

THE EVOLUTION OF CODIFICATION IN THE CIVIL  
LAW LEGAL SYSTEMS: TOWARDS DECODIFICATION  
AND RECODIFICATION

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I. INTRODUCTION

The objective of this article is to consider the fundamental transformation that has been taking place in the civil law tradition<sup>1</sup> due to the influence of the decodification and recodification processes during the 20th century and their perspective on the future. The article makes special reference to the Latin American civil codes.

Codification of the 19th century was a unique socio-historical phenomenon that emerged with the impulse of the French Revolution and the rise of philosophical doctrines such as, *ius-naturalism*, rationalism and the Enlightenment. However, by the

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1. The civil law and the common law traditions are the most highly influential legal traditions in the contemporary world, and have been exported with greater or less effect to other parts of the world. See JOHN MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA AND EAST ASIA* 3 (1994).

turn of the 19th century, the “classical” Codification had been subjected to new forces that gradually changed the legal and social order with crucial consequences on the civil law tradition. The dynamics of the legal change were symbolized by many factors. Two of the more relevant being the decodification and the recodification processes. The former relates to special legislation away from the civil codes that causes fissures in their unit body, and the latter refers to the partial and global reform to avoid civil codes obsolescence.

In Latin America, the 19th century Codification in Central and South America had some particular characteristics. The codification began after the independence process from Spain and Portugal in order to avoid uncertainty of the applicable law, to stabilize the legal system, and to consolidate new national regimes. In fact, drafting civil codes and constitutions was the primary interest of jurists and legislators in the Latin American new independent republics. Moreover, the French Civil Code<sup>2</sup> was used as a “model” by several 19th century Latin American civil codes. Subsequently, new legal approaches and doctrines were used, such as Germanic<sup>3</sup> and Italian civil legislation,<sup>4</sup> among other legal sources. Throughout the 20th century, the tendency towards decodification and recodification in Latin America had substantially transformed the content and structure of the civil codes.<sup>5</sup> Regardless of the dramatic impact of the decodification process in the civil legal systems, however, the recodification process seemed to have substantial momentum in Europe and

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2. For a discussion of the influence of the French Civil Code, see MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 44-64 (1994); MERRYMAN ET AL., *supra* note 1, at 1149-62; JOSE CASTAN TOBEÑAS, *I-1 DERECHO CIVIL ESPAÑOL COMUN Y FORAL* 217-21 (Editorial Reus ed. 1988); LUIS DIEZ PICAZO & ANTONIO GULLON, *SISTEMA DE DERECHO CIVIL* 49 (7th ed. 1990).

3. For a discussion of the influence of the German Civil Code, see, e.g., MERRYMAN ET AL., *supra* note 1, at 1163-73; Paolo Becchi, *La Codificación Posible Hegel entre Thibaut e Savigny*, *ANUARIO DE DERECHO CIVIL*, Jan.-Mar. 1995, at 195-217; JOHN MERRYMAN, *LA TRADICIÓN JURÍDICA-ROMANO CANÓNICA* 59-71 (Fondo de Cultura Económica ed. 1989) [hereinafter MERRYMAN II].

4. For a discussion of the influence of the Italian Civil Code, see Sandro Schipani, *Notta Introduttiva*, in V STUDI SASSARESI (*DIRITTO ROMANO, CODIFICAZIONI E UNITÀ DEL SISTEMA GIURIDICO LATINOAMERICANO XIII-XIV* (Giuffrè et al. ed. 1981); LUIS DIEZ-PICAZO Y PONCE DE LEON, *Codificación, Descodificación y Recodificación*, *ANUARIO DE DERECHO CIVIL*, Apr.-Jun. 1992, at 473-84 [hereinafter DIEZ-PICAZO].

5. For a historical perspective of Codification after the independence process in Latin America, see, e.g., JORGE BASADRE, *HISTORIA DEL DERECHO PERUANO* 323 (4th ed., Librería Studium 1988 (1937)); FERNANDO DE TRAZEGNIES, *LA IDEA DE DERECHO EN EL PERÚ REPUBLICANO DEL SIGLO XIX* 151 (Fondo Editorial Pontificia Universidad Católica del Perú 1980).

Latin America, indicating that it would influence the development of the civil law tradition in the foreseeable future.

In summary, after an Introduction in Part I, this Article includes in Part II a brief discussion of the Codification in the 19th century, with special references to Latin American civil codes. In addition, Part III and Part IV contain an approach of the decodification and recodification processes. In both cases, the discussion focuses on the impact of this phenomenon in the classical Codification and its development in the 20th century. Specifically, the last part includes a comment about the recodification process in Latin America.

## II. THE CODIFICATION

### A. *The Development of the Codification Process*

As many commentators have pointed out, the Codification was a unique socio-historical phenomenon<sup>6</sup> developed in the civil law tradition during the 19th century. The Codes drafted during this process differed radically from the compilations of the Roman, Canonic law, or other codes.<sup>7</sup> The root of the Codification was the “intellectual revolution” that took place in Europe in the 18th century with its principles and doctrines based on the Enlightenment, *Ius* rationalism, secular Natural Law, Bourgeois liberalism, and Nationalism. These ideas produced a new way of thinking about society, law, economy, and state with decisive consequences for the civil and common law tradition.<sup>8</sup> This

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6. ANTONIO HERNANDEZ GIL, FORMALISMO, ANTIFORMALISMO Y CODIFICACION, 23 (1970); see also Manuel de la Puente y Lavalle, *La Codificación*, 30 THEMIS 29, 36 (1994); CASTAN TOBEÑAS, *supra* note 2, at 214; Carlos Lasarte Alvarez, *El Derecho Civil en la Epoca Codificadora y Vicisitudes Posteriores*, in II CENTENARIO DEL CÓDIGO CIVIL; 1105, 1106-62 (Editorial Centro de Estudios Ramon Areces ed. 1990); MERRYMAN II, *supra* note 3, at 59-71; Picazo, *supra* note 4 at 474-477; Angel M. Lopez y Lopez, *Constitución, Código y Leyes Especiales, Reflexiones sobre la Llamada Descodificación*, in II CENTENARIO DEL CÓDIGO CIVIL 1163, 1164-76 (Editorial Centro de Estudios Ramon Areces ed., 1990); Juan Roca Guillamon, *Codificación y Crisis del Derecho civil*, in II CENTENARIO DEL CÓDIGO CIVIL 1755, 1756-75 (Editorial Centro de Estudios Ramon Areces ed. 1990).

7. There are substantial differences between Code and Compilation. The Digest of Justinian, the Canonic codes, The 7 Partidas, and The Fueros do not have the characteristics of the modern Codes produced as a result of the Codification process of the 19th century. See CASTAN TOBEÑAS, *supra* note 2, at 211.

8. MERRYMAN ET AL., *supra* note 1, at 441-51; Guillamon, *supra* note 6, at 1755; ERIC J. HOBBSBAWN, LAS REVOLUCIONES BURGUESAS 77-129 (Ediciones Guadarrama ed. 1964); MOLTOR-SCHOLOSSER, PERFILES DE LA NUEVA HISTORIA DEL DERECHO PRIVADO 61 (trans. Martinez Sarrión 1980). For the development of naturalism in connection with the relationship between justice and law which also applies to the question of the relationship between justice and international economic law, see Frank Garcia, *Trade*

development deeply influenced western nations, producing dramatic events, specifically, the American and French Revolution, the Italian Risorgimento, the wars of independence in Central and South America, and the unification of Germany, among others.

In reference to civil law tradition countries, this philosophical and political phenomenon had a significant effect in the development of public and private law. In particular, Wieacker explained that: “the Codification was not focused on gathering, compiling, improving or reforming the existent scientific or pre-scientific law - as the former German reforms or Roman and Spanish compilations-, but planning a better society by means of new systematic and creative law.”<sup>9</sup> In fact, the relation Civil Code/Constitution, with the primacy of the private law, supported the legal framework of the 19th century bourgeois liberal society.<sup>10</sup> According to John Merryman, one of the most important aims of the French Revolution was to unify private law, and as a result, “the spirit of the intellectual revolution led the French to promulgate five codes: *Les Cinq Codes*. These include – after the famous *Code Civil des Français* (1804) – *Le Code de Procédure Civile* (1806), *Le Code de Commerce* (1807), *Le Code Pénal* (1810) and *Le Code d’Instruction Criminelle* (1810).”<sup>11</sup> Of the five codes, the *Code Civil* is traditionally well known for its fundamental role in consolidating the modern Codification and its vast influence around the world. The French Civil Code’s legal sources include, among others, the *coutumes* of Paris, the Roman Law studies elaborated by French jurists Domat and Pothier, and the law of the Revolution.<sup>12</sup>

Since the ideology of the French Codification reflected the influence of the French Revolution, one of its principal objectives was to repeal entirely the old legal system. In fact, the

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and Justice: *Linking the Trade Linkage Debates*, 19 U. PA. J. INT’L BUS. L. 391, 404-11 (1998).

9. F. WIEACKER, *HISTORIA DEL DERECHO PRIVADO DE LA EDAD MODERNA* 292 (Francisco Fernández Jardón trans., Aguilar 1957 (1908)). See JOSE LUIS DE LOS MOZOS, *Prologue to I EL CODIGO CIVIL DEL SIGLO XXI* 11, 25 (Comisión de Reforma de Códigos del Congreso de la República del Perú ed. 2000); Alvarez, *supra* note 6, at 1106.

10. The relation between Civil Code/Constitution under the bourgeois-liberal revolution in the 19th century was the framework of the legal system. In the words of Lopez y Lopez: “*En una visión de conjunto, el Estado Liberal confiaba el andamiaje jurídico de la sociedad civil al Derecho privado, en rigor a los Códigos civiles. No tenía necesidad de rigidizar los valores profundos, que estaba llamado a representar, en las Cartas Constitucionales, por entenderlos suficientemente amparados por los Códigos.*” Lopez y Lopez, *supra* note 6, at 1165.

11. MERRYMAN ET AL., *supra* note 1, at 453.

12. CASTAN TOBEÑAS, *supra* note 2, at 211.

institutions of the *Ancien Régime*,<sup>13</sup> absolute monarchy, interlocking powers of the King, nobility, feudalism, territorial division, courts system and others, were eliminated. In its place, by means of the Codes, a new legal system was institutionalized. The legal system was based on principles of the French Revolution and the Enlightened Society. The primacy of the statute law incorporated the equality under the law, individual freedom, private property, liberty of contract and separation of powers to prevent intrusion of the judiciary into areas reserved to the legislative and executive.<sup>14</sup>

According to the principles of *ius* rationalism, the Codification focused on systematizing and simplifying the legal system while avoiding the complex *ius commune* framework.<sup>15</sup> As a consequence, it was necessary to draft codes without gaps and with coherent, clear, and complete legal rules. Thus, as far as accessibility to the people was concerned, the French Civil Code represented the model of coherence and simplicity.<sup>16</sup> Jean-Etienne-Marie Portalis, one of the most influential drafters of the French Civil Code, in his *Discours Préliminaire*, remarked that the provisions of the Civil Code were elaborated as principles or maxims to be developed and applied by judges or jurists, although during the post-evolutionary period, the tendency was to deny the judiciary lawmaking power.<sup>17</sup>

In addition to France, in the beginning of the 19th century, the tendency towards Codification caused a widespread interest in Germany and others parts of Europe and Latin America. In 1814, Thibaut, the eminent German law professor, proposed that Germany adopt the Codification to unify the entire legal system, thus mirroring the simplicity and coherence of the French civil code, which was the best model to follow.<sup>18</sup> However, Savigny and

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13. About the *Ancien Régime* and other social and economic aspects before the revolution, see HOBBSBAWN, *supra* note 8, at 25-45.

14. See JEAN-ÉTIENNE MARIE PORTALIS, DISCURSO PRELIMINAR DEL PROYECTO DE CODIGO CIVIL FRANCÉS 27-113 (Manuel de Rivacoba y Rivacoba trans., Edeval ed. 1978); Lopez y Lopez, *supra* note 6, at 1163-64; Díez-Picazo, *supra* note 4, at 474-78.

15. MERRYMAN ET AL., *supra* note 1, at 449-51.

16. See Díez-Picazo, *supra* note 4, at 478; MERRYMAN ET AL., *supra* note 1, at 450 (stating that in some aspects – rationalist ideals of completeness, simplicity, non-technical – the Civil Code of France became a “revolutionary utopia” facing the new contemporary social and economic changes).

17. PORTALIS, *supra* note 14, at 36.

18. See, e.g., Becchi, *supra* note 3, at 195; DE LOS MOZOS, DERECHO CIVIL, METODO, SISTEMAS Y CATEGORÍAS JURÍDICAS 116-17 (Editorial Civitas eds., 1st ed. 1988); De Los Mozos, *La “Cultura Jurídica” del Código Civil: Una Aproximación a Su Estudio*, in I CENTENARIO DEL CÓDIGO CIVIL 663, 673 (Editorial Centro de Estudios Ramon Areces ed. 1990).

the Historical school opposed the Thibaut proposal on the basis of the historical dimension of the law as an expression of “the common consciousness of the people”.<sup>19</sup> The Codification was postponed by several decades. After the German political unification in 1871 several German codes were enacted. The German civil code of 1896 (effective in 1900) had a profound impact on modern Codification.<sup>20</sup> The differences between French and German civil codes are relevant. The former is based on the principles of rationalism and *ius-naturalism*, whereas the latter is scientific, technical, and heavily influenced by the Pandectist system.<sup>21</sup>

There is no doubt that the traditional image of the “classical” 19th century codification has changed in contemporary civil law countries. It has become clear in the 20th century that new social, economic, and political developments demanded a shift in emphasis from private law to both public and regulatory law. According to Glendon, “the dynamics of the legal change have worked primarily through a movement away from the civil codes (via special legislation and judicial construction), and through code revision, constitutional law, harmonization of law within the European Community, and the acceptance through treaties and conventions of a variety of supranational legal norms.”<sup>22</sup> In general terms, civil law and common law comparativist scholars<sup>23</sup> have asserted that a fundamental transformation has taken place in the civil law tradition which is symbolized by the tendencies toward the “decodification,”<sup>24</sup> “constitutionalization,”<sup>25</sup> “supranational legislation,”<sup>26</sup> and “re-codification.”<sup>27</sup>

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19. Merryman explained the Savigny proposal regarding the codification process in Germany in the following terms:

Savigny’s principal argument against Codification was that his own age lacked the ability necessary to do it properly. In his view, a proper code had to be an organic system based on the true fundamental principles of the law as they had developed over time. A thorough understanding of these principles was an indispensable prerequisite to codification. Savigny found such mastery of principles lacking among his contemporaries and feared that a codification in his time would therefore do more harm than good to perpetuating misunderstandings. Thus, he urged his contemporaries to study the historical evolution of the basic principles first and to turn to codification- if at all- later.

MERRYMAN ET AL., *supra* note 1, at 476.

20. CASTAN TOBEÑAS, *supra* note 2, at 224-28.

21. See DIEZ-PICAZO & GULLON, *supra* note 2, at 51.

22. GLENDON ET AL., *supra* note 2, at 62.

23. *Id.*; MERRYMAN ET AL., *supra* note 1, at 1241.

24. Since the Italian scholar Natalino Irti published his article *L’età della decodificazione* (1978), the theory of decodification had a significant influence in the civil

In dealing with a comparativist legal analysis, it is possible to find that traditional uncodified legal systems have codified particular legal issues. On the other hand, codified systems used to have uncodified legal subjects. According to Schlesinger, there is no highly developed legal system in existence today that is either wholly codified or wholly uncodified.<sup>28</sup>

A few examples might help clarify this issue. In France, the evolution of the law of torts is an example of judge-made law in

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law tradition. See e.g., Natalino Irti, *L'età della decodificazione*, in DIRITTO E SOCIETÀ 613 (1978); NATALINO IRTI, *LA EDAD DE LA DESCODIFICACION* (Editorial Bosh ed., 1992); Adriano De Cupis, *A Proposito di Codice e di Decodificazione*, 25 RIVISTA DE DIRITTO CIVILE 2, 47 (Guifrè ed. 1979); Rodolfo Sacco, *Codificare: Modo Superato de Legifere?*, 29 RIVISTA DI DIRITTO CIVILE 2, 117 (1983).

25. According to Merryman, the movement towards “constitutionalism” in civil law tradition displays a number of common features, which include:

the new constitutionalism has prominently sought to guarantee and to expand individual rights: rights to civil and criminal due process of law; to equality; to freedom of association, movement, expression, and belief; and to education, work, health care, and economic security. The “old” individual rights that were an objective of the revolution and that received their ‘constitutional’ protection in the civil codes- rights of personality, property, and liberty of contract- have to a large extent been achieved and solidified in the work of ordinary courts quietly applying the traditional sources and methods of law. The constitutions are the sites of the new individual rights, and the clash of constitutional litigation is the medium of their definition and enforcement. The rise of constitutionalism is in this sense an additional form of decodification: the civil codes no longer serve a constitutional function.

MERRYMAN, *supra* note 1, at 1245. In the same vein, see Lopez y Lopez, *supra* note 6, at 1170.

26. For some examples of the influence of the European Union (EU) in the state members’ national legislation, see RALPH H. FOLSON ET AL., *INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM-ORIENTED COURSEBOOK* 1324 (West Group ed. 1999). As to Latin America regional and sub-regional integration, see, e.g., Frank J. Garcia, “Americas Agreements” - *An Interim Stage in Building the Free Trade Area of the Americas*, 35 COLUM. J. TRANSNAT’L L. 63, 65-68 (1997); G. POPE ATKINS, *LATIN AMERICAN INTEGRATION* 169-87 (1995); INTER-AMERICAN DEVELOPMENT BANK, *THE LATIN AMERICAN INTEGRATION PROCESS IN 1988, 1989, 1990*, 3-12 (1992); Julio J. Nogues & Rosalinda Quintanilla, *Latin America’s Integration and the Multilateral Trading System*, in *NEW DIMENSIONS IN REGIONAL INTEGRATION* 28-31 (Jaime De Melo & Arvind Panagariya eds. 1993).

27. See, e.g., DIEZ-PICAZO, *supra* note 4, at 474-77; DE LOS MOZOS, *supra* note 9, at 11-25.

28. See *FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS* 51 (Rudolf B. Schlesinger ed., 1968); MERRYMAN II, *supra* note 3, at 60-61; Dale Beck Furnish, *Fuentes del Derecho en Los Estados Unidos: La Muerte del Derecho Consuetudinario, Las Fuentes Escritas en la Edad del Derecho Positivo, y el Papel y Efecto de los Restatements of the Law*, 13 IUS ET VERITAS 143, 161 (1996).

the civil law tradition.<sup>29</sup> Thus, the issue of formation of contracts in French law is composed entirely of case law since the Civil Code does not have any provisions to solve offer and acceptance problems.<sup>30</sup> Conversely, the United States, despite its common law tradition, has a substantial segment of its law of contracts that is currently regulated under the provisions of the Uniform Commercial Code (U.C.C.). American contract law has been greatly influenced by the provisions of the U.C.C. According to Llewellyn, its principal original drafter, Article 2 of the U.C.C. contains not only rules applying specifically to goods transactions (such rules governing shipment, inspection, and the risk of loss), but also provisions susceptible to broader application, such as the Code's definition of "good faith" or its prescription of "unconscionability."<sup>31</sup> However, civil and common law comparativist scholars pointed out that there are substantial differences between the role and function of the codes under civil or common law tradition including legal systems, ideology, authorities, and enforcement.<sup>32</sup>

### B. Codification in Latin America in the 19th Century

The most persuasive reasons offered by scholars to explain the 19th century codification in Latin America have been the need to avoid uncertainty of the applicable law, to stabilize the legal system, and to consolidate new national regimes.<sup>33</sup> In fact, after the independence, drafting civil codes and constitutions was the primary interest of jurists and legislators in the Latin American new independent republics.<sup>34</sup>

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29. See Parviz Owsia, *The Notion and Function of Offer and Acceptance Under French and English Law*, 66 TUL. L. REV. 871 (1992); MERRYMAN ET AL., *supra* note 1, at 1242.

30. *Id.*

31. See E. ALLAN FARNSWORTH, *CONTRACTS* 29-32 (2d ed., 1990); NEW YORK UNIVERSITY SCHOOL OF LAW, *FUNDAMENTALS OF AMERICAN LAW* 201-10 (Alan B. Morrison ed. 1996).

32. See MERRYMAN, *supra* note 1, at 60-62; Furnish, *supra* note 28, at 160-61.

33. J.M. Castán Vázquez, *La Influencia de la Literatura Jurídica Española en las Codificaciones Americanas*, Address before the Real Academia de Jurisprudencia y Legislación (Jan. 23, 1984) (Spain) [hereinafter Vázquez Address]; J.M. Castán Vázquez, *El Sistema de Derecho Privado Iberoamericano*, in *IV Estudios de Derecho Civil en Honor del Profesor CASTAN TOBENAS* 157-88 (Ediciones Universidad de Navarra ed., 1969) [hereinafter *Derecho Privado*].

34. P. Catalano, *Sistema Jurídico, Sistema Jurídico Latino-Americano y Derecho Romano*, *REVISTA GENERAL DE LEGISLACION Y JURISPRUDENCIA*, Sept. 1982; Alejandro Guzmán Brito, *Puntos de Orientación para el Estudio Histórico de la Fijación y Codificación del Derecho en Iberoamérica*, *REVISTA GENERAL DE LEGISLACION Y JURISPRUDENCIA* (1983); J.L. De Los Mozos, *Perspectivas y Método para la Comparación*

The French Civil Code enacted in 1804 was the “model” to draft Latin American civil codes in the early 19th century.<sup>35</sup> Since it had Roman law influence, its adoption did not require an entire break from the preexisting Spanish and Portuguese colonial legal structure. Moreover, the 19th century codification served to consolidate the Roman law introduced in Latin America by Spanish and Portuguese colonial legislation.<sup>36</sup> In general, the language and concepts of the French codes were clear and familiar for Latin American countries because of their affinities with the legal institutions that were introduced in Latin America during the colonial period.<sup>37</sup>

In the 19th century, the most relevant and influential Latin American civil codes were drafted by conspicuous drafters: Andres Bello (Chilean Civil Code),<sup>38</sup> Velez Sarsfield (Argentinian Civil Code)<sup>39</sup> and Teixeira de Freitas (draft of Brazilian Civil Code).<sup>40</sup> As an illustration, the Chilean civil code drafted by Andres Bello was adopted virtually in its entirety in Ecuador (Civil Code of 1860) and Colombia (Civil Code of 1873), while Argentina, Paraguay, Uruguay, Honduras, Venezuela, El Salvador and Nicaragua adopted specific provisions in their own civil codes.<sup>41</sup>

Although highly influenced by the French Civil Code, most Latin American civil codes enacted in the 19th century adopted a variety of other legal sources. From this perspective, the sources most frequently cited as contributing to the formation of the Civil Codes in Latin America are the following:

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*Jurídica en Relación con el Derecho Privado Iberoamericano*, 60 REVISTA DE DERECHO PRIVADO 777 (1976) [hereinafter *Perspectivas*].

35. The early 19th century Latin American civil codes were adopted as follows: Haiti (1825), Oaxaca (México) (1827-1828), Bolivia (1831), Dominican Republic (1844), Perú (1852) and Chile (1855). CASTAN TOBEÑAS, *supra* note 2, at 221.

36. Vázquez Address, *supra* note 33, at 100-10.

37. *Id.*

38. See A. GUZMAN BRITO, I ANDRES BELLO CODIFICADOR: HISTORIA DE LA FIJACION Y CODIFICACION DEL DERECHO CIVIL EN CHILE 115 (Ediciones Universidad de Chile ed., 1982); J.M. Castán Vázquez, *El Humanismo de Andrés Bello y su Proyección en el Derecho Civil Iberoamericano*, 5 CENTENARIO REVISTA CRITICA DE DERECHO INMOBILIARIO 653, 666 (1992); FERNANDO MURILLO RUBIERA, ANDRES BELLO: HISTORIA DE UNA VIDA Y DE UNA OBRA 189-437 (La Casa de Bello ed., 1986).

39. See CASTAN TOBEÑAS, *supra* note 2, at 223.

40. Sandro S. Schipani, *Dal Diritto Romano alle Codificazioni Latino-ameriamicane: L'opera di A. Teixeira de Freitas*, in V STUDI SASSERSI (DIRITTO ROMANO, CODIFICAZIONI E UNITA DEL SISTEMA GIURIDICO LATINOAMERICANO XIII-XIV (Giuffrè et al. ed., 1981); CASTAN TOBEÑAS, *supra* note 2, at 230.

41. GUZMAN BRITO, *supra* note 38, at 463.

Roman Law which is the fundamental source of all the “Roman-Germanic family” or civil law tradition.<sup>42</sup>

Spanish and Portuguese laws enforced in Latin America before civil codes were drafted. Among these were the “Novísima Recopilación,” “Las Siete Partidas,” and the “Fuero Real.”<sup>43</sup>

The French Civil Code of 1804, known as the Napoleonic Code.<sup>44</sup>

Additionally, other civil codes enforced at the time of civil codes drafting in Latin America include the Civil Codes of Germany, Spain, Switzerland, Sardinia, Austria, Prussia and the two Sicilies influenced the formation of the Civil Codes in Latin America.<sup>45</sup> For instance, the Brazil Civil Code of 1917 had a remarkable influence of the German Civil Code, and Cuba adopted almost entirely the Spanish Civil Code of 1889.<sup>46</sup> Civil law treaties and studies written by prestigious French, German and Spanish scholars in the 19th century: Pothier, Domat, Troplon, Zacharie, Demolombe, Merlin, Escriche, Molina, Garcia Goyena and Savigny, among others also contributed to some extent.<sup>47</sup>

Over the 20th century, the obsolescence in various degrees of the early 19th century codes motivated a tendency towards legislative reforms in Latin America. This phenomenon follows the general tendency in civil law systems toward the partial or global reforms of codes to adapt socio-economic and legislative changes.

### III. THE THEORY OF DECODIFICATION

Since the Italian scholar Natalio Irti published his article *L'età della decodificazione* (1978), several commentators have analyzed the process of decodification under different perspectives

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42. MERRYMAN ET AL., *supra* note 1, at 473.

43. Vázquez Address, *supra* note 33, at 100-10.

44. CASTAN TOBEÑAS, *supra* note 2, at 217-24.

45. MERRYMAN ET AL., *supra* note 1, at 473.

46. CASTAN TOBEÑAS, *supra* note 2, at 230-32.

47. See MERRYMAN ET AL., *supra* note 1, at 472-73; Vázquez Address, *supra* note 33, at 100-10.

with specific references to the civil codes.<sup>48</sup> According to Diez Picazo “decodification is the proliferation of special legislation outside the codes that causes important fissures in the unit body of the civil codes.”<sup>49</sup> It is clear that during the 20th century, in response to social and economic changes, civil codes faced decodification when special legislation removed large areas of law from the coverage of the civil codes creating new areas of law or “microsystems”<sup>50</sup> that differed ideologically and methodologically from the original structure of the civil codes.<sup>51</sup> Consequently, areas of heterogeneous statutory law have increased on a variety of civil code topics such as, employment law, urban and agrarian leases, intellectual property, insurance, contracts of carriage, competition, monopoly, and consumer protection law. These laws are not merely a supplement to the code to complete or clarify its provisions, but rather, they break up the original unity of the civil system creating a plurality of microsystems with different principles.

In addition, the growth of judge-made law has produced another kind of decodification.<sup>52</sup> Civil law courts have created “doctrines” and “the applicable law” by interpreting or by developing new judge-made rules in order to adapt the codes to new conditions, to fill gaps, to clarify ambiguities, and to deal with incompleteness.<sup>53</sup> In fact, prominent examples of judge-made law in the civil law tradition include: the law of torts under the French and Spanish courts,<sup>54</sup> the doctrines of “abuse of law,” “good faith,” “*clause rebus sic sanctibus*,” “*venire contra factum proprium*,”<sup>55</sup> “the general doctrine of precontract”<sup>56</sup> created by the Spanish courts since the early 20th century, and the application of “*rebus sic stantibus doctrine*” under the general clause section

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48. See Irti, *supra* note 24, at 613; MERRYMAN ET AL., *supra* note 1, at 1241; DIEZ-PICAZO, *supra* note 4, at 473; Lopez y Lopez, *supra* note 6, at 1163-64. For a discussion about decodification in Latin America see, e.g., Alejandro Guzmán Brito, *Codificación, Descodificación y Recodificación del Derecho Civil Chileno*, 2 REVISTA DE DERECHO Y JURISPRUDENCIA 39, 41 (1993); Jorge Mosset Iturraspe, *La Codificación en Latinoamérica*, in II COMISION DE REFORMA DE CODIGOS 653, 655 (Comisión de Reforma de Códigos del Perú ed., 1999).

49. DIEZ-PICAZO, *supra* note 4, at 478.

50. MERRYMAN ET AL., *supra* note 1, at 1241.

51. GLENDON ET AL., *supra* note 2, at 64.

52. *Id.* at 63; MERRYMAN ET AL., *supra* note 1, at 1242; DIEZ-PICAZO, *supra* note 4, at 478-79.

53. DIEZ-PICAZO, *supra* note 4, at 478-79.

54. MERRYMAN ET AL., *supra* note 1, at 1242.

55. DIEZ-PICAZO, *supra* note 4, at 479.

56. For a discussion about the Spanish judge-made law in the general theory of precontract, see MARIA LUISA MURILLO, *FORMA Y NULIDAD DEL PRECONTRATO* 50, 53 (1993) (Spain).

242 B.G.B. developed in German courts.<sup>57</sup> Moreover, Merryman emphasizes the growth of the public administration that interprets laws, issues, rules, and makes decisions that affect citizens more directly than legislation or litigation.<sup>58</sup>

The growth of constitutionalism is an additional form of decodification. As Merryman noted, “the civil codes no longer serve a constitutional function” as they had in the past under the bourgeois liberal Constitutions.<sup>59</sup> In addition, after World War II, new Constitutions of “rigid character” were enacted in civil law countries providing mechanisms to challenge the constitutionality of legislation. In Spain, before the Family Civil Law Reform of 1981, civil codes were made void through means of a judicial process that determined their constitutionality.<sup>60</sup> The new European constitutions provided the establishment of special tribunals with the power of judicial review (i.e., the Austrian, German and Italian Constitutional Courts, the Spanish Constitutional Tribunal, and the French Constitutional Council).<sup>61</sup>

The development of supranational legislation, such as the European Union (“EU”) Directives,<sup>62</sup> the regional or sub-regional integration agreements<sup>63</sup> and international commercial legislation such as the Convention on Contracts for the International Sale of

57. See Klang-Byklinsky, A.B.G.B. Kommentar (1976); MERRYMAN ET AL., *supra* note 1, at 1163.

58. MERRYMAN ET AL., *supra* note 1, at 1244.

59. See *id.* at 1245. In the same perspective, see Lopez y Lopez, *supra* note 6, at 1170; DIEZ-PICAZO, *supra* note 4, at 473-84.

60. DIEZ-PICAZO, *supra* note 4, at 473-84.

61. *Id.*

62. Of significance is the tendency towards the unification of European Contract Law caused by the commercial expansion of the European Union (EU) and the “Common Market”. Among this efforts: the *Principles of European Contract Law* (1995-1998) drafted by the Commission on European Contract Law (PECL) (Chairman, Prof. Ole Lando). The main purpose of the PECL is to serve as a first draft of a part of a European Civil Code. However before they are enacted, the PECL may also be applied as part of the *lex mercatoria*. Other initiatives, the *Contract Code* (1972), drafted by Harvey McGregor on behalf of the English Law Commission and the *European Code of Contracts Draft* (1995-1997) elaborated by the Academia of European Private Lawyers, based on the proposal of Professor Giuseppe Gandolfi during the first Congress of Pavia, Italy (1990). See, e.g., Lando & Beale (eds.), *Principles of European Contract Law, Parts I & II, combined and revised, the Hague/London/ Boston, 1999*; HARVEY MCGREGOR, *CONTRACT CODE: PROYECTO REDACTADO POR ENCARGO DE LA LAW COMMISSION INGLESA* (José M. Bosch ed., trans. Jose María de la Cuesta Saenz & Carlos Vattier Fuenzalda (1997)); G. Gandolfi, *Pour Un Code Européen Des Contracts*, in *REVUE INTERNATIONALE DE DROIT CIVIL* 707, 708 (1992).

63. See FOLSON ET AL., *supra* note 26, at 90. Regarding Latin American regional and sub-regional integration, see *supra* authorities cited in note 26.

Goods (“CISG”),<sup>64</sup> set aside national laws with crucial consequences for contemporary civil and common legal traditions.<sup>65</sup>

#### IV. THE RECODIFICATION PROCESS

##### A. Preliminary considerations

Generally, over the 20th century, the obsolescence in various degrees of the early 19th-century codification has triggered a tendency towards partial or global reform to adapt civil codes to the fundamental transformations taking place in the civil law tradition.<sup>66</sup> In fact, the civil legal system in the 19th century was characterized by its strong individualism, legislative supremacy, rigorous separation of the judiciary from the legislative and administrative powers, limited judicial role, denial of *stare decisis*, primacy of the civil code, development of conceptual structure, preoccupation with certainty, systematization and completeness of the codes.<sup>67</sup> This 19th-century “model” has been subjected to profound transformation caused by several forces, such as socio-economic changes, social and economic diversity in society, globalization, international trade, industrial and post-industrial revolution, technological development, legal changes, decodification, recodification, supranational legislation, regional and sub-regional integration, unification of commercial and civil law, “socialization” of the law, impact of constitutionalism, etc.<sup>68</sup>

From this perspective, civil law countries concerned about the obsolescence that affects the civil codes decided to adapt the codes to reflect the changes by means of different legal techniques, including filling gaps through special legislation and judicial-lawmaking.<sup>69</sup> However, the proliferation of special legislation moving away from the codes caused confusion and uncertainty about the applicable law. This phenomenon reinforced the revision of the codes incorporating special legislation and the

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64. John A. Spanogle & Peter Winship, *International Sales Law: A Problem-Oriented Coursebook* 51 (West Group ed. 2000); Folson et al., *supra* note 26, at 90.

65. **FIRST NAME** ZIMMERMAN, *ESTUDIOS DE DERECHO PRIVADO EUROPEO* 111, 112-159 (Civitas ed., trans. Antoni Vaquer Aloy (2000)).

66. See MERRYMAN ET AL., *supra* note 1, at 1241.

67. *Id.*

68. See GLENDON ET AL., *supra* note 2, at 63-64; DIEZ-PICAZO, *supra* note 4, at 478-79; Iturraspe, *supra* note 48, at 660.

69. DIEZ-PICAZO, *supra* note 4, at 482-84.

substitution of the entire code for a new one, commonly known as “recodification.”<sup>70</sup>

The concept of recodification is neither simple nor uncontroversial. According to De los Mozos, by means of recodification, the special legislation is incorporated on the current code system.<sup>71</sup> However, depending on the particular circumstances, the entire system can be substituted for a new codification.<sup>72</sup> Civil and common law commentators asserted that the recodification process brought new vitality to civil law tradition.<sup>73</sup> As an illustration, France, Germany, Belgium, Italy, Swiss and Spain have revised and reformed partially their ancient civil codes covering major civil areas as family Law, property Law, individual rights, etc.<sup>74</sup> On the other hand, several civil law countries pursued global reforms drafting a second and a third generation of new codes that repealed the old ones.<sup>75</sup> They differ substantially from the earlier “classical” first generation of codes adopted in the 19th century.

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70. See DE LOS MOZOS, *supra* note 9, at 11, 25.

71. *Id.*

72. De Los Mozos asserted that the Codification of *lege lata* is not a recodification in strict legal sense:

*No es propiamente recodificación lo que entienden algunos, acudiendo al subterfugio de distinguir entre codificación de lege lata y codificación de lege ferenda, porque la primera no es más que una preparación de la verdadera y propia Codificación. En Francia, donde no ha existido ni existe una Comisión General de Codificación al estilo español aparecen Comisiones de Codificación a partir de 1948 y que fundamentalmente, tienen la finalidad de la codificación de lege lata y que por ello se limita a determinar los preceptos implícitamente derogados a aclarar las contradicciones y a introducir modificaciones formales.*

*Id.* at 11-21.

73. See DIEZ-PICAZO, *supra* note 4, at 474, 484.

74. See DE LOS MOZOS, *supra* note 9, at 21. Concerning the reforms in the French Civil Code of 1804 and German Civil Code of 1900, see MERRYMAN ET AL., *supra* note 1, at 1153-73; CASTAN TOBENAS, *supra* note 2, at 215-30. As to the Spanish Civil Code of 1886, the “Título Preliminar,” and the Family Law section were reformed in 1974 and 1981, respectively. (All made significant transformations to the Spanish civil law). See also ACADEMIA MATRITENSE DE NOTARIADO, ESTUDIOS SOBRE EL TÍTULO PRELIMINAR DEL CÓDIGO CIVIL I-II (Edersa ed. 1977); CASTAN TOBENAS, *supra* note 2, at 276; Sandro Schipani, *Il Codice Civile Spagnolo come Ponte fra Sistema Latinoamericano e Codice Europei*, REVISTA DE DIRITTO CIVILE, May-Apr. 1994, at 359, 360-97. In reference to the Swiss Civil Code of 1907, see CASTAN TOBENAS, *supra* note 2, at 228.

75. See, e.g., Civil Code (Italy) (1942), Civil Code (Portugal) (1966), Civil Code (Guatemala) (1963), Civil Code (Bolivia) (1975), Civil Code (Venezuela) (1982), Civil Code (Perú) (1984), Civil Code (Paraguay) (1987), Civil Code (Netherlands) (1990), Civil Code (Québec) (1994). See Luis F.P. Leiva Fernandez, *La Legística y la Reforma de los Códigos Civiles*, in II EL CODIGO CIVIL DEL SIGLO XXI, 1449, 1472 (Comisión de Reforma de Códigos del Congreso de la República del Perú ed. 2000).

From this perspective, the Italian Civil Code of 1942 has remarkably influenced the second generation of civil codes in Europe, such as the Portuguese Civil Code of 1966-67 and the Netherlands Civil Code, which went into effect in 1992.<sup>76</sup> In Latin America, its influence is significant in the civil codes of Perú (1984) Venezuela (1982), and Paraguay (1987), among others.<sup>77</sup>

Considering the characteristics of the 20th century recodification and code revision,<sup>78</sup> however, they differ substantially from the “classical” codification. The recodification tends to be marked by more eclecticism. This takes the form of using comparative law to investigate approaches and solutions to common problems. For example, to draft the Civil Code of the Netherlands (1990), which went into effect in 1992, and the Civil Code of Québec (1994), the draftspersons drew not only on a variety of continental European models, but on the common law and international conventions.<sup>79</sup> From this perspective, the exchange of ideas among common law, civil law, and Nordic systems would be reinforced through the European Union or other supranational organizations.<sup>80</sup>

In addition, the diversity in society is considered a decisive element to take into account during the recodification process. Modern lawmakers are more pragmatic than the drafters of the Enlightenment codes or the highly abstract German Civil Code. In fact, today’s private law reform is often preceded by significant fact and opinion research in comparative law and sociology. Finally, contemporary civil law shows an awareness of the limits of law, avoiding excessive casuistry and introducing general clauses of good faith and equity in the civil codes. This flexible rule increases the participation of judicial role.<sup>81</sup>

### *B. The Re-codification Process in Latin America*

In Latin America, the tendency towards partial or global reform to avoid the obsolescence of codification has been developed with success not only in civil codes, but in commercial,

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76. DIEZ-PICAZO, *supra* note 4, at 474-83.

77. *Id.*

78. See GLENDON ET AL., *supra* note 2, at 64; DIEZ-PICAZO, *supra* note 4, at 482.

79. *Id.*

80. For further information on the development of European Union’s supranational legislation, see *supra* note 62.

81. See GLENDON ET AL., *supra* note 2 at 64; Iturraspe, *supra* note 48, at 653, 655; Martha Figueroa Torres, *Criterios Orientadores para la Revisión y Reforma del Código Civil de Puerto Rico*, in II EL CÓDIGO CIVIL DEL SIGLO XXI, 1449, 1472 (Comisión de Reforma de Códigos del Congreso de la República del Perú ed., 2000).

administrative and criminal codes as well. The growth of “commissions to reform civil codes” has given a strong impulse to the recodification process in Central and South America, including in Argentina, Brasil, Bolivia, Perú and Puerto Rico.<sup>82</sup> Moreover, new civil codes have been drafted in Guatemala (1963), Bolivia (1975), Venezuela (1982), Perú (1984), Paraguay (1987).<sup>83</sup> In addition, revision and partial reforms have been introduced in the civil codes of Ecuador, Colombia and Argentina, among others.<sup>84</sup>

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82. The “commissions to reform civil codes” have reinforced the recodification process, including the “*Comisión especial encargada de elaborar el Anteproyecto de Ley de Reforma del Código civil de Perú*” created by Law No. 26394 (Nov. 22, 1994); the “Comisión de Reforma del Código civil argentino” created in 1995; the “Comisión conjunta permanente para la revisión y reforma del Código civil de Puerto Rico” created by Law No. 85 (Aug. 16, 1998); the “Comisión de revisión y actualización del Código civil boliviano” (1994). See Atilio Anibal Alterini & Carlos Alberto Soto, *Preface to I EL CÓDIGO CIVIL DEL SIGLO XXI* 27, 48 (Comisión de Reforma de Códigos del Congreso de la República del Perú ed. 2000); Jorge Muniz Zichez, *15 Años del Código Civil y Su Proceso de Reforma*, in *I EL CÓDIGO CIVIL DEL SIGLO XXI* 27, 48 (Comisión de Reforma de Códigos del Congreso de la República del Perú ed. 2000); Hector Alegría, *Reforma del Código Civil Argentino: Proyecto Unificado de 1998*, in *II EL CÓDIGO CIVIL DEL SIGLO XXI*, 945, 970 (Comisión de Reforma de Códigos del Congreso de la República del Perú ed. 2000); Juan Antonio Chachín Lupo, *Construcción del Nuevo Orden Jurídico para Bolivia*, in *II EL CÓDIGO CIVIL DEL SIGLO XXI* 1473, 1482 (Comisión de Reforma de Códigos del Congreso de la República del Perú ed. 2000); Figueroa Torres, *supra* note 81, at 1483, 1523.

83. CASTAN TOBENAS, *supra* note 2, at 221; Leiva Fernandez, *supra* note 75, at 1457-59; Código Civil del Perú, Edición Oficial (Ministerio de Justicia del Perú ed. 1984); Chachín Lupo, *supra* note 82, at 1476-82; Figueroa Torres, *supra* note 81, at 1485-1523.

84. As illustrated, the recodification has had different degrees of influence, with the most significant being in the Latin American civil codes drafted in the 19th century: the Civil Code of Argentina (1871) – drafted by Velez Sarsfield – the Civil Code of Chile – drafted by Andres Bello – and the Civil Code of Brasil (1916).

The Civil Code of Argentina was revised and only partially reformed in 1968. Thus, in 1995, the Argentinian executive power decided to designate a “commission of jurists” to draft a new civil code. The final version of the civil code, elaborated upon by the commission mentioned below, is still pending until receipt of official final approval. See Guillermo Borda, *El Problema de la Reforma de los Códigos Civiles*, in *II COMISION DE REFORMA DE CODIGOS* 649, 660 (Comisión de Reforma de Códigos del Perú ed. 1999).

The Civil Code of Chile (1855) has not been partially or globally reformed to date. Chilean commentators noted that the decodification process has created a vast bulk of legislation, outside the Civil Code originally drafted by Bello, which must be adapted to the transformations of the civil law. See Guzmán Brito, *supra* note 34, at 41-62; FERNANDO FUEYO LANERI, *INSTITUCIONES DE DERECHO CIVIL MODERNO* 571 (Editorial Jurídica de Chile ed. 1990). As to the new tendencies in contracting under the Chilean civil legal system, see HERNÁN CORRAL TALCIANI, *Nuevas Formas de Contratación y Sistema de Derecho Privado (con Especial Referencia al Derecho Chileno)*, in *INSTITUCIONES DE DERECHO PRIVADO-CONTRATACION CONTEMPORANEA* 547, 548-66 (Palestra ed. 2000). In 1975, Brazil decided upon the drafting of a new civil code taking into account the obsolescence in certain areas of the Brazilian Civil Code of 1916. The final project of civil code, elaborated by a special commission of jurists, is pending on official final approval. See Figueroa Torres, *supra* note 81, at 1502; CASTAN TOBENAS, *supra* note 2, at 230.

An approach to the recodification in Argentina and Peru would be useful to illustrate this process. The civil code of Argentina (1871), which was drafted by the eminent jurist Dalmacio Velez Sarsfield, is one of the most influential civil codes of the 19th century in Latin America.<sup>85</sup> The Argentinian commentators pointed out that the partial reform of its ancient civil code was necessary for several reasons, which included obsolescence in major areas, socio-economic changes, growth of special legislation outside of the civil code, and decodification.<sup>86</sup>

After several unsuccessful projects of reform, the Law of Reforms No.17.711, which was enacted in 1968, introduced structural and ideological changes in the civil code covering major areas like family law, contracts, property, and individual rights.<sup>87</sup> The Velez Sarsfield Code, being drafted in the 19th century, was a rational, liberal and individualistic approach.<sup>88</sup> However, this reform shifts it towards social values introducing provisions about the theory of abuse of law, the *rebus sic sanctibus* clause and the principle of good faith and equity.<sup>89</sup> In Argentina, the judge-made law had a decisive influence in developing the law of torts and consumer protection.<sup>90</sup> In 1995, the executive power decided that “the drafting of a new civil code of Argentina” would integrate into the legal system relevant provisions, such as the constitutional reforms of 1994, the international treaties that affect commercial and civil areas and the unification of the private law.<sup>91</sup> The “Comisión Honoraria” consisting of distinguished jurists, drafted the project of the new Argentinian Civil Code, which is pending official approval by the Congress.<sup>92</sup>

When considering the Peruvian Codification, commentators noted that the principal goal of the Peruvian civil code of 1852 was to consolidate the independence process.<sup>93</sup> Its principal legal source was the French Civil Code.<sup>94</sup> In 1922, after a long debate, the Congress of Perú decided to achieve a global reform of the civil

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85. *Derecho Privado*, *supra* note 33, 174-75.

86. See Guillermo Borda, *La Reforma de 1968 al Código Civil Argentino*, in II EL CODIGO CIVIL DEL SIGLO XXI 1473-482 (Comisión de Reforma de Códigos del Congreso de la República del Perú ed. 2000).

87. *Id.*

88. Borda, *supra* note 84, at 650-60.

89. *Id.*

90. *Id.*

91. See Alterini & Soto, *supra* note 82, at 37-47; Alegría, *supra* note 82, at 945-70.

92. *Id.*

93. León Barandiarán, *Estudio Comparado del Código Civil de 1852 y el Código Napoleónico*, 2 III REVISTA JURÍDICA DEL PERÚ 71, 72 (1952).

94. *Id.*; *Perspectivas*, *supra* note 34, at 79.

code.<sup>95</sup> As a result, a new Peruvian civil code was enacted in 1936.<sup>96</sup> Its purpose was to introduce modern legal institutions that were under the influences of the German, Argentinian and Brazilian civil codes, which were among other socio-economic changes of the early 20th century.<sup>97</sup> However, commentators pointed out that several factors gradually influenced the revision and global reform of the civil code of 1936, such as accelerated socio-economic changes, progressive obsolescence in different areas, scientific and technological developments, decodification, and constitutional transformations introduced by the new Constitution of 1979.<sup>98</sup>

As a result, the current Peruvian Civil Code was enacted in 1984.<sup>99</sup> It had a significant influence on the Italian Civil Code (1942) in major areas such as contract law, introducing new institutions like “la lesión”, “excesiva onerosidad de la prestación,” “contrato por persona a nombrar,” “contrato en favor de tercero,” and “contrato de suministro.”<sup>100</sup> In addition, it is the process of a partial reform of the Peruvian Civil Code of 1984 that focused on specific areas including the unification of the civil and commercial law and the adjustment to the new Constitution of 1993.<sup>101</sup> The appropriate approach when determining whether a global or partial reform is needed in dealing with socio-economic changes and avoiding the obsolescence of the civil codes depends on the particular circumstances and necessities of each society and its legal system.<sup>102</sup>

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95. Comisión Reformadora del Código Civil Peruano, *Actas de las sesiones de la Comisión reformadora del Código civil peruano de 1852, creada por Supremo Decreto de 26 de agosto de 1922* (C.A. Castrillón ed. 1928); Sandro S. Schipani, *El Código Civil Peruano de 1984 y El Sistema Jurídico Latinoamericano*, in *EL CÓDIGO CIVIL PERUANO Y EL SISTEMA JURIDICO LATINOAMERICANO* 41, 43-69 (Cultural Cuzco ed. 1986).

96. F. GUZMÁN FERRER, *CÓDIGO CIVIL PERUANO DE 1936* (Cultural Cuzco ed. 1982).

97. Schipani, *supra* note 95, at 43-69.

98. PROYECTOS Y ANTEPROYECTOS DE LA REFORMA DEL CODIGO CIVIL I-II (Fondo Editorial, Pontificia Universidad Católica del Perú ed. 1980) [hereinafter PROYECTOS].

99. *Código Civil del Perú, Edición Oficial* (Ministerio de Justicia del Perú ed. 1984).

100. Jorge Muñoz Ziches, *Reformas al Código Civil de 1984*, in II COMISION DE REFORMA DE CODIGOS 382, 383-408 (Comisión de Reforma de Códigos del Perú ed. 1999); MANUEL DE LA PUENTE Y LAVALLE, *EL CONTRATO EN GENERAL XI*, 1st part, XV, 2nd part (Fondo Editorial Pontificia Universidad Católica del Perú ed. 1993); PROYECTOS, *supra* note 98.

101. See Carlos Alberto Soto, *La Reforma del Código Civil de 1984*, in I EL CÓDIGO CIVIL DEL SIGLO XXI 85, 86-126 (Comisión de Reforma de Códigos del Congreso de la República del Perú ed. 2000); Ziches, *supra* note 82, at 385; Juan José Ballén et al., *¿Hasta dónde Llegamos? En busca del Código Civil Perfecto: Conversación con Jorge Avendaño, Manuel de la Puente y Lavalle y Felipe Osterling*, 14 IUS ET VERITAS 145, 155 (1997).

102. See DE LOS MOZOS, *supra* note 9, at 19.

From this perspective, Diez-Picazo suggested that partial reforms of the civil codes were more likely to be successful in legal systems with an efficient judicial role to prevent conflicts and fill gaps by means of judge-made law and application of general clauses.<sup>103</sup> For example, Spain, German and France have ancient civil codes, but partial reforms and flexible judge-made law have adapted them to new necessities.<sup>104</sup> However, in the absence of such a change, a global reform that substitutes the entirely legal system would be appropriate. As an example, a second and third generation of civil codes have been enacted in Europe, Latin America, and North America, including the civil codes of Italy (1942), Netherlands (1992), Perú (1984) and Québec (1994).<sup>105</sup>

Finally, the majority of contemporary commentators have emphasized the importance of adaptation of the civil codes to the constitutional reforms.<sup>106</sup> As mentioned above, partial and global reforms in the 20th century have been pursued to introduce constitutional transformations in the civil codes to guarantee the rights of human beings in economic, social, cultural and spiritual projections. According to De Los Mozos, this tendency has reinforced the significant role of the civil code, which focused on the development of the human being's rights from a personal and social dimension.<sup>107</sup>

## V. CONCLUSIONS

A fundamental transformation has taken place in civil legal systems due to the impulse of new forces in Society and Law. The dynamics of legal change are symbolized by many factors, with the decodification and the recodification processes being two of the more relevant.

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*Recodificar, pues, no es más que 'racionalizar' el Derecho reconduciendo las normas a ese parámetro de racionalidad. Unas veces habrá que reconducir las leyes especiales al sistema del código porque haya pasado su oportunidad bien porque carecía por completo de ella. Pero, otras veces, el cambio de circunstancias o la aparición de hechos nuevos debidamente ponderados, deberán impulsar la propia reforma del sistema.*

*Id.*

103. See DIEZ-PICAZO, *supra* note 4, at 482-83.

104. *Id.*

105. See, among others, MERRYMAN ET AL., *supra* note 1, at 1241-46; Guillamon, *supra* note 6, at 1755-75; DIEZ-PICAZO, *supra* note 4, 482-83.

106. See, among others, Guillamon, *supra* note 6, at 1755-75; Lopez y Lopez, *supra* note 6, at 1163-76.

107. DE LOS MOZOS, *supra* note 9, at 11-25.

From this perspective, adapting civil codes to the changes and new necessities has been the principal concern of civil law countries. As a result, the application of different legal techniques to fill the gaps produced by the growth of special legislation around the codes created large bodies of legal provisions to complete and clarified elucidated matters governed by the civil code. However, the decodification emerged when this special legislation removed large areas from the coverage of the civil codes and created new areas of law or “microsystems” that differed ideologically and methodologically from the original structure of the civil code. For example, employment law, urban and agrarian leases or consumer protection law, and intellectual property, to name just a few. In addition, new forms of decodification have proliferated by means of judge-made law, the rise of constitutionalism and the supranational legislation.

Regardless of the dramatic impact of the decodification in the civil legal systems, the recodification process brought new vitality to the civil law tradition by means of partial and global reforms to avoid gradual obsolescence in the civil codes. Furthermore, the global reforms have promoted the drafting of new civil codes that differ substantially from the “classical” 19th century codification. The method of recodification takes into account new criteria to draft civil codes including the use of comparative law to investigate approaches and solutions to common social problems, taking into account the diversity of society for determining how to regulate legal institutions, awareness about the limits of the law prevents excessive casuistry, the reinforcement of judicial role, and the tendency to general clauses, etc.

By the turn of the 20th century, it has become clear that the recodification process has had substantial momentum in Europe and Latin America, indicating that it will influence the development of the civil law tradition in the foreseeable future.