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## THE CODE NAPOLÉON: BURIED BUT RULING IN LATIN AMERICA

M. C. MIROW\*

*"The Liberator President is highly aware of the wisdom with which the Code Napoleon was drafted."*<sup>1</sup>

When lawyers from different countries meet, they are likely to exchange almost phatic pleasantries about legal practice and their legal systems. Latin American lawyers visiting the United States invariably respond to inquiries about these matters with the observation that their system is based on the Napoleonic Code. This statement, of course, does not mean the same thing to a U.S. lawyer as it does to any European lawyer. It is an assertion of historically and culturally rooted equality or even superiority to the Anglo-American common law system. This short-hand reference to the French Civil Code of 1804 is a gross oversimplification, but one that continues today. Indeed, noted comparative lawyers and legal historians are partly to blame for such statements. In the United States, because our introductory law school literature tends to perpetuate it,<sup>2</sup> lawyers are apt to believe this characterization of Latin American law. Echoing the great European comparativists, general Latin American literature also continues this description.<sup>3</sup> It is a convenient short-hand comment, but unsoundly inaccurate. To say that Latin American law is centered on the *Code Napoléon* is similar to saying that United States law is based on Blackstone's *Commentaries* and that Belgian law is based on Justinian's *Digest*. There is some truth and some falsity to these statements and this study proposes to explore the historical and present-day significance of the *Code* in Latin America, particularly the Spanish-speaking countries.

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1. Letter from José D. Espinosa, General Secretary to Bolívar, to José Manuel Restrepo, Minister of the Interior (May 13, 1829) (in Manuel Pérez Vila, *El Código Napoleón en la Gran Colombia, una iniciativa trascendental del Libertador*, 19 *REVISTA DE LA SOCIEDAD BOLIVARIANA DE VENEZUELA* 819, 823 (1960)). For Bolívar and the *Code Napoléon*, see generally M.C. Mirow, *The Power of Codification in Latin America: Simón Bolívar and the Code Napoléon*, 8 *TUL. J. INT'L & COMP. L.* 83 (2000).

2. See JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 58 (2d ed. 1985).

3. See Jorge L. Esquirol, *The Fictions of Latin American Law (Part I)*, 1997 *UTAH L. REV.* 425, 432 (1997).

In 1909, Frederic William Maitland, one of England's great historians, cogently observed that, within the common law system, "[t]he forms of action we have buried, but they still rule us from their graves."<sup>4</sup> The forms of action, procedurally embodied in the common law writs commencing legal proceedings, provided the taxonomy of Anglo-American common law for over 700 years. Maitland's annunciation of their death is known to virtually every student of the history of Anglo-American law; it is perhaps as familiar as "honeste vivere, alterum non laedere, suum cuique tribuere" is to those in the civil law tradition. Writing at the beginning of the twentieth century, Maitland rhetorically lamented the dismantling of the procedural writ system that defined substantive areas of law and maintained a clear distinction between law and equity in the common law system. This change occurred in England through piecemeal legislation in the nineteenth century and especially through the sweeping procedural reforms of the Common Law Procedure Act of 1852 and the Judicature Act of 1873.<sup>5</sup> Despite the removal of procedural difference and of particular labels for private law remedies, the substantive distinctions left in the common law by the forms of action were lasting and continue today. Thus, Maitland was quite correct to note the paradox: the forms of action had been buried, but they continued and continue to rule the common law.

Maitland's observation, published at the beginning of the twentieth century, noted fundamental changes in the common law that came about in the nineteenth century. Today, at the beginning of the twenty-first century, looking back at the changes of the twentieth century, one may make a similar observation concerning the place of the *Code* in Latin America. Thus, today this author paraphrases for Latin America: "The *Code Napoléon* we have buried, but it still rules us from its grave."

Just as the buried forms of action continue to structure and define Anglo-American law, so too does the buried *Code* continue to rule Latin-American law. This study will first briefly situate the *Code* in the development of Latin American private law. After establishing the primary importance of the *Code* in the development of nineteenth- and early twentieth-century Latin American law, this study will then explore the present-day aspects both burying the *Code* and permitting it to reign in Latin America's legal development and culture. Even in the formative years of national Latin American law, the *Code* was not a monolithic concept or text removed from interpretation, and it carried assumptions about legal structure and method with it from the beginning. The paradox of its burial and rule are not purely a modern phenomenon. Nonetheless, the sharp clarity of this dual place of the *Code* in recent times is notable, and this study explores its

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4. F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES 2 (A.H. Chaytor & W.J. Whittaker, eds., 1936).

5. See *id.* at 7-8, 81. For the United States, I have argued that this pivotal moment occurred later than many would expect, in the mid-twentieth century. See M.C. Mirrow, *Legal History in the Law School Curriculum*, in LEGAL EDUCATION FOR THE TWENTY-FIRST CENTURY 187 (Donald B. King ed., 1999).

manifestation.

## I. THE CODE NAPOLEON IN INDEPENDENCE AND EARLY REPUBLIC LATIN AMERICA

The fundamental influence of the *Code Napoléon* on Latin America's legal development is unquestionable and clearly evident from contemporary sources. Indeed, Latin American scholars have produced a fine body of work on the codification of private law. These works underscore the importance of the *Code* in the process of creating new national law for the new republics.<sup>6</sup>

After independence, the new republics of Latin America sought to create new law. The first wave of constructing new law occurred at the constitutional level, with countries immediately drafting constitutions in order to replace colonial rule with national structures. Drafters of these documents were often informed by the political writings of European Enlightenment philosophers, the liberal Spanish Constitution of Cadiz (1812), and the Constitution of the United States of America.<sup>7</sup> Legal reform in the creation of new republics was not limited to the constitutional level; private law too needed to be recast to reflect the needs of these new countries.

Rewriting and reforming private law was important for several reasons. First, some aspects of private law were clearly inconsistent with the new forms of republican government. Nobility, slavery, special jurisdictions, and legal disabilities of illegitimates, as well as the private law institutions linked to these areas of law, had to be removed.<sup>8</sup> Second, a unique body of private law was an important step in creating national identity and consolidating state power in new governments.<sup>9</sup> Indeed, many new constitutions made direct references to legal reform, specifically codification. Third, the legacy of colonial private law was a complicated and unwieldy mass of repetitive and conflicting sources. This conflict

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6. See, e.g., CODIFICACIÓN Y DESCODIFICACIÓN EN HISPANOAMÉRICA: LA SUERTE DE LOS DERECHOS CASTELLANO Y PORTUGUÉS EN EL NUEVO MUNDO DURANTE LOS SIGLOS XIX Y XX (Bernardo Bravo Lira & Sergio Concha Márquez de la Plata eds., vol. 1, 1998); ALEJANDRO GUZMÁN BRITO, ANDRÉS BELLO CODIFICADOR: HISTORIA DE LA FIJACIÓN Y CODIFICACIÓN DEL DERECHO CIVIL EN CHILE. (vols. 1 and 2, 1982); ALEJANDRO GUZMÁN, HISTORIA DE LA CODIFICACIÓN CIVIL EN IBEROAMÉRICA (2000); CARLOS AUGUSTO RAMOS NÚÑEZ, EL CÓDIGO NAPOLEÓNICO Y SU RECEPCIÓN EN AMÉRICA LATINA (1997); VÍCTOR TAU ANZOÁTEGUI, LA CODIFICACIÓN EN LA ARGENTINA (1810-1870): MENTALIDAD SOCIAL E IDEAS JURÍDICAS (1977).

7. See KENNETH L. KARST & KEITH S. ROSENN, LAW AND DEVELOPMENT IN LATIN AMERICA: A CASE BOOK 43-44 (1975).

8. See MARÍA DEL REFUGIO GONZÁLEZ, ESTUDIOS SOBRE LA HISTORIA DEL DERECHO CIVIL EN MÉXICO DURANTE EL SIGLO XIX 44 (1981); JOSÉ LUIS SOBERANES FERNÁNDEZ, HISTORIA DEL DERECHO MEXICANO 115-63 (6th ed. 1998).

9. See IVÁN JAKSIĆ, ANDRÉS BELLO: SCHOLARSHIP AND NATION-BUILDING IN NINETEENTH-CENTURY LATIN AMERICA 156-81 (2001); J. VANDERLINDEN, LE CONCEPT DE CODE EN EUROPE OCCIDENTALE DU XIII<sup>e</sup> AU XIX<sup>e</sup> SIÈCLE: ESSAI DE DÉFINITION 223-25, 243 (1967); CSABA VARGA, CODIFICATION AS A SOCIO-HISTORICAL PHENOMENON 334 (Sándor Eszenyi et al. trans., 1991).

led to desires for simple codes of applicable law.<sup>10</sup> Fourth, commerce, property, and the legal system demanded sources and rules that would ease their operations and establish their place in the new republics.<sup>11</sup>

Despite these forces pushing for the reform of private law in the new republics, true, effective, and lasting change was often delayed for decades. Most countries in Latin America continued to refer to the private law as it existed on the eve of independence, as modified by piecemeal rules enacted or decreed intermittently after independence. This delay was mostly the result of the political instability Latin American countries faced after independence. Civil wars and civil strife reflected deep political differences in segments of the population of many countries. Liberal and conservative notions of politics and society faced off against each other, complicated by considerations of what form—federal or centralized—governments should take.

In addition to the lack of politically stable governments, the treasuries of the new countries were impoverished and resources for legal reform were scarce. Government or self-appointed individuals and committees undertaking the task of legal reform often moved forward without assurances of financial benefit.

The legal talent necessary for reform was also scarce. Able judges, lawyers, and legislators were occupied with the immediate tasks of getting new governments to run smoothly, rather than retreating to the drafting room to consider various possible code sections for new national codes. Even finding the right books to begin work on new private law could present insurmountable difficulties. Early republic legal education was in the European *ius commune* tradition, and with academic inertia and familiarity with current materials, there was little pressure from professors to reform private law. As the cradle of government, law schools were subject to political forces and governmental supervision. For example, the introduction of the works of Jeremy Bentham into the classroom met with governmental prohibition more than once.<sup>12</sup>

Legal reform and codification could also be hindered by those holding vested interests in the present system. Thus, holders of large properties feared that new legislation might undo their carefully constructed arrangements, and the Church feared the secularizing influences of legal reform on its jurisdiction and property.

In this environment, early attempts at codification for the most part failed to make lasting and important changes in the sources of private law. Some countries did draft and pass civil codes in the 1820s and 1830s. For example, the Haitian Civil Code of 1825 is a nearly exact copy of the *Code Napoléon*.<sup>13</sup> Similarly, the Civil Code of Oaxaca (Mexico) of 1827-1829 appears to have been taken almost entirely from the *Code*.<sup>14</sup> Nonetheless, it was not until the mid-nineteenth century

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10. See Mirow, *supra* note 1, at 90-94.

11. See JEREMY ADELMAN, *REPUBLIC OF CAPITAL: BUENOS AIRES AND THE LEGAL TRANSFORMATION OF THE ATLANTIC WORLD 1-15* (1999).

12. See Mirow, *supra* note 1, at 99-100.

13. See GUZMÁN, *supra* note 6, at 191.

14. See *id.* at 198.

that conditions had improved so that codification of private law could be attained with greater success. When conditions were better, individuals and committees took up the call to provide codes of private law for the new republics.

Successful codifications of private law were often exercises in comparative legislation. At the core of these exercises were the *Code Napoléon* and the European commentary sources that quickly grew around the main text. This however does not mean that Latin American countries merely translated and borrowed the *Code*, article by article. Rather, the *Code Napoléon* provided the structure and measure of the enterprise. The substantive rules adopted often varied from the French provisions, and in drafting and explaining such provisions, individuals noted the divergence from the French *Code*. Even at this early national stage of Latin American law the *Code*, as text, was being buried as it was adopted, adapted, translated, and placed in new codes. European scholars also noted the successes and failures from their point of view of these new codes. For example, Raúl Guerin de la Grasserie criticized the Peruvian Civil Code of 1852 for its systematic inexactitude and deficient classification, and Angel Osorio, President of Madrid's *Colegio de Abogados* and *Real Academia de Jurisprudencia* commented on reforms of Argentina's civil code.<sup>15</sup>

Apart from the intrinsic appeal of the *Code* and its widespread acceptance within world legal circles, its Frenchness made it particularly attractive to Latin Americans in this crucial period of Latin American codification, during the second half of the nineteenth century. French culture ruled Latin American culture and the élite of Latin America were a Francophone élite. Despite Latin American admiration of Anglo-American economic and political successes, ruling classes of Latin America intellectually aligned themselves with the French intelligentsia and saw French progress somehow more in tune with Latin American cultural and societal aspirations. This allegiance was true despite French military action in Mexico in 1838 to collect debts and France's occasional blockades of the River Plate in the first part of the nineteenth century.<sup>16</sup> The French installation of Maximilian and Carlota in the 1860s in Mexico further complicated the place of France in the nineteenth-century Latin American mind.<sup>17</sup>

With this environment in mind, we may consider the work of Andrés Bello as a brief example of the Latin American codification of civil law. Bello drafted perhaps the most influential code in the development of Latin American private law, the Chilean Civil Code of 1855.<sup>18</sup> For the law of contracts and obligations, Bello expressly stated that he followed the law of the French *Code*, and this author's own research indicates Bello followed the *Code Napoléon* in other areas

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15. See Carlos Rodríguez Pastor, *Vida, pasión y muerte de las codificaciones*, in LIBRO HOMENAJE A ULISES MONTOYA MANFREDI 611, 613 (1989).

16. See THOMAS E. SKIDMORE & PETER H. SMITH, *MODERN LATIN AMERICA* 358-61 (5th ed. 2000).

17. See MICHAEL C. MEYER ET AL., *THE COURSE OF MEXICAN HISTORY* 374-86 (6th ed. 1999).

18. See, e.g., GUZMÁN BRITO, *supra* note 6; JAKSIĆ, *supra* note 9, at 156-81; M.C. Mirow, *Borrowing Private Law in Latin America: Andrés Bello's Use of the Code Napoléon in Drafting the Chilean Civil Code*, 61 LA L. REV. 291 (2001).

of his code as well. Nonetheless, in style, Bello found the *Code* too brief, and opted for greater specificity and illustrative language in his code.<sup>19</sup> Indeed, in pressing for codification in Chile, Bello translated and published works of Portalis concerning codification in France.<sup>20</sup> French commentary sources were essential in Bello's project as well. Alejandro Guzmán writes, "Entre los autores extranjeros, llevaron su preferencia los franceses Devincourt, Rogron y sobre todo Pothier en sus diversos *Traites*; también empleó a Merlin, Favard de l'Anglade, Portalis y Maleville... Troplong, Duvergier, Toullier, Delangle y Duranton."<sup>21</sup> Bello's code is an important example because it was adopted widely in the region and served as a model for the civil codes of other Latin American countries.

Bello was, of course, not alone in looking to the *Code Napoléon* as a fundamental source for national codification in Latin America during the mid-nineteenth century. The French Civil Code was an important source for other influential codes in Latin America, such as Teixeira de Freitas's Brazilian Code, *Esboço do Código Civil*, from the 1860s and Dalmacio Vélez Sarsfield's Argentine Civil Code from the same period.<sup>22</sup> French commentary sources continued into the first part of the twentieth century as interpretive tools and as guides for domestic treatises on civil law.<sup>23</sup>

From the mid-nineteenth century to the mid-twentieth century, the French *Code* and its commentary sources provided many of the core concepts and methodologies of private law in Latin America. In a collection of reported oral histories of well-known Venezuelan legal practitioners conducted in the late 1970s, lawyers recall their studies in the 1920s and 1930s and note the use of the following as texts for legal study during the period: Ortolán, Petit, Pradier Fodéré, Planiol y Ripert, Demolombe, Aubry y Rau, Baudry Lacantinerie, Colin, and Capitant.<sup>24</sup> The sources used by Luis Felipe Urbaneja in the course of his studies, practice, and teaching also illustrate this reliance. As a law student at the Universidad Central de Venezuela from 1926 to 1934, Urbaneja recalled: "We learned by the textbook, which I estimate gave us no less than 80 percent of our knowledge. The texts were almost always in French or Italian, languages that we had learned to read in our *bachillerato*, above all French."<sup>25</sup>

The central place of the *Code Napoléon* in Latin American private law has been noted by many. The regional importance of secondary sources commenting on the *Code* is less well documented, but nonetheless, equally established. Thus, the *Code* and its method of structuring the law were a primary influence on the development of Latin American private law. This study, however, does not seek to

19. See Mirow, *supra* note 18, at 302.

20. See Portalis, *Legislación: Discurso preliminar del proyecto de código civil de Francia, El Araucano*, Aug. 17, 1833, at 2.

21. See GUZMÁN, *supra* note 6, at 243.

22. See *id.* at 296-301, 334-36.

23. See ANZOÁTEGUI, *supra* note 6, at 113.

24. See ROGELIO PÉREZ PERDOMO, *LOS ABOGADOS EN VENEZUELA: ESTUDIO DE UNA ELITE INTELLECTUAL Y POLÍTICA, 1780-1980*, 359, 377, 389 (1981).

25. *Id.* at 376.

reexamine proof of the influence of the *Code Napoléon* on national codifications and on subsequent legal developments. Rather, given the importance in Latin America of the *Code* and other French sources from the mid-nineteenth to the mid-twentieth centuries, this study now addresses the factors weakening the impact of the *Code* and those factors keeping its force alive.

## II. THE *CODE NAPOLÉON* BURIED

In the past few decades Latin American private law has undergone substantial independent changes that have served to bury the *Code* in the region. Some forces driving these changes are common to many other civil law countries where the limits of national codification are facing demands from expanding subject matters, decodification, and globalization.<sup>26</sup> Other forces driving these changes have been unique to the region. International political and economic forces realigning Latin American interests, economies, and thought in the twentieth century have directly affected the development of private law in the region. Although the United States has been an actor in several of these developments, its influence should not be given too great an emphasis in seeking the reasons why the *Code* has become buried. Nonetheless, because the United States' influence preceded many of the other influential factors, it is treated first in this study.

Perhaps the most important political factor was World War II. This war created political, economic, and intellectual shifts in Latin America's relationship with other countries of the world. While the direction of European law in general was altered by the war, it was altered even more so from Latin America's standpoint as communication between European and Latin American countries was substantially curtailed. The war interrupted trade between Europe and Latin America, and the influences that came with the status of trading partner waned for Europe. Even though French influences on Latin American culture and thought continued strongly into the first part of the twentieth century, they competed with and were displaced by a growing U.S. cultural presence that had begun to enter Latin America even before World War II. In the first half of the twentieth century, the United States' national security concerns prompted it to assert its policies and influence with greater strength in the region. By 1945, Germany and Italy had lost all credibility in Latin America, and England and France were too weak from the war to carry on meaningful foreign influence in the region. The United States thus became the main foreign influence in Latin America.<sup>27</sup> With hemispheric interests in mind shortly after World War II, the Treaty of Rio led to the Organization of American States (OAS).

Latin America's legal world reflected these broad political, cultural, and intellectual shifts. In light of the OAS, some U.S. law schools began to offer programs for Latin American law students and lawyers to foster greater understanding and economic ties between the two legal communities. For example, in 1947, major U.S. corporations sponsored the Inter-American Law Institute at New York University. This support provided fellowships for

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26. See MERRYMAN, *supra* note 2, at 151-58.

27. See SKIDMORE & SMITH, *supra* note 16, at 367-68.



“outstanding young lawyers from the countries to the south to spend an academic year in the United States to study the Anglo-American legal system.”<sup>28</sup> By the time Venezuelan law student Urbaneja became a professor, teaching civil law from 1939 to 1950, he regarded his contributions as spearheading a movement away from the rhetorical tradition of the French commentators toward the use of practical cases “in the style of the North American method created at Harvard by Langdell.”<sup>29</sup> This comment is illustrative of a regional shift in mentality about foreign influences in Latin American legal education, and thus in Latin American law generally. This shift from European to U.S. influence lessened the importance of the *Code Napoléon* in Latin America.

Perhaps equally as important as World War II, the Cold War established U.S. interest in influencing legal change in Latin America. U.S. policy makers saw economic and social development as the tool to inoculate the region from international Communism. Development was linked to law and legal systems, and U.S. law professors advanced the Law and Development Movement in many countries of Latin America during the 1960s and 1970s. This well-meaning exercise in sharing expertise focused on changing methods of legal instruction, remodeling the lawyer into social engineer and problem solver, and instilling rule skepticism along the lines of American legal realism.<sup>30</sup> For instance, in the classroom the movement sought to replace the model of part-time eloquent and distinguished professors lecturing on code provisions with a model of interactive, “Socratic,” and clinical experiences for students. The reasons for this movement’s failure are varied, and in some instances it ushered in a backlash to more traditional methods and expectations in legal education. For example, one dean of a Colombian law school who had embraced such changes was “replaced by an older French trained attorney” who cast off the newer trends.<sup>31</sup> For the most part, however, this movement did effect some changes that shifted Latin American law farther away from European methods and the *Code Napoléon*. These changes included advancing sociological critiques of legal formalism, instilling a more self-reflective approach to legal education in the region, and fostering numerous interpersonal connections between Latin American and U.S. educators that would create long-standing academic relationships.<sup>32</sup> Hence, with the Law and Development Movement we find another factor serving to bury the *Code Napoléon*.

The United States’ attempts to influence Latin American legal change did not stop with the Law and Development Movement. Indeed, after a brief respite and period of regrouping, U.S. legal academics—many supported by the same

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28. PHANOR J. EDER, *A COMPARATIVE SURVEY OF ANGLO-AMERICAN AND LATIN-AMERICAN LAW* xi (1950).

29. See PERDOMO, *supra* note 24, at 379.

30. See JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* 4 (1980).

31. DENNIS O. LYNCH, *LEGAL ROLES IN COLOMBIA* 116 (1981).

32. See generally Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 *FLA. L. REV.* 41 (2003).

organizations behind the Law and Development Movement—advanced a program best described as the Rule of Law Movement. In recent decades, U.S. lawyers and professors have mostly advised governments on institutional changes that would better their administration of justice. Initiatives have included: studying the judiciary and court systems and making recommendations for increasing their independence; improving the training of government lawyers, judges, and other personnel; increasing the efficiency and transparency of legal proceedings; and making changes in legal education.<sup>33</sup> This academic and practical emphasis on institutional and procedural aspects of law, rather than the content of its substantive provisions, has also served to lessen the importance of the *Code* and its method.

In addition to, and concurrent with, the prominence of United States models and influences, international investment in Latin America and the globalization of legal practice have led to sidestepping domestic law and national legal systems. One aspect of globalization has been to reduce the importance of individual nations. A result of the diminution of the importance of individual states is a diminution in the importance of their domestic codes, including the civil codes of each country. Thus, in a legal world without borders, codes that indirectly support the autonomy of nation-states are less important.<sup>34</sup> With regional agreements on international economic law and related matters, such as the North American Free Trade Agreement (“NAFTA”), the Andean Community, MERCOSUR, and the Free Trade Area of the Americas (“FTAA”), Latin American domestic law has become subjected to international norms and ideas that diminish the importance of domestic law in these areas of law, though the effect has been slight in the realm of private law.<sup>35</sup>

The effect is not limited to trade and related matters. In recent decades, international lawyers have put forth various consensus views of how transactions related to business and property ought to be conducted, structured, and documented. Some have argued that globalization really means North “Americanization,” as Wall Street and Washington lawyers further the legal hegemony of the United States throughout the world.<sup>36</sup> Business and property related transactions typically provide governing rules by contract or choice of law provisions. Thus, in such transactions, domestic law becomes increasingly irrelevant. If domestic law becomes increasingly irrelevant, the underpinnings of domestic law, e.g. the code, become less important. Consequently, the globalization of business law serves to bury the *Code*.

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33. Alfredo Fuentes-Hernández, *Globalization and Legal Education in Latin America: Issues for Law and Development in the 21st Century*, 21 PENN ST. INT’L L. REV. 39, 43-47, 51-59 (2002). Funding for such initiatives has also come from the World Bank. Joseph R. Thome, *Heading South but Looking North: Globalization and Law Reform in Latin America*, 2000 WIS. L. REV. 691, 697.

34. CARLOS AUGUSTO RAMOS NÚÑEZ, CODIFICACIÓN, TECNOLOGÍA Y POSTMODERNIDAD: LA MUERTE DE UN PARADIGMA 56-68 (2000).

35. H. Patrick Glenn, *Harmony of Laws in the Americas*, 34 U. MIAMI INTER-AM. L. REV. 223, 230-31 (2003).

36. Ugo Mattei, *The Issue of European Civil Codification and Legal Scholarship: Biases, Strategies and Developments*, 21 HASTINGS INT’L & COMP. L. REV. 883, 888 (1998).

As another product of globalization, Latin America has rapidly adopted systems of alternative dispute resolution, particularly in resolving private law disputes. Thus, traditional tribunals can be avoided by the use of mediation and arbitration. Where such methods of dispute resolution are employed, decision makers may turn to various substantive rules of decision, including rules contractually agreed to by the parties and rules from other legal systems. They may also decide disputes without recourse to any particular legal rule. Thus, with the use of alternative dispute resolution, the importance of national code provisions and their application dwindles.

Factors burying the *Code* have not been exclusively external, such as those resulting from U.S. or international pressure. Many factors are either indigenous developments or internal changes commonly found in other civil law systems. Addressed next, these factors include the development of a strong and reliable body of indigenous commentary literature, the growth of case law as a source of law, various aspects of decodification, and the phenomenon known as "recodification."

Since the beginning of the twentieth century, lawyers and legal academics in many Latin American countries have provided highly specialized commentary sources on their own national codes. These works have, in effect, replaced the more standard, yet often more general, French and other European works commenting on the civil law. While these Latin American works may continue to cite occasionally the European masters of the *Code*, they rely much more on national and even other Latin American treatise writers for authority. For example, a recent text on testamentary succession from Colombia included references to Baudry-Lacantinerie, Demolombe, and Planiol y Ripert. Nonetheless, these references are dwarfed by references to the works of Chileans Claro Solar (1945) and Somarriva Undurraga (1961), and of Colombian Carrizosa Pardo (1961).<sup>37</sup> Indeed, treatises produced in countries of the region with leading legal publishers such as Argentina, Chile, and Mexico are often used as authoritative texts in other countries, and these have replaced older translations of French and other European commentaries.<sup>38</sup>

The growth of case law, precedent, and even the doctrine of *stare decisis* have also served to bury the *Code*. Cases, as both interpretational tools and sources of law, have gained ground in areas once ruled exclusively by civil code provisions.<sup>39</sup> A common example in Latin America, and perhaps in the entire civil law world, is the growth of tort law.<sup>40</sup> As cases expand and explain code provisions, the autonomy of the code as sole source of substantive law is eroded.

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37. See ROBERTO SUÁREZ FRANCO, *DERECHO DE SUCESIONES* 451-54 (2d ed. 1996).

38. See Alejandro M. Garro, *Unification and Harmonization of Private Law in Latin America*, 40 AM. J. COMP. L. 587, 612 (1992).

39. See RAMOS NÚÑEZ, *supra* note 34, at 86; Arthur T. Von Mehren, *Some Reflections on Codification and Case Law in the Twenty-First Century*, 31 U.C. DAVIS L. REV. 659, 667-70 (1998).

40. See generally Jonathan A. Miller, *Products Liability in Argentina*, 33 AM. J. COMP. L. 611 (1985); Natalia M. Bartels & M. Stuart Madden, *A Comparative Analysis of United States and Colombian Tort Law: Duty, Breach, and Damages*, 13 PACE INT'L L. REV. 59 (2001).

Cases as sources of law have also gained significant ground through the growth of constitutional law in Latin America. The *Code* is yielding its primacy in the area of constitutional law. Thus, as in Europe, the constitutionalization of Latin American law has created a methodological shift for lawyers and judges in Latin America.<sup>41</sup> Constitutional law is judicial interpretations of constitutional provisions, often by constitutional courts. Constitutional law is, therefore, case law, which in this context has led to the development of notions of precedent and *stare decisis*.

Along with the heightened attention constitutions have recently received, the allied areas of effective courts, human rights, and individual rights have also garnered significant academic attention.<sup>42</sup> Constitutional law, particularly the procedural devices that many Latin American countries are offering their citizens to enable them to challenge actions on constitutional grounds, has served to increase the power of judges and reduce the formalism often instilled in judges by traditional civil law training.<sup>43</sup> With the growth of constitutionally based actions, many judges, not just the judges of constitutional courts, are deciding the constitutionality of state, and even private, actions. With such actions, judges make constitutional law to apply to their cases. Cases, whether as newly introduced tools of interpretation for traditional areas of civil law or as new products of constitutional law, are burying the *Code* in Latin America.

Another development related to the sources of law and incorporating the idea of decodification follows from the increasing number of sources generally, and even the growing number of codes.<sup>44</sup> The idea behind this process of decodification is that the traditional structure of the Napoleonic Codes no longer serves as a useful organizational device because of the complexity and volume of new legislation.<sup>45</sup> As the number of areas requiring legislative action increases, these new topics often do not find their home within the structures of the civil code, or even the traditional codes. For example, Latin American law experienced the beginning of this decodification process with labor law, agrarian reform, mining law, and family law. Legislation affecting these areas was just too large and complex to be incorporated into existing codes and resulted in the creation of

41. See NATALINO IRTI, *LA EDAD DE LA DESCODIFICACIÓN* 63-65, 93-106 (José Maria Bosch ed., L. Rojo Ajuria trans., 1992) (originally titled *L'ETÀ DELLA DECODIFICAZIONE*, 1979).

42. See Kirsten Matoy Carlson, *Premature Predictions of Multiculturalism?*, 100 MICH. L. REV. 1470 (2002) (reviewing DONNA LEE VAN COTT, *THE FRIENDLY LIQUIDATION OF THE PAST: THE POLITICS OF DIVERSITY IN LATIN AMERICA* (2000)).

43. See Bernardino Bravo Lira, *Estudios de derecho y cultura de abogados en Chile 1758-1998: tras la huella ius commune, la codificación y la descodificación en el Nuevo Mundo*, 20 REVISTA DE ESTUDIOS HISTÓRICO-JURÍDICOS 85 (1998); Luis Díez-Picazo y Ponce de Leon, *Codificación, descodificación y recodificación*, 45 ANUARIO DE DERECHO CIVIL 473, 480-81 (1992).

44. See generally *id.*; Maria Luisa Murillo, *The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification*, 11 J. TRANSNAT'L L. & POL'Y 163 (2001); see also IRTI, *supra* note 41 (defining the terms "decodification" and "microsystems"); Miguel Acosta Romero, *El fenómeno de la descodificación en el derecho civil*, REVISTA DE DERECHO PRIVADO, July - Aug. 1989, at 611; Alejandro Guzmán B., *Codificación, descodificación y recodificación del derecho civil chileno*, 90 REVISTA DE DERECHO Y JURISPRUDENCIA Y GACETA DE LOS TRIBUNALES 39 (1993).

45. See Díez-Picazo, *supra* note 43, at 478-79.

new, separate codes. Additionally, new areas of law, such as laws for minors, environmental law, corporate compliance, securities regulation, and the insurance industry, require very detailed rules and administrative procedures established under "legislative microsystems." With the appearance of these new codes and microsystems, the importance of the code structure diminishes.<sup>46</sup>

In addition to multiple sources of law leading to decodification, some have also viewed the introduction of new technologies as contributing to the process. For instance, tying the book, the nation state, and the code together as coworkers in modernity, Ramos Núñez argues that the CD-ROM, the Internet, globalization, and a new non-code based *ius commune* symbiotically lead to the beginning of a postmodern era, destroying a past paradigm of Latin American law.<sup>47</sup> This shift is probably not unique to Latin America, but may also be observed throughout the civil law world.

While decodification has been a common shift in all systems based on codes, Latin American law has also been subject to legislation and microsystems that are products of their particular populations. Legislation and institutions established to protect and promote native populations are being advanced and enacted in almost every country of the region.<sup>48</sup> Because many of these developments are guided by international models and organizations, such legal pluralism in Latin American countries lessens the importance of the traditional single codified law.<sup>49</sup> Thus, in addition to the common elements of decodification found in most civil law systems, legislation directed at the indigenous populations of Latin America has helped to bury the *Code* in the region.

In summary, various legal changes have served to remove the *Code* from importance in the course of Latin American private law. The *Code* had a high place in Latin American law of the nineteenth century. It provided a guiding structure for legal thought, development, institutions, and education. Nonetheless, its taxonomic power has decreased and more areas of law are found outside the application of its provisions. The passage of time and numerous elements have served to reduce the importance of the *Code*, particularly in the past fifty years. Some of these elements came from early outside influences such as the United States, although these may not be of primary importance. Some of these elements have been specific to Latin America, while others have been changes shared by civil law jurisdictions generally, and still others are the product of global economic change. Each of the changes described above has served in some way to bury the *Code*.

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46. See RAMOS NÚÑEZ, *supra* note 34, at 26, 50.

47. See *id.* at 31-91.

48. See Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS J. 57, 74-89 (1999).

49. See Maria Luisa Bartolomei, *The Globalization Process of Human Rights in Latin America Versus Economic, Social and Cultural Diversity*, 25 INT'L J. LEGAL INFO. 156, 173-79 (1997); John A. Mills, *Legal Constructions of Cultural Identity in Latin America: An Argument Against Defining "Indigenous Peoples"*, 8 TEX. HISP. J.L. & POL'Y 49 (2002).

### III. THE *CODE NAPOLÉON* RULES

Despite the forces working to bury the *Code*, it rules from its grave. When forced to give one-sentence descriptions of their legal systems, Latin American lawyers will still assuredly assert that theirs is based on the *Code Napoléon*. The *Code* rules as a symbol and unifying structure of the law. The *Code* represents a paradigm of law, a *mentalité*, and a talisman. Indeed, it is not so much the particular French Civil Code of 1804 that continues to rule, but rather what the *Code Napoléon* stands for and what the *Code's* progeny is in terms of substantive law and legal method in the region. In broad terms the *Code* stands for the virtues of codification: rationality, progress, pedagogy, and utopia.<sup>50</sup> The *Code* is emblematic of principles of law and justice within the positivist legal tradition. The paradigmatic function of the *Code* has its roots in history, and its authoritative quality and nostalgic call continue today in Latin America and the world. George P. Fletcher has recently grouped the *Code* with the U.S. Constitution and the German Civil Code of 1900 as one of the "three nearly sacred books in Western law."<sup>51</sup> The intervening modifications by translation, by early drafters, and by subsequent legislators and executive decrees are inconsequential to one describing the nature of Latin American private law. After nearly two centuries of autochthonous legal change and modification, the French *Code* rules. Its authority reaches across these changes and modifications. It is, indeed, a powerful text.

In many ways, the *Code* continues to serve a taxonomic function as the intellectual superstructure upon which all legal thought is built. Its structure continues to rule the structure of the law, just as the forms of action continue to rule (often silently) the common law. As Fletcher observes, "The code is supreme not in its language, not in the hierarchy of the legal system, but in the framework of thought that guides the mind of the French jurist."<sup>52</sup> Similarly, Pierre Legrand has observed, "[a] civil code is the grammar of the law."<sup>53</sup> For Latin America, Alejandro Garro has noted that the *Code* "provided Iberoamerica with a legal glossary followed by Andres Bello in his Chilean Civil Code, Velez Sarsfield in his Argentine Civil Code, and by the drafters of the Spanish Civil Code."<sup>54</sup> Thus, on this taxonomic level, it is a grammar, a glossary, a *mentalité* that continues today.

The substance and structure of the code have also dictated certain forms of institutions that have become established in the region. As a result, the nature of the code and its subject matter has dictated a certain place for the judiciary and the nature of tribunals, not only by substantive area, but also in approach to judicial decision-making.<sup>55</sup> Thus, the role and function of courts in Latin America were

50. See Díez-Picazo, *supra* note 43, at 474-78.

51. George P. Fletcher, *Three Nearly Sacred Books in Western Law*, 54 ARK. L. REV. 1, 2 (2001).

52. *Id.* at 12.

53. Pierre Legrand, *Strange Power of Words: Codification Situated*, 9 TUL. EUR. CIV. L.F. 1, 4 (1994).

54. Alejandro M. Garro, *On Some Practical Implications of the Diversity of Legal Cultures for Lawyering the Americas*, 64 REV. JUR. U.P.R. 461, 469 (1995).

55. See JEAN-LOUIS HALPÉRIN, *HISTOIRE DU DROIT PRIVÉ FRANÇAIS DEPUIS 1804* 52-56 (1st ed.

established in a period before the burial of the *Code*, and these courts and their methods of deciding cases continue today in Latin America.

Similarly, the structure of legal education continues for the most part in the continental, French tradition. Indeed, in many countries of the region the *Code* defines the structure of the curriculum. Just as the forms of action still distantly define the contours of the first-year curriculum in the United States, so too does the *Code* establish borders between some of the required courses of Latin American law schools. Courses may be entitled "personas," "bienes," "obligaciones" and "sucesiones" following code divisions, and students carry their versions of the code with them to class. The method of education continues in the tradition of the *Code* with the bulk of instruction based on lectures about code provisions. The language used is precise and erudite, and law lectures are a particular genre with their own style, vocabulary, and delivery. The performance aspects of teaching follow European lines, and student participation is for the most part limited to note-taking and admiration. In the classroom, the *Code* rules.

In the Latin American legal mind, the *Code* stands for and perpetuates continuity with Enlightenment Europe and orderly, liberal, powerful states. The *Code*, particularly through its important European commentators, provides cultural and linguistic links between Latin America and Europe that will continue throughout this century. Latin Americans, when challenged by Anglo-American lawyers, invoke the *Code* as a basis for their legal system, asserting legal, cultural, and political superiority. It is an assertion of Latin American continuity with a great European tradition. The *Code* paradoxically stands for both "antiquity greater than the common law," because its roots are in Roman law, and "modernity and rationality," because it is product of nineteenth-century France. Mention of the *Code* ties Latin America to its own and to Europe's *ius commune*. To invoke the *Code* is to invoke Europe, and to invoke Europe is to chart certain aspirations of Latin America in political and economic terms. As Jorge Esquirol has pointed out, "Latin American societies are not European, only their jurists pretend to be. The notion of Europeanness is rather a political aspiration. Its goal is assimilating illiberal Latin America to the culture of European democracy."<sup>56</sup> Similarly, to invoke the *Code Napoléon* is to affirm the Europeanness of Latin American law and thus to elevate the cultural and political position of Latin America in the western world view.

By linking Latin American law with Europe, Latin American lawyers not only include their countries in the European tradition, but also exclude their countries from the legal, cultural, political, and economic realm of the United States. By embracing European law, Latin American lawyers construct barriers to the United States. Facile references to the *Code* become a short-hand method of establishing "otherness" from the legal system and the perceived hegemony of the United States. References to the French *Code* may even imply linguistic ties of the Romance languages which similarly serve to include Europe and to exclude the

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1996).

56. Esquirol, *supra* note 3, at 470.

United States. Just as the process of codification is political, so too is the continued appeal of a code. Thus, as a political symbol, the *Code* rules from its grave.

Related to the code's Europeanness is its general place in history in the popular and legal mind. Beyond authority through the ages and authority through reason, the *Code* also rules through nostalgia. The assertion that Latin American law is based on the *Code Napoléon* recalls a pre-war, European-aligned past. The days when Latin American law was governed by the *Code* and its methodology were, in nostalgic terms, simpler days for the law and for the people. The very mention of the *Code* imports thoughts of the days of the great national codifiers and commentators, of days before present problems and complexities. The *Code*, as text, has also been seen as an important method of conveying the content of the law beyond classroom and courtroom to laypeople. The notion, in theory if not in practice, that the provisions of the *Code* should be non-technical and available for lay understanding is another important way the *Code* continues its reign.<sup>57</sup>

Even on the level of substantive rules, the inverse of decodification, with its new codes and microsystems, can be observed. This process is labeled "recodification." Some legal areas that for social or economic reasons were separated from the core of the civil code have now returned, either as new provisions within the ambit of the code or because these areas of law have been removed from the extensive legislation they once demanded under prior governmental policies.<sup>58</sup> This is particularly true where Socialist legislation has been erased as part of capitalist reforms. Thus, employment contracts may return to the jurisdiction of the civil code as a contract for services and residential leases for urban housing may return to the civil code as just another kind of lease. Nonetheless, some have noted that the idea of recodification is artificial. Once legal rules have been established in systems outside the code, the return of these subject matters to the civil code does not reinvigorate the code. This is particularly true in areas of the law once governed exclusively by the code, but now subject to administrative oversight and institutions.<sup>59</sup>

While the forces of globalism have for the most part served to bury the *Code*, the effects of internationalization on private law have served to keep the *Code* ruling in the mind of Latin American lawyers. Those involved in codifying private international law on a national level have seen this process as an outgrowth of the civil code.<sup>60</sup> On the European level, in the movement towards a European Civil Code, Ugo Mattei identified one group of contributors as representing a "highly homogeneous European legal academic elite" who seek to steer the project with

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57. See ROBERT CHARLES MEANS, UNDERDEVELOPMENT AND THE DEVELOPMENT OF LAW: CORPORATIONS AND CORPORATION LAW IN NINETEENTH-CENTURY COLOMBIA 272 (1980).

58. See generally Murillo, *supra* note 44.

59. RAMOS NÚÑEZ, *supra* note 34, at 82-85.

60. See Paul Lagarde, *Sur la non-codification du droit international privé français*, 25 SYRACUSE J. INT'L L. & COM. 45 (1998) (describing the mid-twentieth century attempts); François Rigaux, *Codification of Private International Law: Pros and Cons*, 60 LA. L. REV. 1321 (2000).



Roman law reins.<sup>61</sup> Indeed, those advancing the European Code project seem to press for individual national civil code methodologies and structures.<sup>62</sup> Similarly, Latin American countries are represented in the International Institute for the Unification of Private Law (ten of UNIDROIT's 58 member countries are from the region), the United Nations Commission on International Trade Law (six of UNCITRAL's 36 member countries are from the region), and the Hague Conference on Private International Law (eight of 64 member countries).<sup>63</sup> Regional developments in private international law are somewhat more limited when compared to the efforts of UNIDROIT, UNCITRAL and the Hague Conference, but the focus of these undertakings often follows the traditional *Code* method of larger projects.<sup>64</sup> The basis for the construction of private international law is one that shares much with the tradition of nineteenth-century codification on the domestic level. Thus, assumptions about both method and substance in the creation of private international law are based in the code and comparative legislation. In private international law, the *Code* continues to rule.

Numerous factors in Latin America have served both to bury the *Code* and to keep it ruling in the minds of lawyers and in the life of the law. The contemporary existence of these factors has led to a tension that will continue into the twenty-first century in the region. Writing about Peru in 2000, Ramos Núñez stated:

The death of codes, however, has not yet come. Perhaps the end is near. A paradigm so interior to the conscience of lawyers does not pass away only once, but during a long historical process. According to Kuhn, there are circumstances, although rare, in which two paradigms can coexist peacefully. Surely, we find ourselves in that rare conjuncture at which the code is not resigned itself to oblivion.<sup>65</sup>

The paradox of two paradigms continues. In practice, the *Code* has been buried; in institutions, structures, and *mentalité*, the *Code* rules. Indeed, we have buried the *Code Napoléon*, but it still rules us from its grave.

61. Mattei, *supra* note 36, at 885-86, 894-98.

62. Pierre Legrand, *Codification and the Politics of Exclusion: A Challenge for Comparativists*, 31 U.C. DAVIS L. REV. 799 (1998); see Mattei, *supra* note 36, at 894-98.

63. Fuentes-Hernández, *supra* note 33, at 50-51; see also Hague Conference on Private International Law, Member States, at [http://www.hcch.e-vision.nl/index\\_en.php?act=states](http://www.hcch.e-vision.nl/index_en.php?act=states). Listing (last visited Sept. 24, 2004).

64. See Garro, *supra* note 38; Paul A. O'Hop, Jr., *Hemispheric Integration and the Elimination of Legal Obstacles under a NAFTA-Based System*, 36 HARV. INT'L L.J. 127, 164-66 (1995); see also Consejo Permanente de la Organización de los Estados Americanos, Comisión de Asuntos Jurídicos y Políticos, *Conferencias Especializadas Interamericanas sobre Derecho Internacional Privado: Informe y conclusiones*, at [http://scm.oas.org/doc\\_public/SPANISH/HIST\\_03/CP11200S04.doc](http://scm.oas.org/doc_public/SPANISH/HIST_03/CP11200S04.doc) (Apr. 17, 2003).

65. RAMOS NÚÑEZ, *supra* note 34, at 91.