitution is more distant to people's daily lives than the Civil Code, which, otherwise, is all around people all the time, being the weather under which people move and has a decisive influence on the orientation and formation of a society"*. This paragraph was reproduced in the Message for the Introduction of the Unified Code Project in 1998.

Thus, the Civil Code constituted the main source of civil law – almost exclusive – and many times was attributed a value equivalent to that of a Constitution.

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[13] In force since 1946.

[14] Professor Ishikawa explains that the Civil Code is a product of comparative law and notes it was influenced by the French Civil Code – through the "Boissonade Draft" – and the First and Second drafts of the German Civil Code.

[15] The essay about codification in Portugal written by Prof. Dário Moura Vicente describes the influence of the Portuguese Civil Code of 1966 in Africa.

[16] The essay written by the distinguished comparatist Professor Roberto Sacco is eloquent when it states that "*the civil code is the product of Italy's adhesion to the German categories and concepts. The practical rules are always French (…), but the concepts are German …*".

[17] The Civil Code of Taiwan is the Civil Code promulgated by the Nationalist Government of China during the period 1929–1931. However, at that time, Taiwan was still under Japanese rule, the Civil Code of the Republic of China did not come into effect in Taiwan until October 25, 1945.

1.1.2.3 The Content of the Nineteenth Century Codes

The Codes of the nineteenth century basically followed the structure of the Napoleonic Code. Therefore, it included the rules about the person – which in the French Code started with the concept of nationality –, the family that was directly related to the person[18]; property or patrimonial rights which entailed contracts, obligations arising from contracts and wrongful acts; real property rights; and succession law.

The criteria behind the structuring of the nineteenth-century codification can be in general terms described as follows:

(i) The absolute nature of the property right;
(ii) The absolute value of the pledged word, which gave the contract a compulsory force as if it were the law in itself;
(iii) Family Law conceived from the idea of an indissoluble marriage.

The person was regarded as the subject of family and patrimonial legal relations, and for that reason, references to the person's individual rights were scarce.

This notion of civil law restricted in the end to the person and their patrimony would be broadened. Pursuant to this, the civil codes included the general law of the person (from the Swiss Civil Code) and the Italian Civil Code incorporated labor law.

1.1.2.4 Partial Conclusions

To sum up the reasons for the expansion of the codification method, we can say that:

– The nineteenth century showcased the expansion of the codification method;
– The reasons for this expansion are many and varied: the rationalization of a dispersed legislation; the regulation of new social and economic realities; the National cohesion and the exercise of the state monopoly in the creation of laws;
– The Napoleonic Code had a decisive influence in the expansion of the method serving as a source for many codes of European and Latin American countries as well as countries in other continents;
– The codification process was not restricted to civil law, but it also extended to commercial and other branches of law;
– The Civil Codes of the nineteenth century contained the regulation of the typical market institutions: contracts and property – which included then succession upon death –, but also regulations over natural persons, artificial persons, and family;
– As of the beginning of the twentieth century, the German and Swiss Codes of Obligations reflected a more modern methodology than the Napoleonic Code and served as a source of inspiration to new Codes and the reforms of the existing ones.

[18] Thus, Book I of the Civil Code of Argentina is called "Of the Person", is divided into two sections, the first of which named "Of the Person in General" and the second "Of the personal rights in family relations".

1.1.3 A Code, Multiple Codes. The Issue in Federal States

The phenomenon of federal States and codification presents several models that must be considered before regarding the object and structure of the Codes. Evidently, a Civil Code which rules a whole State (Switzerland, Germany, Argentina) differs from a Civil Code only applicable to a province or local state (the civil code of Oaxaca or any other Mexican state).

Furthermore, we will also identify states where, even though there is a single civil code, there are rules of private law which collect particularities for certain provinces, regions or other minor political entities.

1.1.3.1 Federal States with Unified Substantive Law

As mentioned above, the codification boom had various reasons; one was the aim of having a single legislation in the States that at the same time could monopolize the law making process.

This was a relatively easy objective to be attained in the unitary countries such as France. But, it was – and it is still – much more complex in the federal states and, in general, in those in which the political entities within the same State maintain – generally due to particular historical reasons – a certain legislative autonomy.

This has given rise to the development of two completely different models.

On the one hand, States have unified the civil legislation, in such a way that there is a single Code valid and enforceable in all the political entities of the National State, even when those entities still retain a certain degree of constitutionally recognized autonomy.

Therefore, in federal states like Germany, Switzerland, Brazil and Argentina there is a single Civil Code for the whole State. This, notwithstanding the fact that in many particular states preexisting the National State there could have been local codes in force, like in Bevier and Prussia which is Germany nowadays; in some cantons of the Helvetic confederation, such as Vaud and Geneva.[19]

In Argentina, the 1853 Constitution, which was strongly inspired in the United States Constitution, recognizes the Provinces as entities legally and historically preceding the National State, which is formed by a pact among them resulting in its creation. Delegating to the Federal Congress the power to pass a single Civil Code, and the Commercial, Criminal and Mining codes, was seen as enabling national cohesion.

[19] One particular case is the one of Poland, which 1791 Constitution set forth the enactment of a civil code as well as a criminal code, but what happened was that during the existence of the Polish – Lithuanian State foreign codes were in force in different parts of the country; so, according to the region, the Austrian Code, the Napoleonic Code, and the Prussian Code, later replaced by the BGB's, were applicable. Only after the First World War, Poland undertook the task of codifying all the country, which resulted in the 1933 Code of Obligations and 1934 Commercial Code.

1.1.3.2 Federal States with Local Substantive Law

The second model is given by federal countries which have assigned their states or provinces the authority to enact their own Codes or civil legislation. In this area, the most remarkable case is that of Mexico in which the states are constitutionally empowered to pass their own civil codes; while the Commercial Code is enacted by the Federal Congress and, therefore, it is the one for the whole federation. It is widely known that the system tends to be rather inefficient due to the possibility of conflict with respect to the applicable substantive law to the legal relations of private law.

Also, in the United States, each State of the Federation has its own substantive law, but there is no national code for the whole Federation. The Uniform Commercial Code – similar to a code of national enforceability – is a legal body applicable in the states which incorporate it as local law. And, the Restatements are private works that have importance, but they cannot be compared with a code of general enforceability for the whole country. Local regulations, uniform laws, model laws, federal statutes governing certain matters make an extremely complex puzzle and, in the end, not very efficient, as Professor Maxeiner points out in the title of his essay: "Costs of no Codes".

1.1.3.3 Spain

In some countries, where private law is codified in order to be applicable to the whole State, there still may be some local arrangements.

The most obvious example is that of the Kingdom of Spain, where owing to historical reasons originated in the *Reconquista* period, certain territories were granted some prerogatives known as "*fueros*"[20] (Charters) which are currently retained.[21] So, Navarra, Aragón, Cataluña and other territories have regimes of regional law, some of which have enacted their own codes, such as the Cataluña Civil Code (2004) and the 2011 Regional Law Code of Aragón. The essay of Professor García Cantero describes the relation of these regional law systems with the whole Spanish legal system.

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[20] The territory of the Iberian Peninsula was invaded by Muslims coming from Africa in the year 711. What is named the *Reconquista* was completed by the year 1492, year in which the Catholic Monarchs – Isabel of Castile and Ferdinand of Aragón – took control of Granada. In this long period of almost eight centuries, certain principalities and kingdoms were granted "fueros" (charters) which are currently retained.

[21] The 1978 Constitution sets forth in its section 149 that the State has the exclusive jurisdiction over the commercial, criminal and procedural legislation, as well as the civil legislation; however such exclusivity exists *"Notwithstanding the Autonomous Communities' rights of conservation, modification and development of the civil, regional law codes or special laws, where they exist. In any case, the rules related to the application and enforceability of legal statutes, legal-civil relationships as to the forms of marriage, the organization of registries and public instruments, basis of contractual relationships, statutes to resolve conflict of laws and the definition of the sources of the law with regard, in this last case, to regional laws or special laws."*

1.1.3.4 Partial Conclusions

The aforementioned suggests that those countries taking steps towards codification should bear in mind that:

- On the one hand, a system with a civil code of general enforceability in the entire territory is much more efficient than a system in which multiple codes or statutes of limited territorial enforceability coexist.
- However, so long as historical, political, ethnic and geographic reasons impose respectable particularities, such codes may coexist rather reasonably, though they should define the limits within which each general or particular statute shall rule.

1.1.4 "Uncodified" Models

Although the codification model was indeed very much followed in the nineteenth century by countries in all latitudes, there is still an important part of the world that failed to adhere to codification; thus, it is worth pointing out that a significant percentage of the world population lives in countries of an undeniable political and economic weight that have no codes, or, at least, they lack a civil code or a commercial code like the one Portalis and his colleagues bequeathed to humanity.

Under this important category, two different models may be identified which have not followed the codification idea, but, at the same time, belong to different legal families: such models are the Scandinavian and the common law.

1.1.4.1 Scandinavian Countries

Scandinavian countries are generally classified under the Romano-Germanic family. In this way, the essay written by the Finnish Prof. Teemu Juutilainen and the Norwegian National Report presented at the Taiwan Congress state that both legal systems are "*part of the Nordic (less precisely: Scandinavian) legal community, together with Sweden, Denmark, and Iceland*", and referring to the classification of this group the Finnish essay appeals to the opinion of René David by stating: "*René David and John E.C. Brierley include Finnish and the other Nordic legal systems in the Romano-Germanic legal family. as a secondary grouping, alongside Latin, Germanic, and Latin American laws, and so on"*. Even if the relation between the Nordic system and the Continental European system seems undeniable, the truth is that these countries did not follow the codification tradition.

The conclusion on this matter can be found in the Finnish essay when it explains that: *"Other parts, notably when it comes to general principles of law, are uncodified and expected to remain so. To be sure, a comprehensive codification of the "general part" of private law would be at odds with the Nordic tradition"*.

1.1.4.2 Common Law: The United States Case

Common law is broadly speaking judge-made law with different features in the United States and England that have been extensively studied by doctrine.[22] Codification is then completely outside the tradition of this legal family; however, in the United States, the subject has been the topic of much doctrinal and political intense debate for a very long time; and, nowadays there exists a legislative body known as Code – Uniform Commercial Code – which deserves a detailed analysis.

Today, Private Law, including the topics of this essay, contract law, commercial law, consumer law, and family law, is principally the law of 50 separate states; and state law, with the lone exception of Louisiana, is uncodified law.

The complex legislative system added to the other sources, in particular the legal precedents, makes it extremely difficult to understand the private law in the United States.

Afterwards, we will see how, during the twentieth century, the idea of a comprehensive codification of private law is practically not discussed, and even in a lesser degree at a national level; but the complexities we refer to have caused some private institutions to work very hard to issue documents that could make current law applicable. All this has given rise to documents like the *restatements* and model or uniform laws that were adopted in some cases as local law by the States, such as the case of the Uniform Commercial Code.

1.1.4.3 The Scotland Case

Scotland is classified as a mixed legal system but not codified – as the essay written by the Scottish Professor Elspeth Reid illustrates –, in which features of the civil law and the common law traditions combine. Scottish Law presents a mixture not just in terms of the rules themselves, but also in terms of processes of legal reasoning. The style of legal reasoning is strongly rooted in the common law, in that it is inductive, moving from the specific case to general principle, rather than deductive, starting from general principle and moving to the specific case. But while case-law is very important, there is also a strong conceptualist tradition, and if there is no obvious answer in the case-law or in statute, the Scottish courts will readily look at the texts of classic jurists of high authority, the Scottish "institutional" writers which are regarded as important sources of law, as noted above. Whatever the historical significance attributed to its components, a mixed system is deeply embedded in modern Scottish law.

Thus, the Scotland Act 1998 established the Scottish Parliament and devolved legislative competence in areas of private law that were within the competence of

[22] David, René – Jauffret-Spinosi, Camille, *Les grands système de droit contemporains*, Dalloz, 11e édition, Paris, 2002, p. 265, state: "Le droit anglais, issu des procédures de la common law, est encore essentiellement un droit jurisprudentiel…".

the Westminster Parliament; but still Scotland has no Civil Code as such, though certain discrete areas of the law are governed by a comprehensive statute, or series of statues.

Although Scotland is far from the codification tradition, there have been various initiatives in recent years directed at codification. The draft prepared by McGregor had no success, but was a project undertaken in order to provide a starting point for negotiations in developing a common European Contract Law. From that time, both Scotland and England have participated in such European initiatives, but with separate representatives from north and south of the border.

1.1.4.4 Codes in Force in the Framework of Uncodified Models: The Quebec, Louisiana and Puerto Rico Cases

Canada and the United States share the characteristics that they are both federal states, belong to the common law system, recognize to their Provinces or States certain autonomy in the matter of private law and both are absent from national or provincial codes. But, they also have a very special circumstance in common: there is in both countries a Province or State that since the nineteenth century has had its own Civil Code with a clear French inspiration. We are making reference to the Canadian Province of Quebec and the State of Louisiana in the United States.

The essay of Andrés Parise, about the Louisana's experience, begins by stating: "*Louisiana is the only U.S. state that is considered to be a member of the [Romano-Germanic] family. It is the only state with a civil code that originally followed the tenets of nineteenth-century continental European codes".*

The process of codification starts at the beginning of the nineteenth century and Louisiana has its first Civil Code in 1825; revised in 1870.

As for the "*structure and content of nineteenth-century civil codes in Louisiana was pretty much in harmony with that of other contemporaneous codification endeavors. The structure in Louisiana followed the model provided by the Code Napoléon, and a similar situation took place with other civil codes in the Latin American countries."*

It is obvious that "*Louisiana has been an isolated "Civil Law island" partially surrounded by a "sea of Common Law""*, but *"…the content of the Louisiana Civil Code presents interesting features: it is applicable in a mixed jurisdiction, and it is drafted in English language. Louisiana, considered by many a mixed jurisdiction, combines aspects of common- and civil-law".*[23]

Quebec reality does not differ so much. Originally conquered by France, it was then incorporated to Canada, which was part of the British Empire, though maintaining its mother tongue and its law, affiliated to the Romano-Germanic family.

[23] Puerto Rico can also be described as a mixed legal system highly influenced by special American styled statutes, especially with regard to administrative and commercial rules of law. But, as in Quebec, "the Code is now a symbol as being Puerto Rican". See the essay written by Prof. Muñoz.

Thus, in 1866 the Civil Code of Lower Canada was enacted and it recognized the Napoleonic Code as its main source. Of course, it is worth mentioning that, as is the case in Louisiana, Quebec is also a mixed jurisdiction given that procedural law, the judicial system and many statutes in the matter of commercial law are based on the common law; notwithstanding the foregoing, the Quebecer report for the Taiwan Congress notes that: "*Still, in everything that concerns patrimonial relationship within the provincial jurisdiction, the civilian and Romano-Germanic concepts rule and reasoning methodology apply*".

Puerto Rico, is today, "as codified as possible under the circumstances".[24] Puerto Rico was a country member of the continental European culture until it was annexed to the United States as a result of the Spanish – USA war. But the substitution of Spanish public law – constitutional and administrative law and organization – with American rules and statutes, the virtual suppression of the Commercial Code due to the adoption of many special commercial statutes copied from the United States, and the adoption of United States models of judicial administration and procedure changed the perspective. American case law quickly developed and by 1938 legal studies became U.S. patterned, with students entering law schools after completion of any one of a series of university studies and learning the law, at least public, procedural and commercial law through the case method. Private non-commercial law, however, remained codified and since the early 1970s a renewed source of pride and revival, despite efforts to adopt a new and modernized Civil Code, proved fruitless. The Civil Code has been modernized through special statutes, especially in matters of Family Law, which at times have amended the Code and at times complemented it.

1.1.5 The "Decodification" Era

1.1.5.1 What Is the "Decodification Era"

As we have noted the twentieth century commenced with the coming into effect of the BGB (German Civil Code) and a few years later, with the Swiss Code of obligations, promptly taken on by Turkey. Furthermore, some North African countries adopted civil codes following European models, especially the French one.[25]

[24] See Muñiz Argüelles' essay.

[25] In North African countries, French law has been combined with Islamic law, especially in family law matters and law of the persons; however, it still has great influence as in the case of the 1975 Algeria Civil Code and 1948 Egypt, copied then by Libya; and on the civil law of countries like Morocco and the Tunisian Republic: Tetley, William, "Mixed Jurisdictions: common law vs. civil law (codified and uncodified)", 4 Uniform L. Rev. (N.S.) 1999-3, 591–619.

However, jurists commented on the existence of a decodification process; Natalino Irti and his famous publication "The Decodification Era" paved the way for it.[26]

Professor Rodolfo Sacco summarizes Irti's ideas on the subject by saying: "*The civil code has lost its monopoly… [it] has lost its central place to the constitution, administrative law, and labor law and shares its role with a number of small laws that speak a language and adopt their concepts*" Moreover, the decodification process seems even more critical in the sphere of commercial law.

The different essays included in this book are eloquent on this issue.

The Argentine essay points out that the 1869 Civil Code, in force as from 1871, has been subject to some revisions; the most relevant one in 1968. But, dozens of laws on relevant matters pertaining to private law have been passed and are in force outside the scope of the Civil and Commercial Codes. In a number of cases, what was simply done was "removing" from the code institutions in it such as: company law, bankruptcy, insurance, maritime transport, and so on.

In France, as it is universally known, the Napoleonic Code applies, but it has been revised in many opportunities, in general terms, to incorporate innovative topics; for example, those related to the protection of privacy; bioethics and the liability for manufactured products.

Spanish Prof. García Cantero also recognizes the existence of a decodification process. But also shows the existence of an inverse process given that certain special rules detached, even ideologically, from the Civil Code have to some extent, returned to it. This is the case of the lease contract and rural rental contracts. Anyway, there are other laws in force outside the scope of the Civil Code.

Even though Portugal has enacted a new Civil Code in 1966, Prof. Moura in his Portuguese essay says: "*To a certain extent, a phenomenon of de-codification has thus also occurred in Portugal, by virtue of which Civil Law now comprises many rules not included in the Civil Code*".

The essay from the Czech Republic, written by Professor David Elischer, Ondřej Frinta and Monika Pauknerová, states that this country also "*has experienced a significant process of decodification…"*

However, the decodification process does not exhaust in the cases in which certain matters "separate from" the Civil Code or the Commercial Code to be regulated by special laws, which constitute "legislative microsystems"; or in that certain new matters are treated by special laws which are not incorporated to any code.[27] As the essays from France, Italy and Argentina point out, the Code must coexist with other sources even of a higher hierarchy – like the Constitution, the supranational law and the community law – from which subjective rights arise, the

[26] Irti, Natalino, *La edad de la decodificación*, translated by Luis Rojo Ajuria, Barcelona, 1992; German scholars – as Joseph Esser and Friedrich Kübler – have also announced the end of the code's era: cited by Schmidt, Karsten. "Il Codice Commerciale Tedesco: dal declino alla recodificazione", *Rivista di Diritto Civile*, Cedam, Padova, 1999.

[27] In Argentina, the trust, leasing and credit card are subjects never covered by the Commercial Code and from their origin were treated in special laws.

fulfillment of which individuals may demand either at national or supranational levels. We will go back to this subject later.

1.1.6 The "Recodification" Era

1.1.6.1 Overestimation of the "Decodification"

Despite the announcement of the "death" of the Codes, a significant trend of opinion makes an accurate distinction between the aging of the Codes and the codification method. It is beyond doubt that the nineteenth-century codes aged as a result of the accelerated social changes of the twentieth century. And, this aging process is even more evident in the case of relations originated in the creation of supranational communities not even envisaged by the authors of such Codes.

But this does not mean abdicating the method because codification is a systematic demand of law.[28] And codification should be conceived not as an immovable target, but, as a living process, an essentially dynamic set in which new laws are constantly being incorporated and outdated ones displaced; thus, demanding a permanent revision. Indeed, it seems that there can be no doubt that the codification method is still in practice and that, according to DE LOS MOZOS, the "decodification era" is *now fortunately overcome.* This is evidenced by the process which doctrine has referred to as "recodification" and which actually encloses diverse factors. On the one hand, countries with a codification tradition which have totally or partially rewritten their codes. On the other hand, countries which, by mid twentieth-century, did not have civil or commercial codes, but have been incorporating them in the recent years as a way to adapt to the market economy, ratify their national identity or simply to improve the quality of expression of their legal systems.

1.1.6.2 Recodification in Countries with a Codification Tradition

As mentioned above, many countries that drafted their civil codes in the nineteenth century have totally or partially rewritten them in the twentieth century or even in the few years of the twenty-first century. It was Professor Sacco who affirmed in a 1983 publication that, as events have developed, it looks as if legislators have forgotten we are in the decodification era, "*due to the fact that in the last half century forty new Civil Codes have been promulgated*".[29] And, since this remarkable contribution of the distinguished Italian jurist many more reforms have followed:

[28] SCHMIDT, op. cit.

[29] SACCO, RODOLFO, "Codificare, modo superato di legiferare?", *Rivista di Diritto Civile,* Cedam, Padova, 1983.

the Dutch reform, the Codes of Quebec, Peru and Paraguay, the German reform and the draft or revision of codes in numerous countries which began to incorporate to the market economy upon the dissolution of the Soviet Union, such as the Russian Federation, Lithuania, Estonia, the Czech Republic and so on.

It can be pointed out that a milestone in this process was the draft of the 1942 Italian Civil Code, which served as a model to the renovation of the Latin American legislations, especially the Bolivian Code in 1975, the Peruvian Code in 1984 and the Paraguayan Code in 1985; also, the Argentine reform in 1968.

Portugal has replaced the old Civil Code for the new Civil Code in 1966; but, Portugal also has: the Companies Code, the Copyright and Related Rights Code, the Industrial Property Code, the Labour Code, the Insolvency Code, the Code of Civil Registry, and the Code of Securities.

Quebec's recodification has been relevant. The new code has been in force since 1st January 1994 and has become the source of inspiration in other countries for the revision of their own codes.[30]

On the other hand, the codification tendency was evident in France; about 70 codes can now be found on the French Government's official legal website. Some of these codes are nothing more than ordinary, normal length statutes. However, if it is evident in many branches of the law, it is different in the field of the Civil Law, where even though many limited reforms concerning parts of the Code were enacted, "a global reform of the Code is not on the agenda".[31] In the same way, the whole process of updating the Civil Code has been chaotic in Belgium.[32]

1.1.6.3 The Situation in Former Socialist Countries: Estonia, Poland and the Czech Republic

Another aspect of the recodification process of private law was seen in the countries that after the Second World War were left under soviet influence – such as Poland, Czecho-Slovakia or Hungary – or were directly a part of the URSS, such as Estonia, Lithuania and Latvia. After the disappearance of the Soviet Union, they changed their economic system radically, and the Baltic countries regained their political independence. This required arduous work to rebuild a private law system adapted to the new political circumstances and economic system.

This is all very thoroughly explained in Irene Kull's essay about Estonia Republic, which refers to how private law in Estonia has been restructured in different periods to pave the way to the recognition of private property and economic freedom. This permitted their opening to the influence of the law from Western Europe, though not

[30] For example, in Argentina it has been the source of numerous solutions proposed by the 1998 Project; on the subject s. Rivera, Julio César, "Le projet de code civil pour la République argentine", *Les Cahiers de Droit*, (Quebec, Canada), vol. 46, nº 1–2, mars/juin 2005, ps. 295 y ss.

[31] Borghetti, Jean Sebastien, "French Law".

[32] Heirbaut, D. and Storme, M. E., "Private Law Codifications in Belgium".

following the codification method beyond the existence of a Commercial Code, the characteristics of which will be later discussed.[33]

The situation in the Czech Republic is alike: although the 1964 Civil Code was amended on many occasions, it is significantly stigmatised due to its socialist origin. Moreover, after so many amendments, the text of the Code was absent from any conception and appeared to be completely unsatisfactory. In consequence, the 1964 Civil Code was finally replaced by a new Civil Code in effect since 1st January 2012, and was completed with the Business Corporation Act and the Private International Act.

1.1.6.4 The Situation in the Countries Outside the Scope of the Codification Method

We have already transcribed the Finnish essay where it explains: "*Other parts, notably when it comes to general principles of law, are uncodified and expected to remain so. To be sure, a comprehensive codification of the "general part" of private law would be at odds with the Nordic tradition*".

Some traits of this can also be seen in the Scottish essay. Even though the McGregor Project failed to receive much support, the potential codification at a European level aroused interest. Additionally, the United States follows a tendency to consolidate some branches of private law through crossed channels: model laws, uniform laws and restatements.

And, finally, among the common law countries, Israel has a Civil Code Project under development.

1.1.6.5 Decodification and Recodification in the Field of Commercial Law

The decodification and recodification of the Commercial Law will be treated again *infra* n° 7.1 and following.

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[33] In other countries that were part of the socialist area, there may still be some statutes in force from the time of the soviet influence; but were strongly reformed. Thus, in Poland, the 1964 civil and commercial codes are still in force. But "*…from 1990 the changes of both codes are numerous and frequent. At first, already in 1990 the provisions connected with the previous economic system were eliminated from the civil code, while the provisions important for free market economy were introduced (for example general provisions on securities). The changes were timing at:*

- *adjustment to the new economic and political system defined by the Constitution of 1997*
- *adjustment to international obligations*
- *adjustment to European law, especially important in the period prior to Polish accessions to EU on May 1, 2004 (National report presented at the Taiwan Congress)*".

1.1.6.6 Partial Conclusions

- The decodification process was a consequence of the aging of the Codes; but it did not imply the abandonment of the codification method as rational expression of the law;
- The evidence of the survival of the codification method is the recodification process, which includes the renovation of the old Codes of the nineteenth century and the new Codes enacted by countries incorporated to the free market economy

1.2 Second Part. The Content of the Codes and Their Relation with Other Branches of the Law

As noted before the civil codes of the nineteenth century referred to the persons and their family relations; the typical market institutions: the property and the contract,[34] which led to the regulation of all real rights over a person's property or third parties' property as well as the regulation of the contractual obligations and obligations resulting from wrongful acts; and, to the succession of legal relations and situations.

Still, in many countries, codification was not limited to civil law, but, following the French model, it was completed drafting a commercial code.[35] In this section we will consider the relation between the Civil Code and the Commercial Code in its origins and its evolution to these days.

1.2.1 The Civil Code and Commercial Law

As noted before, the codification process did not stop nor did it restrict to civil law only. Regarded as the maximum legislative expression, it spread into many areas of law and to the sphere of private law, especially the mercantile branch of the law.

The initial model was the French Commercial Code of 1807, followed by many others, like the Portuguese (1833, replaced in 1888), Italian (1865, rewritten in 1882), the 1859 Spanish Code,[36] made applicable to Puerto Rico[37]; the German

[34] Galgano, Francesco, "Interpretación del contrato y lex mercatoria", *Revista de Derecho Comparado* (Santa Fe – Buenos Aires), 2001.

[35] Outside the scope of private law, codification generally extended to criminal law and procedural law.

[36] Revised in 1885.

[37] The Commercial Code of Spain is applicable in Puerto Rico from 1886. It was readopted in 1932, but many parts are not in force because some matters are part of the federal system of the United States, as Bankruptcy and Maritime Law.