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Reflections on Codification History

If we do not count constitutions, codifications are the most important texts of a nation's legal system, at least in those countries which have codifications. Sometimes, a code may even surpass the constitution as a national symbol. Thus, since 1789, France has had so many regime changes and subsequent new constitutions that Jean Carbonnier has called Napoleon's 1804 Civil Code the true constitution of France.[1] The Code, not the regularly changing constitutions, assured the stability of French law and society. One may wonder whether this still applies today, given that the current constitution, that of the Fifth Republic, already dates from 1958 and seems to have given France some stability.[2] Nevertheless, the main point stands: codifications are extremely important. Therefore, there is no lack of studies on codification. However, this does not mean that there is no need for further research on this topic, as we have to reevaluate existing research.

The main problem of codification studies concerns definition. One aspect of this is rather easy to solve. Strictly speaking, we should distinguish between the process and its result, codification, the making of a code, and the code, the text produced.[3] In this text, we will use codification and code as synonyms, referring to the result, not the process leading up to it. Many scholars have tried to define code/codification; so a bewildering variety of definitions of codifications exists, with a few studies trying to bring more clarity. Of these, the most thorough analysis is Jacques Vanderlinden's 1967 book on the concept of code in Western Europe from the thirteenth to the nineteenth century.[4] Vanderlinden's method was pioneering at the time and, even more than half a century later, still looks innovative. Based on the sources, he develops a concept, which he refines by returning to the sources for an additional analysis. Vanderlinden finds that historically, the word code applied to two types of very different texts:

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1 J. Carbonnier, "Le Code civil" [in:] *Le Code civil, 1804–2004. Livre du bicentenaire*, eds. Cour de cassation *et al.*, Paris 2004, p. 33.

2 Cf. J. Roux, "Permanences et mutations du Code civil au XXe siècle" [in:] *200 ans de Code civil*, eds. J. Bouineau, J. Roux, Paris 2004, pp. 127–129.

3 Cf. R. Cabrillac, *Les codifications*, Paris 2002, p. 55.

4 J. Vanderlinden, *Le concept de code en Europe occidentale du XIII^e^ au XIX^e^ siècle. Essai de définition*, Bruxelles 1967.

collections of existing material, which do not change the substance of the law, and newly made texts which do so,[5] or in other words, compilations as opposed to true codifications. The former have been around for a long time; the latter only broke through around 1800. Focusing on them, Raoul van Caenegem offers a definition of a true codification.[6] Instead of repeating it here, it is better to focus on the elements Vanderlinden and van Caenegem see as essential for a true code. This is legislation that covers an area of law in a complete, systematic, innovative, and accessible way. If we look at these elements, it becomes clear that other definitions also contain them,[7] though not always worded in the terms I use here. For example, instead of "complete," other words emphasising certain aspects may be used, like "exhaustive" or "exclusive." Exclusivity may be thematic; the code contains everything for its given area of the law; or it may be geographic, that is the code applies to the whole country without exceptions. The systematic element can be limited to a consistently applied almost mathematical structure, or may also include a coherent social programme. Looking beyond those differences, it becomes clear that, although the many definitions of true codifications contain a mixture of the essential elements just mentioned, most of them drop one or more of these elements. For example, for the German scholar Reinhard Zimmermann, accessibility, at least for ordinary people, is unnecessary, nor should a code have thematic exclusivity. To him, the hallmark of a code is its systematic character.[8] On the other hand, to the Dutch scholars Jan Lokin, Willem Zwalve, and Corjo Jansen, thematic exclusivity is sacrosanct; the presence of a system is not.[9]

Looking back at Vanderlinden helps us understand why scholars all dip into the same stock of essential characteristics, but do not arrive at the same selection and combination of these essential elements. Vanderlinden studies the concept of a code, meaning the ideal of a code, not the reality of it, which, in his opinion, crystallised around 1800. At that time, we indeed find the first author to use the word, Jeremy Bentham,[10] and the code which thereafter would stand as a model for codification, Napoleon's 1804 Civil Code. Current definitions trace their lineage back to the era around 1800 and the views on codifications which circulated then. The concept of that time has turned out to be a pipedream. Newer codes do not correspond to the original ideal of a true code, and older codes have been so ravaged by change that they do not correspond to it either. Even more, even around 1800, the ideal of a code was an illusion. Even Napoleon's code did not contain all the law, was in some ways very unsystematic, preserved a lot of older law, or turned back the clock on the achievements of the

[5] J. Vanderlinden, "Qu'est-ce qu'un code?," *Cahiers de droit* 2005, vol. 46, no. 1–2, pp. 29–51.

[6] R. Van Caenegem, *An Historical Introduction to Private Law*, Cambridge 1992, p. 12.

[7] See, for example: J. Schmidt, "Kodifikation" [in:] *Handwörterbuch des Europäischen Privatrechts*, vol. 2, eds. J. Basedow *et al.*, Tübingen 2011, pp. 986–987.

[8] R. Zimmermann, "The civil law in European codes" [in:] *Regional Private Laws and Codification in Europe*, eds. H. MacQueen *et al.*, Cambridge 2003, p. 18.

[9] J. Lokin, W. Zwalve, C. Jansen, *Hoofdstukken uit de Europese codificatiegeschiedenis*, Den Haag 2020, pp. 21–25.

[10] J. Vanderlinden, "Code et codification dans le pensée de Jeremy Bentham," *Tijdschrift voor rechtsgeschiedenis* 1964, vol. 32, no. 1, pp. 45–78.

French Revolution,[11] and its accessibility for lay people was doubtful. To illustrate this, let us just look at what most French bourgeois in the nineteenth century would have considered to be the code's central article, article 544: "Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by laws or regulations."[12] The reference to other laws and regulations indicates that the code is not exhaustive. It also reduces the law's accessibility for readers. Where should they look for these other laws and regulations? If they go on a search for them, when will they know that their quest has ended, that they have seen every other existing law or regulation? That our definitions of codification are a *fata morgana* may not necessarily be a problem. The ideal still helps us study codifications and evaluate them according to their success in realising the essential elements of a true code. We should, however, be aware that these elements are contradictory. For example, accessibility for ordinary people stands in contrast to the systematic nature of a code. Accessibility implies that the reader should be able to open a code, read an article of it and understand it, but this is not possible if the code follows a system, as a systematic code first requires the reader to have mastered the general system before reading individual parts.

The easiest way to get around the definition problem would be to use the French 1804 Civil Code as a model. After all, for a long time, it set the tone not just in France but worldwide for what a code should be.[13] There are several objections to this approach. The French Civil Code may have been a shining beacon of codification during the nineteenth century, but that era ended when the German Civil Code appeared on the scene,[14] and each subsequent new code has only weakened French primacy here. Even during the nineteenth century, it is doubtful that the French Civil Code was a model. As the research of Aniceto Masferrer has shown, references to French codes during the nineteenth century did not necessarily indicate that France was the source of inspiration. They could be just a mere argument adding the French code's prestige to reform proposals.[15] In some cases, the references to France even hid an aversion to

[11] J.-L. Halpérin, "Le droit privé de la Révolution: héritage législatif et héritage idéologique," *Annales historiques de la Révolution française* 2002, vol. 328, no. 2, pp. 135–151.

[12] This official translation of the 2013 version of the French Civil Code was available on the Légifrance site (legifrance.gouv.fr [accessed: 12.11.2025]), which currently only offers the text in French. The only complete archived version of the official English translation can be found on https://www.precisement.org/blog/Les-Codes-traduits-en-anglais-de-l-ancien-Legifrance.html [accessed: 12.11.2025]. Readers using the current French text on Légifrance should be aware that during the nineteenth century the Académie française reformed French ortography (N. Catach, *Histoire de l'ortographie française*, Paris 2001), so that early nineteenth-century Frenchmen had a slightly different text. Thus, the current version of article 544 reads: "La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements." However, the original text had *réglemens* instead of *règlements* (D. Heirbaut, "Art. 516–710bis" [in:] *Edition cumulative du Code civil: le texte actuel et l'édition originale avec toutes les modifications en Belgique de 1804 jusqu'à 2004*, eds. D. Heirbaut, G. Baeteman, Mechelen 2004, p. 725).

[13] B. Fauvarque-Cosson, S. Patris-Godechot, *Le Code civil face à son destin*, Paris 2006.

[14] *Ibid.*, pp. 37–74.

[15] A. Masferrer, "Codification as nationalisation or denationalisation of law: The Spanish case in comparative perspective," *Comparative Legal History* 2016, vol. 4, no. 2, pp. 100–130.

the French Civil Code. The Netherlands could boast of many renowned jurists in the early modern era. When the Dutch tried to codify their law around 1800,[16] they turned first of all to their national champion of jurisprudence, Hugo Grotius and his *Inleiding tot de Hollandsche Rechtsgeleertheyd* (translated into English as: The Jurisprudence of Holland).[17] A first codification effort at the end of the eighteenth century failed. Louis Bonaparte, newly made king of the Kingdom of Holland that his brother Napoleon had created, started anew. Napoleon rejected the first draft because it preferred the Dutch tradition over his own code. The next drafters wisely highlighted the French model, salving Napoleon's ego. The many references to France notwithstanding, their text still owed less to France than to their native legal tradition.[18] Napoleon, however, let this second draft pass and it became law, though only for two years because of Napoleon's dissatisfaction with his brother Louis. As this example shows, we need to look again at the references to French law during the nineteenth century to determine whether they are substantial or just formal, because the French Civil Code may have been less of a model then than we may have assumed. Moreover, even within Napoleonic France, the Civil Code seems to have been an exception, not the rule. Napoleon attended more than half of his Council of State meetings on the Civil Code, but was not so interested in the Code of Civil Procedure[19] or the Commercial Code.[20] Likewise, Jean-Jacques-Régis de Cambacérès, his number two, who presided over the Council of State in his absence, prioritised the Civil Code over the two other private law codes.[21] The other members of the Council of State either did not know the topic well enough (civil procedure)[22] or not at all (commerce).[23]

Finally, the looming shadow of Napoleon steered the history of French private law codification in a direction that clashes with the needs of today's democratic societies. Whatever titles he awarded himself, Napoleon was a military dictator. His parliamentary institutions were only window dressing.[24] Of the two houses, the

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16 For a good overview of events, see: T. Veen, *'En voor berisping is hier ruime stof': over codificatie van het burgerlijk recht, legistische rechtsbeschouwing en herziening van het Nederlandse privaatrecht in de 19de en de 20ste eeuw*, Amsterdam 2001, pp. 4–21.

17 B. Sirks, "Hugo de Groot, *Inleiding tot de Hollandsche Rechts-geleertheyd*, 1631" [in:] *Juristen die schreven en bleven*, eds. G. Martyn *et al.*, Hilversum 2020, pp. 42–46.

18 F. Brandsma, "'Een Basterd Code Napoleon'? Het Wetboek Napoleon ingerigt voor het Koningrijk Holland" [in:] *Nederland in Franse schaduw: recht en bestuur in het Koninkrijk Holland (1806–1810)*, eds. J. Hallebeek, B. Sirks, Hilversum 2006, pp. 221–247.

19 Cf. J.-L. Halpérin, "Le Code de procédure civile de 1806: un code de praticiens?" [in:] *1806–1976–2006. De la commémoration d'un code à l'autre: 200 ans de procédure civile en France*, eds. L. Cadiet, G. Canivet, Paris 2006, p. 28.

20 E. Theewen, *Napoléons Anteil am Code Civil*, Berlin 1991.

21 A. Padoa-Schioppa, "Napoleone e il *Code de commerce*" [in:] *Diritto et potere nella storia Europea*, Firenze 1982, pp. 1045–1060.

22 G. Dahlmanns, "Verfahrensrecht. Frankreich" [in:] *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, Bd. III/3, ed. H. Coing, München 1982, p. 2541.

23 Cf. *Les tribunaux de commerce et l'évolution du droit commercial*, ed. É. Regnard, Paris 2007, pp. 26–28.

24 I. Collins, *Napoleon and his parliaments*, London 1979.

Tribunate could discuss drafts but could not enact them. The Legislative Body could vote on new legislation, but could not discuss it. The Tribunate turned out to be more critical of the first parts of the Civil Code than Napoleon wanted and he reacted by throwing out half of its members. By 1807, he was so disgusted with the Tribunate that he abolished it altogether.[25] Since later codification efforts failed, French scholars and politicians took one important message from this: codifications are incompatible with a parliamentary democracy. Only a strong leader can ensure a new code.[26] Indeed, the 1975 French Code of Civil Procedure arrived thanks to the work done under another general, Charles de Gaulle.[27] However, the French did not realise that the perceived incompatibility between parliaments and codifications had become a self-fulfilling prophecy. Unhindered by this fallacy, parliaments in other countries have been able to make new codes. This means that instead of being typical, the French case is atypical and, thus, cannot be the model.

Given that studying the French Civil Code does not suffice, the best approach would be to study codification worldwide, but that is not feasible. Many selections of countries are possible, but given France's historical importance, it still remains interesting to look at France, not as a model but as a peculiar case. Germany is even more interesting because there were about forty Germanies in the nineteenth century and two in the half-century after the Second World War, so that more than any other European country, Germany has been a laboratory of codification. The size of a country may determine its attitude towards codification. At least in a European context, France and Germany are "great" nations; so it may be best to also look at two smaller countries between them, the Netherlands and Belgium, the more so because they had a fundamentally opposite view of codification. The Netherlands have a very strong tradition of making codifications. To the Dutch, codification is a way for a small people to show its greatness.[28] In other words, they prefer not to copy someone else. In Belgium, pragmatism dominates, so the Belgians prefer to let someone else do the work and copy it.[29] Comparative studies generally focus on civil codes because studying every code a country can boast of is impossible. This is based on the assumption that civil codes can stand for other codes. However, this assumption has not been tested. To verify it, other codes, in particular, commercial and civil procedure codes, should be looked at as well. As the example of Napoleonic France above shows, their history may have been different.

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25 P. Van den Berg, *The Politics of European codification: A History of the Unification of Law in France, Prussia, the Austrian Monarchy and the Netherlands*, Groningen 2006, pp. 180–183.

26 J. Carbonnier, "La codification dans les états de droit: le cas français," *L'Année canonique* 1995–1996, vol. 38, pp. 91–96.

27 G. Cornu, "L'avènement du nouveau Code de procédure civile. La codification" [in:] *Le nouveau Code de procédure civile: vingt ans après*, ed. Cour de cassation, Paris 1995, pp. 19–28.

28 E. Meijers, "Wijzigingen en aanvullingen van het Burgerlijk Wetboek na 1838" [in:] *Gedenkboek Burgerlijk Wetboek 1838–1938*, eds. P. Scholten, E. Meijers, Zwolle 1938, p. 63.

29 D. Heirbaut, *Hebben/hadden onze ministers van justitie een 'civiel' beleid?*, Mechelen 2005.

This short text does not permit a detailed presentation of the research findings of a study of private law codifications in the four countries mentioned from the end of the eighteenth century until today,[30] but it can present a few main points of interest. First of all, it is remarkable how codification history is still national history and, as such, remains absent from international literature. Scholars who only read English next to their own language reduce internationalisation to a monoculture of English, thereby impoverishing, not enriching their outlook. For example, as already mentioned, the best studied code in international literature is Napoleon's Civil Code. However, there is only one book in English, itself a translation, chronicling its genesis and the first century of its existence.[31] For its second century, no overview in English is available. Therefore, many extremely interesting cases for comparative legal history remain unnoticed outside their home country. I can illustrate this with the story of Eduard Maurits Meijers, the professor who started the work on the post-war Dutch Civil Code. In the Netherlands, a whole body of literature on Meijers exists and a monograph on his life is forthcoming.[32] Already a famous professor before the Second World War, he became a household name in the Netherlands when the Germans removed him from office, as he was Jewish, and his friend Rudolph Cleveringa courageously spoke out against this.[33] Meijers survived the camps and in 1947 was asked to write a new civil code for his country, in part because he had accrued so much prestige that no one had the temerity to speak against this.[34] Meijers is somewhat unique in that he was both a great scholar and a famous person known to the people at large. That in itself would justify studying him more in comparative literature. However, Meijers is also unique in that, by 1947, he started with ideas on codification that were extremely well developed. As a student, he had already dreamed of a new civil code and started thinking about the best way to achieve it. For example, he studied the method of earlier codification efforts in the Netherlands to elaborate a theory on the division of labour between drafters and politicians in making a new code.[35] Meijers's views on codification should be fundamental to any codification effort, but it is hard to find anything about him in any language other than Dutch.[36] This shows that we need more works bridging the gap between national legal history and international scholarship.

More knowledge of national legal histories could help us use comparative legal history as an alternative history. Counterfactual history tries to determine what would

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30 For a text that does so, see: D. Heirbaut, *Redefining Codification. A Comparative History of Civil, Commercial, & Procedural Codes*, Oxford 2025.

31 J.-L. Halpérin, *The French Civil Code*, Abingdon 2006.

32 H. Runia, *Eduard Maurits Meijers, een wetenschapper met politieke ambitie*, [Forthcoming].

33 On the speech, see: K. Schuyt, *R.P. Cleveringa: recht, onrecht en de vlam der gerechtigheid*, Amsterdam 2019, pp. 158–208.

34 R. Chavannes, *E.M. Meijers and the recodification of the Dutch civil code after World War II: Renewal's only victory?*, modern history thesis, Oxford University, Oxford 1997, p. 11, http://www.chavannes.net/assets/meijers.pdf [accessed: 23.11.2025].

35 Cf. E. Meijers, "Voorwoord" [in:] *De ontwerpen der Commissie van redactie der nationale wetgeving: het tweede boek van het Burgerlijk wetboek*, ed. Dispuut "Nomos", Haarlem 1935, pp. vii–viii.

36 An important exception is: E. Meijers, *La réforme du Code civil néerlandais*, Agen 1948.

have happened if a certain event had not occurred.[37] Unfortunately, in most cases, speculations about the "What if" question become castles in the air. They result in nice fiction, but as a scholarly endeavour, they leave much to be desired. There is, however, a way of writing an alternative history that may have its head in the clouds but has its feet still solidly planted in the ground. We can study what might have happened if a country had taken another path by looking at another, neighbouring country which did take that road.[38] Once again, Meijers offers a good example. Otto Gierke criticised the German Civil Code because it was not "social"[39] enough, that is, it did not consider the latest evolutions in society. His criticism fell on deaf ears in Germany, but it influenced Meijers, who set out to draft a more social code for the Netherlands, as Gierke would have wanted.[40] Thus, anyone wondering what the German Civil Code would have looked like if Gierke had been heard in his own country can look at the Dutch Code to understand what this might have led to. Instead of the baseless speculation of counterfactual history, comparative history offers us a well-founded view of what might have been. Given that we do not change an event but rather the whole context, it is better to label this alternative rather than counterfactual history. Needless to say, this approach has its limits and works better the closer the original and its alternative are. The most interesting cases concern countries divided instead of united by codes. Nineteenth-century Germany was a patchwork of states. Differences existed among, but sometimes also within, these states. Prussia, Bavaria, and the Grand-Duchy of Hesse gained territories on the left bank of the Rhine through the reshuffling of Germany after the defeat of Napoleon. As the Rhineland was allowed to preserve its French law,[41] we can study it as an alternative to the law of the old Prussian, Bavarian, or Hessian lands. Amusingly, we find a parallel in the other direction during the twentieth century. Alsace-Lorraine became German in 1871 and, subsequently, it also received the new codes of a unified Germany. After the First World War, it returned to France, but part of German law was allowed to survive if it could serve as an example for French reforms. Thus, Alsace-Lorraine did not just offer a mirror of what France could have been with German law, but the French also actively looked into this mirror to modernise commercial law and civil procedure.[42] The entangled histories of

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37 R. Van Caenegem, "Counterfactual history and the First World War," *European Review* 2017, vol. 25, issue 3, pp. 494–501.

38 D. Heirbaut, "A source of inspiration for legal historians: Raoul van Caenegem's views on legal history," *Tijdschrift voor rechtsgeschiedenis* 2020, vol. 88, no. 1–2, pp. 29–31.

39 T. Repgen, *Die soziale Aufgabe des Privatrechts. Eine Grundfrage in Wissenschaft und Kodifikation am Ende des 19. Jahrhunderts*, Tübingen 2001.

40 C. Jansen, "Die Beweggründe des Eduard Maurits Meijers (1880–1954) für den Entwurf des neuen Niederländischen Bürgerlichen Gesetzbuches (1992)," *Zeitschrift für Europäisches Privatrecht* 2008, no. 16, pp. 59–78.

41 W. Schubert, *Französisches Recht in Deutschland zu Beginn des 19. Jahrhunderts. Zivilrecht, Gerichtsverfassungsrecht und Zivilprozessrecht*, Köln 1977.

42 É. Coutant, *L'Alsace et la Moselle: terrains d'expérimentation de la réforme du droit civil et commercial français (1918–1975)*, unpublished PhD thesis, Université de Bordeaux, Bordeaux 2018, https://tel.archives-ouvertes.fr/tel-02927769 [accessed: 23.11.2025].

Germany and France led to territories with the law of the traditional enemy, showing us a glimpse of what might have been. Ironically, both Germany and France naturalised the law from the other side. In the nineteenth century, the Germans called their French law "Rhenish"; in the twentieth, the French labelled their German law "local." In any case, the more entanglements[43] countries show, the more their individual histories can be a treasure trove for developing an alternative history.

If we limit ourselves to national histories, it is remarkable how much path dependence[44] is at work in studying codifications. Certain views, once accepted, become almost set in concrete and are not disputed. For example, although four authors wrote the French Civil Code, it has become traditional to extoll Jean-Étienne Marie Portalis. For some, he is the "father of the Civil Code."[45] If we analyse the praise for Portalis in detail, we immediately note that it is, to a large extent, due to his broader view on the code's philosophy, which he explains in his Preliminary discourse.[46] There is, however, a problem. When the Tribunate expressed dissatisfaction with the first part of the draft civil code it received, this concerned Portalis' work. The counterpart to his Preliminary Discourse was a Preliminary Book that he drafted for the civil code. The Council of State had not liked it and had already trimmed it down, but even that reduced version still led to attacks in the Tribunate. To counter those, Napoleon did not just purge the Tribunate; his Council of State reduced the Portalis draft even further. In the end, only six articles survived.[47] Portalis may have shown himself in his Preliminary Discourse to be a genius of codification, but the Civil Code could only become law by removing most of that genius, which puts Portalis in a completely different light. His later fame rests mostly on the promotion of his legacy by his son and grandson.[48] We can only wonder how many other established "truths" of codification history must be reevaluated.

Another example of later perspectives obscuring historical reality can be found in Germany. Currently, jurists and legal historians tend to focus on the genesis of the German Civil Code. The Code of Civil Procedure is a topic of interest only to proceduralists. However, historical reality tells a very different story. During the nineteenth century, the codification of civil procedure took first place. Most German states did not even bother trying to devise a new civil code, and only one of them, Saxony, managed to enact a new civil code.[49] In contrast, we see a codification frenzy

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43 For this concept, see: *Entanglements in Legal History: Conceptual Approaches*, ed. T. Duve, Frankfurt 2014.

44 For this concept, see: N. Schröter, *Pfadabhängigkeit und Recht*, Tübingen 2024.

45 J.-L. Chartier, *Portalis: le père du Code civil*, Paris 2004.

46 J.-L. Halpérin, "Portalis Jean-Étienne Marie (1746–1807). Discours préliminaire" [in:] *Dictionnaire des grandes oeuvres juridiques*, eds. O. Cayla, J.-L. Halpérin, Paris 2008, pp. 454–459.

47 W. Wolodkiewicz, "'Livre préliminaire' 'titre préliminaire' dans le projet et dans le texte définitif du Code Napoléon," *Revue historique de droit français et étranger* 2005, vol. 83, no. 3, pp. 441–456.

48 J.-F. Niort, "Retour sur 'l'esprit' du Code civil des Français" [in:] *Les penseurs du Code civil*, ed. C. Gauvard, Paris 2009, p. 159.

49 C. Ahcin, *Zur Entstehung des bürgerlichen Gesetzbuchs für das Königreich Sachsen von 1863/1865*, Frankfurt 1996.

for civil procedure, with smaller states joining in and several states enacting more than one codification during the nineteenth century. For example, as soon as Hanover had a new code in 1847, it decided to write the next one, which arrived in 1850.[50] Civil procedure codes popped up all over Germany before the general German Code of 1877 because civil procedure was the main battlefield in the struggle waged by progressive liberals against their conservative opponents.[51] This led to a staggering number of publications. Nineteenth-century Germany produced more than ten thousand monographs on civil procedure.[52] For contemporaries, civil procedure codes took the main stage; the civil code was just a sideshow.

That current national views are distorted has broader implications. When scholars present general views on codification, these are mainly determined by the perceived experiences in their own country. This may lead to strange contradictions. A well-discussed topic in codification studies is the choice between a single drafter and a commission. Both Belgium and the Netherlands tried to write new civil codes at the end of the nineteenth century and failed. Because they had different experiences, they arrived at diametrically opposed conclusions. In the Netherlands, three subsequent commissions never got very far. From this, the Dutch inferred that a codification effort can only be successful if the government entrusts the work to a single drafter.[53] The 1947 decision to charge Meijers with writing a new civil code has to be seen in that light. In Belgium, however, events took a completely different turn. In 1879, François Laurent started to draft a new civil code and failed to find acceptance for it.[54] The Belgians, therefore, concluded that a draft code, authored by a single person, would fail.[55] If we join the Belgian and the Dutch views, we arrive at an absurd conclusion: neither commissions nor single individual drafters can be successful. If this were true, codes would not exist. The problem is, of course, that scholars tend to extrapolate from a set of data limited to their own country and sometimes only its most recent experiences. When Meijers in the Netherlands wrote that a single drafter was a prerequisite for a successful codification,[56] he knew quite well that commissions had written his country's existing codes, but by ignoring that, he made certain that he would be selected as the single drafter to write a new civil code for the Netherlands. For a legal historian,

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[50] No author has ever managed to completely capture the history of nineteenth-century German civil procedure. For a good overview, see: G. Dahlmanns, "Verfahrensrecht. Deutschland" [in:] *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, Bd. III/2, ed. H. Coing, München 1982, pp. 2615–2697.

[51] K. Ledford, "Lawyers, liberalism, and procedure: The German imperial justice laws of 1877–1879," *Central European History* 1993, vol. 26, no. 2, pp. 165–193.

[52] G. Dahlmanns, "Verfahrensrecht. Deutschland…," p. 2615, note 1.

[53] J. Lokin, C. Jansen, *Tussen droom en daad: de Nederlandse Juristen-Vereniging 1870–1995*, Zwolle 1995, pp. 44–47.

[54] E. Bruyère, *Principes, esprit et controverses. L'Avant-projet de Code civil de François Laurent ou l'oeuvre séditieuse d'un libre-penseur*, Leuven [Forthcoming].

[55] Cf. F. Stevens, "'Où est donc passée la commission de révision?' La révision du Code civil en Belgique à la fin du XIXe et début du XXe siècle" [in:] *Les démarches de codification du moyen-âge à nos jours*, eds. G. Macours, R. Martinage, Brussel 2006, pp. 213–221.

[56] Cf. E. Meijers, "Wijzigingen…," p. 63.

contradictory and, thereby, mutually exclusive assumptions about codification lead to much frustration. However, they also have an upside. They indicate that we have been looking in the wrong direction and that other elements are at play. Historically, both single drafters and commissions have succeeded and failed. The number of authors is not the point. Crucial is their willingness to heed the opinion of others and, if necessary, to compromise. Both Meijers and Laurent worked on their own,[57] but Laurent arrogantly disregarded other opinions and obstinately wanted to push through his own views. A few years earlier, a commission tasked with drafting a new civil procedure for Belgium had acted similarly, with equally disastrous results, suggesting that the problem lay not in the number of drafters but in their attitude. If drafters are willing to listen to others and make concessions where necessary, their text can become law.

In this context, it is interesting to examine the role of lobby groups in more detail. Some people assume that in the past, lawmakers were perfect and stood above the fray of ordinary politics. In contrast to today's politicians, they made no errors and did not give in to the concerns of the day.[58] This optimistic view is based on a very shallow study of events. For example, superficially looking at the French 1804 Civil Code may give the impression that a neutral code for the ages arose from Napoleon's genius. However, as Xavier Martin has shown convincingly, Napoleon's code was anything but neutral. Its spirit was distinctly authoritarian and reflected a deep distrust of human liberty.[59] This should not come as a surprise if we keep in mind that Napoleon was a military dictator. Moreover, he did not get it right from the start. Although most studies, including this article, refer to 1804, Napoleon did not get everything right at his first try. The final version of his civil code only arrived in 1807, with the so-called Code Napoléon.[60] In short, the lawmakers of the past were not perfect. One of the problems they, too, had to cope with was lobby groups. In general, lobby groups do not favour codes. They want to score on certain specific points which are of interest to them. This means that fast piecemeal legislation is in their interest, but this does not imply that they are an obstacle to a new code. They focus on the points they care about, but do not bother about the new code as such. Therefore, pointillistic accommodation can save a draft code. For example, in discussions the Catholic Centre Party objected to the divorce law in the draft German Civil Code. An amendment which also allowed a legal separation, which did not dissolve marriage and, thus, was more palatable to Catholics, helped to end the Centre Party's protest.[61] As long as the drafters of a new

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[57] Meijers had one helper, Jan Drion (K. Wiersma, "Drion, Jan (1915–1964)" [in:] *Biografisch woordenboek van Nederland*, vol. 3, Den Haag 1989, http://resources.huygens.knaw.nl/bwn1880-2000/lemmata/bwn3/drion [accessed: 12.11. 2025]).

[58] See, for example: F. Kübler, "Kodifikation und Demokratie," *Juristenzeitung* 1969, vol. 24, pp. 645–651.

[59] X. Martin, *Mythologie du Code Napoléon. Aux soubassements de la France moderne*, Bouère 2003.

[60] D. Heirbaut, "Introduction à l'édition cumulative du Code civil en Belgique: sources et méthodologie" [in:] *Edition cumulative du Code civil: le texte actuel et l'édition originale avec toutes les modifications en Belgique de 1804 jusqu'à 2004*, eds. D. Heirbaut, G. Baeteman, Mechelen 2004, pp. lxxxix–xc.

[61] M. John, *Politics and the Law in Late Nineteenth-Century Germany. The Origins of the Civil Code*, Oxford 1989, pp. 199–240.

code and the politicians behind them are willing to meet lobby groups some of the way, the latter are not that much of a problem.

However, this does not apply to draft civil procedure codes, threatening the power of advocates, the best-represented professional group in parliament. This explains why they can block any new code that is to their disadvantage. The German 1877 Imperial Civil Procedure Rules illustrate this best. Their author, Gerhard Leonhardt,[62] had also worked on the 1850 Hanoverian Code, which had found a balance between advocates and judges. Nevertheless, he wrote a Code for Germany that gave in almost completely to the advocates, predicting, as a true Cassandra, right before the vote in parliament that his text would never work in practice.[63] Almost a century later, France nevertheless received a Civil Procedure Code that lessened the power of the advocates in civil procedure,[64] but this was only possible thanks to a 1958 constitutional change, which had transferred the legislation on civil procedure from parliament to the executive.[65] The exception of civil procedure shows that the question of lobby groups needs more study to verify how universal the limited importance of lobby groups is.

There are a few other illusions of codification history or even legal history in general that an empirical study dispels. I can point to the great divide between common law and civil law for the latter.[66] For Europe, that distinction has the misleading effect of putting English law on par with all the continental legal systems combined. However, if we look at the preparatory works of private law codes, references to English law are almost completely absent. There are a few exceptions, like bankruptcy law,[67] but in general, the idea seems to be that foreign law mostly becomes a source of inspiration for a new code if it has the format of a code.[68] More specific fallacies of codification history concern the aims of a code. Somehow, codification has become linked to major social change. Thus, when a group of leftist jurists wanted to reform English law in the 1960s,[69] this resulted in a Law Commission for England and Wales, which also had to look at codification.[70] Once again, a specific interpretation of Napoleon's Civil Code is at the heart of this view. It is seen as revolutionary because it enshrined some

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62 W. Schubert, "Leonhardt Gerhard Adolf Wilhelm" [in:] *Neue Deutsche Biographie*, Bd. 14, Berlin 1985, pp. 253–254.

63 G. Dahlmanns, "Verfahrensrecht. Deutschland…," p. 2680.

64 Cf. B. Beignier, "Le nouveau Code de procédure civile: un droit des professeurs?" [in:] *1806–1976–2006…*, pp. 35–46.

65 S. Guinchard, "Droit constitutionnel et procédure civile" [in:] *Répertoire de procédure civile*, Dalloz 2018, no. 3–18, https://www.dalloz.fr/documentation [accessed: 23.11.2025].

66 See, for example: R. Zimmermann, *England und Deutschland. Unterschiedene Rechtskulturen?*, Göttingen 2019.

67 See, for example: P. Omar, "L'influence réciproque des législations commerciales française et anglaise en matière de faillite" [in:] *Quel Code de commerce pour demain? Bicentenaire du Code de commerce 1807–2007*, eds. P. Bloch, S. Schiller, Paris 2007, pp. 337–352.

68 Cf. D. Heirbaut, "From France to eclecticism: The role of foreign law and legal history in the drafting of the 'New' Belgian Civil Code" [in:] *Iurium itinera. Reinhard Zimmermann zum 70. Geburtstag am 10. Oktober 2022*, eds. N. Jansen, S. Meier, Tübingen 2022, pp. 101–119.

69 *Law reform now*, eds. G. Gardiner, A. Martin, London 1963.

70 S. Wilson Stark, *The Work of the British Law Commissions. Law Reform… Now?*, Oxford 2017.

achievements of the French Revolution.[71] Compared to the pre-1789 Ancien Régime, the 1804 Code was progressive. Still, it is a bit strange to compare 1804 with the Ancien Régime, from which it is divided by the French Revolution. It makes more sense to set it against the background of the Revolution which immediately preceded it. If we do so, the 1804 Code is not so revolutionary after all.[72] Any other codes studied did not bring great social change either, as it turns out that this was left to special legislation. For example, the postwar Netherlands struggled so much with the introduction of divorce by mutual consent that the first drafter of the new civil code, Meijers, was not allowed to request parliament's opinion on it.[73] Consequently, Book 1 of the Code did not change the law in 1970. That happened in an Act one year later.[74] Codifications may have been intertwined with large-scale reform in the minds of many scholars, but, at least for the codes studied here, the link is absent.

As the previous pages illustrate, my empirical study of codification shows that many accepted beliefs about codification are fallacies. However, my research looked only at private law codes in four Western European countries. Do my findings also apply in other cases? I leave it to other researchers to verify that, but I hope to have offered some stimulating ideas for further research.

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[71] J.-L. Halpérin, *Five Legal Revolutions since the 17th Century: An Analysis of a Global Legal History*, Cham 2014, p. 44.

[72] For example, for property law, see: R. Blaufarb, *The Great Demarcation: The French Revolution and the Invention of Modern Property*, Oxford 2016.

[73] E. Florijn, *Ontstaan en ontwikkeling van het nieuwe Burgerlijk Wetboek*, Maastricht 1995, pp. 147–148.

[74] P. Brood, M. de Wolde, *Scheiden doet lijden. Vier eeuwen echtscheidingsmisère*, Amsterdam 2014, pp. 123–144.

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Summary

Dirk Heirbaut

Reflections on Codification History

Given the importance of codifications, further research on them is needed, including a re-evaluation of existing studies. Even if we distinguish between true codifications and compilations, existing definitions are problematic. Getting around this problem, by using the French 1804 Civil Code as a model, does not help, as it was an atypical text. This article, therefore, looks at the codification experiences of four Western European countries for private law, commercial law, and civil procedure. It shows the defects of national legal histories and the need for a comparative legal history, which can serve as an alternative history based on facts, not speculation. This is illustrated by looking at the differences between single drafters and commissions as authors of draft codes and the impact of lobby groups on their work. The empirical study of codification shows that many accepted beliefs about codification are fallacies, at least for the codes and countries studied here.

Keywords: codification, private law, commercial law, civil procedure, comparative legal history – France, Germany, Belgium, the Netherlands.

Streszczenie

Dirk Heirbaut

Refleksje na temat historii kodyfikacji

Ze względu na znaczenie kodyfikacji konieczne są dalsze badania w tym zakresie, w tym ponowna ocena dotychczasowych opracowań. Nawet jeśli odróżnimy prawdziwą kodyfikację od kompilacji, istniejące definicje są problematyczne. Obejście tego problemu poprzez wykorzystanie francuskiego kodeksu cywilnego z 1804 r. jako wzorca nie jest pomocne, ponieważ był to tekst nietypowy. W opracowaniu przeanalizowano doświadczenia czterech krajów Europy Zachodniej w zakresie kodyfikacji prawa prywatnego, prawa handlowego i postępowania cywilnego. Wskazano wady krajowych historii prawa oraz podkreślono potrzebę stworzenia porównawczej historii prawa, która mogłaby służyć jako alternatywna historia oparta na faktach, a nie spekulacjach. Ilustruje to analiza różnic między pojedynczymi autorami a komisjami jako twórcami projektów kodeksów oraz wpływu grup lobbingowych na ich pracę. Empiryczne badanie kodyfikacji pokazuje, że wiele powszechnie przyjętych przekonań na temat kodyfikacji jest błędnych, przynajmniej w odniesieniu do kodeksów i krajów objętych niniejszym badaniem.

Słowa kluczowe: kodyfikacja, prawo prywatne, prawo handlowe, postępowanie cywilne, porównawcza historia prawa – Francja, Niemcy, Belgia, Niderlandy.