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Heirbaut, Dirk. Redefining Codification. A Comparative History of Civil, Commercial and Procedural Codes. Oxford: Oxford University Press, 2025 (462 pp., ISBN 9780198947363)

Keywords: codification, legal uniformity, civil law codes, types of civil law codes, exclusivity

The phenomenon of legislation is as old as the road to Rome. In 450 BC, the Romans adopted a set of laws known as the *Lex XII Tabularum*: the Law of the Twelve Tables. By modern standards, it can probably be regarded as a codification. The twelve ivory tablets, which were located in the Roman Forum, contained all the Roman private and public law of that time.

This raises the question of what codification is. In other words, under what conditions can a statute be called a codification and are there any consequences attached to this? The answer is not always easy to give. One thing is certain: not every statute is a codification. Extensive statutes, often referred to as codes, generally are. The concept of codification does not originate from Rome, but was coined by the 18th-century English (legal) philosopher Jeremy Bentham (1748–1832).¹ From the end of the 18th century onwards, codifications formed the hard core of continental private law. The same was true for criminal law during the 19th century. The fact that law books came to contain the core of the law has everything to do with the emergence of modern states in Europe at the end of the 18th century. They claimed a monopoly on law-making. The statute, originating from the legislative body, the bearer of national sovereignty, formally became the sole source of law. No law applied outside the text of the statute.

In the past, the central idea behind codification was usually twofold: to bring about *legal unity* and to achieve a *national law*. I take the civil law codes as the most typical example. They put an end to the diversity of private law within the continental European countries. With the promulgation of their codes, almost all legislators banned Roman law

¹ Lokin, Zwolve, Jansen, *Hoofdstukken uit de Europese codificatiegeschiedenis*, 20; van den Berg, *The Politics of European Codification*; Zimmermann, “Codification. The Civilian Experience,” 369ff.

and customary law as sources of law. Legal uniformity provided citizens with a better, more predictable, “sustainable” and comprehensible law. In addition, they brought about *national* law. Before the entry into force of the Code civil (1804), the ABGB (1811), the BGB (1900) and the ZGB (1912), there was no uniform French, Austrian, German or Swiss civil law, but after the promulgation of the codes, there was. In 1900, the BGB sounded the death knell for Roman, Saxon, Bavarian, French, Baden, Prussian, Danish and Austrian private law on the German soil. In 1912, the ZGB abolished the civil law of approximately 25 cantons, including Roman law, the General Prussian Land Law (ALR) of 1794, the ABGB and the Code civil.

Codification brought citizens not only legal uniformity but also legal certainty and equality. Citizens know where they stand: they can rely on this in their economic activities. They also see that similar cases are treated equally.²

In addition to achieving legal uniformity, legal certainty and legal equality, the recent revisions of many civil codes aim to meet the European objective of harmonization. In recent decades, there has been a boom in European directives to be transposed into national civil law.³ Hesselink has shown that codification and harmonization are at odds with each other: harmonization is fragmentary, impressionistic, and unsystematic, and it has an impact at two levels (national and European).⁴ Despite these practical objections to harmonization, many legislators in European countries have decided to incorporate the directives into their civil codes. According to Hesselink, the implementation of the directives has therefore led to friction in national codes. The “European” response to the growing incoherence of European private law was to formulate *soft law* such as the Principles of European Contract Law (2003) and the Draft Common Frame of Reference (DCFR) from 2009. These have inspired national legislative projects and contributed to more consistent national civil law in countries such as Belgium and Poland.⁵

The most influential European codifications originate from the French emperor Napoleon Bonaparte (1769–1821). He is responsible for the Code civil (1804), Code de commerce (1807) and Code pénal (1810). The Code civil has had a major influence in Europe. The code was not only legally binding in France, but also in Belgium and Luxembourg. It served as a model for the civil codes of the Netherlands, Italy, Portugal and Spain, despite Napoleon’s persona. As a “dictator,” he was often criticized, including in the Netherlands. In a speech delivered in 1904 as chairman of the Association of Dutch Lawyers, the Amsterdam lawyer Isaäc Abraham Levy (1838–1920) reminded Dutch lawyers of the “remarkable coolness” with which the Dutch people greeted the centenary of the Code civil in the Netherlands in 1904, even though the Dutch people owed much to that code. The element of power in the Code, a legacy of Roman law “which, after all, puts the *princeps legibus solutus est* [the prince is not bound by the laws – Dig. 1,3,31] at the forefront,” must, according to Levy, have flattered Napoleon’s “despotic spirit,” but not the Dutch with their sense of duty. They refused to commemorate the centenary of the Code civil because they had outgrown a private law that had “entirely different assumptions”

² van den Berg, *The Politics of European Codification*, 23ff; Zimmermann, “Codification. The Civilian Experience,” 389; Jansen, “A European Civil Code and National Private Law,” 474.

³ Schulze, “Changes in the Law of Obligations,” 5ff.

⁴ Hesselink, “The Ideal of Codification and the Dynamics of Europeanisation,” 287ff.

⁵ *Ibid.*, 305; Schulze, “Changes in the Law of Obligations,” 8–9.

than “we, with our sense of community, consider compatible.”⁶ Despite Levy’s unflattering words about Napoleon, it is clear that the Code civil still has great significance for legal life in continental Europe and far beyond (such as in Quebec, Canada, Louisiana, USA, some African countries and the countries of South America, which are not called Latin America for nothing). Later civil codes in Europe also follow the tradition based on Roman law, such as the Polish Civil Code of 1964 (Kodeks cywilny), which in terms of style goes back to the French Code civil and in terms of structure is more similar to the BGB.

Given their important role in continental European countries, studies on codifications are worth noting and discussing. The recently published book by the Belgian professor Dirk Heirbaut, *Redefining Codification. A Comparative History of Civil, Commercial and Procedural Codes*, is a good example of this. It is a major addition to legal history literature. In his introduction, Heirbaut points out that there is no conclusive definition of what codification is in the literature. In line with his Belgian colleague Vanderlinden, he distinguishes between two types of codification: compilation (a record or pure collection of laws) and modification, in other words a legal arrangement that is also aimed at intervening in social relations. In his book, Heirbaut analyses and compares the late 18th, 19th and 20th centuries in the field of civil law, commercial law and civil procedural law in France, Germany (“A Laboratory for Codification”), the Netherlands and Belgium. He explicitly includes the political context in the countries concerned in his analyses.

I note that it is enriching that Heirbaut has included commercial law codes in his considerations. The German Commercial Code, the Allgemeines Deutsches Handelsgesetzbuch (ADHGB), has had a major influence in the Netherlands and some other European countries. Modern writers on comparative law, for example, regard it as one of the codes that gave rise to a specific movement in comparative law: “legislative comparative law.”⁷ Belgium has often been overlooked in the history of European codification. However, on May 1, 2019, with the entry into force of the Companies and Associations Code (Wet van Vennootschappen en Verenigingen – WVV),⁸ this country acquired a new company law. Civil law has also been extensively reformed. Recently, the new property law (Book 3; 2020) and the general doctrine of obligations and contracts (Book 5; 2022) have come into force. The reform of private law is part of a large-scale legislative operation.⁹ In 2016, the Minister of Justice, Koen Geens, published a document entitled *De sprong naar het recht voor morgen. Hercodificatie van de basiswetgeving (The leap towards tomorrow’s law. Recodification of the basic legislation)*, in which he explained the background and content of his plans for Belgian legislation (in both private and criminal law). His introductory remarks are typical of the arguments currently being put forward in favor of recodifying the private law code:

Our society cannot function unless it is assumed that every citizen, and by extension every lawyer who advises him or every judge who judges him, is expected to know the law (“nemo censetur

⁶ See Levy, “Rede voorzitter,” 2, 4.

⁷ Schwenzer, “Development of Comparative Law in Germany, Switzerland and Austria,” 74; Zweigert, Kötz, *An Introduction to Comparative Law*, 51.

⁸ Act of March 23, 2019 (Belgian Official Gazette, April 4, 2019). The original WVV dates from 1999.

⁹ See, for example, Heirbaut, Van der Haegen, “De sprong van Geens: het grootste codificatieplan,” 1403ff; Heirbaut, *Redefining Codification*, 288ff (291).

ignorare legem”).¹⁰ Legal certainty, which is a basic prerequisite for the smooth social and economic transactions, requires simple accessibility of the law applicable to a given situation.¹¹

Legal certainty was an important motive for legislation in the past (as I mentioned above). In his document, Geens also refers to another, more social perspective that also played a role in the Netherlands during the recodification of civil law from 1947 onwards:

Nowadays, more attention is being paid to the protection of weaker parties. In general, the relationship between individual and social interests should be adjusted.¹²

Another important motive for Geens for the recodification of private law was his belief that good private law legislation is necessary in order to be able to compete economically with other countries in the world.

Heirbaut ends his book with three concluding chapters. These are based on a comparison of the results of his earlier discussion of the history of codification in the four countries he studied. In these chapters, he discusses the choices that a legislator must make with regard to a new codification or recodification: a conservative or a revolutionary code?; a learned or a practical code?; a code produced in one go or in stages?; and a code as a new creation or as a copy from a model?¹³ In Heirbaut’s view, there is no ideal answer to these questions. The political, social and legal circumstances differ too much between European countries for that. Heirbaut sees little merit in codification as a vehicle for social reform (p. 420: “successful draft codifications do not rock the boat too much”), although a social motive played an important role in both the Dutch and Belgian Civil Codes. He rejects – following others – the idea that a code must have the appearance and substance of a scientific textbook. Scholarly codifications often led to excessive detail.¹⁴ Heirbaut also warns against the urge for “completeness,” an ideal that many legislators have cherished in the past. Historically, the “completeness” of codes has been one of the most discussed topics in legislation, both in terms of material or substantive completeness or exclusivity (the exhaustive regulation of all possible private law issues down to the smallest details) and formal completeness (the exclusive validity of a codification and the abolition of the old law). The Roman jurist Julianus already noted: “Neither laws nor senate decrees can be drafted in such a way that they cover all cases that may ever arise, but it is sufficient that they regulate what occurs frequently.”¹⁵ The great Roman legislator, Emperor Justinian (482–565), thought the same as Julianus: “But because divine things are indeed perfect, but human law, by its nature, develops infinitely, and there is nothing in it that can remain eternal (for nature hastens to create many new manifestations), we do not harbor the illusion that matters will not arise in the

¹⁰ Dig. 22,6,9,pr: “It is a rule that ignorance of the law harms everyone, but that ignorance of a fact does not harm anyone.”

¹¹ Geens, *De sprong naar het recht voor morgen*, 3 (see also 28).

¹² “Explanation by Prof. Meijers,” in: van Zeben, *Parlementaire Geschiedenis*, 122. See also Meijers, “Voor- en nadelen van het samenstellen,” 175, 176–7; Geens, *De sprong naar het recht voor morgen*, 28 (quote).

¹³ Heirbaut, *Redefining Codification*, 416ff. Heirbaut also discusses the question of whether codification should be the work of one person or of a committee.

¹⁴ Heirbaut, *Redefining Codification*, 424.

¹⁵ Dig. 1,3,10. See also Dig. 1,3,12.

future that have not yet been caught in the snares of the law.”¹⁶ Later legislators, such as the Prussian legislator and many others, paid little heed to these words. Their overly detailed law books quickly became obsolete.¹⁷ An important observation by Heirbaut is the following: “boring drafts have more chances of success”, in the sense that a dull codification increases the likelihood of political approval (p. 440).

Finally, at the end of his book, Heirbaut arrives at his own definition of codification: “legislation covering a major part of the law, which contains at least some modification and imposes a new framework for further development, thereby making the law more ordered for professionals.”¹⁸ Heirbaut’s definition contains two criteria – more substantive ones – that could cause problems: “some modification” and “imposes a new framework for further development.” I therefore prefer a formal criterion. The legislator designates a collection of written rules as the sole source of law in a particular area.¹⁹ In my opinion, the judgement that a law is a codification says nothing about its content (for example, whether it has a refined system or is structured on a case-by-case basis).

Heirbaut’s book is highly recommended for anyone interested in codification and the history of codification. His in-depth analyses of successful and failed codifications and codification attempts in Germany, France, the Netherlands, and Belgium are a source of inspiration for future legislators. As his book shows, successful codifications over the past two centuries have always had political support. Without that support, a codification project is doomed to fail. A possible European Civil Code, a long-standing wish of the European Parliament, therefore seems to be off the table. Nor is an era of decodification imminent in continental Europe.

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¹⁶ C. 1,17,2,18.

¹⁷ Cf. Lokin, Zwolve, Jansen, *Hoofdstukken uit de Europese codificatiegeschiedenis*, 19ff.

¹⁸ Heirbaut, *Redefining Codification*, 449–50.

¹⁹ Lokin, Zwolve, Jansen, *Hoofdstukken uit de Europese codificatiegeschiedenis*, 21. Also: Jansen, “Vorm over inhoud,” 105ff.

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