Mors Codicis: End of the Age of Codification?

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INTRODUCTION

To hear that France might give up on codification would be like hearing that Napoleon was giving up on artillery. Yet this is just what France's principal codification body, the Commission Supérieure de Codification, suggests in a recent annual report: "The Commission observes that the age of drawing up new codes is probably reaching its end." The first reason that it gives is the emergence of digital technologies.[1] In that light, I will ask whether the age of codification—the age of legal codes, generally—may be passing. Along that way, I will ask whether a country that has not so far been committed to codification, such as Australia, may adopt these technical developments so as actually to skip the age of codification.[2] For these purposes, I will consider what, within the western legal tradition, has been meant by "code".

I. CODE AND CODIFICATION

A. Typology

The name "code" has been given to so many types of legislation that there is little consistency in its use.[3] Several kinds of typology could be offered, but one of them might go like this:

1. *Collection* (French: *recueil)*. Laws are collected together in a single work, although that work may be constituted by a series of

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1. Quoted more fully and referenced *infra* note 38.

2. My general perspective in Comparative Law is offered in *Critical Approaches in Comparative Law*, OXFORD U. COMP. L. FORUM 4 (2002), http://ouclf.iuscomp.org/articles/stewart.shtml (online only).

3. JACQUES VANDERLINDEN, LE CONCEPT DE CODE EN EUROPE OCCIDENTALE DU XIII^{E} SIÈCLE AU XIX^{E} SIÈCLE—ESSAI DE DÉFINITION 9-14, 69-74, 229-43 (1967); *Qu'est-ce qu'un code?*, 46 C. DE D. 29 (2005). The latter was the opening address to a Canadian conference on codification. Vanderlinden says that his earlier work had not actually proposed a "coherent definition" of a code, but only a three-part characterization, and offers this admittedly tentative revision of the conference's initial formulation: "a 'code' is a formal assemblage (*un ensemble formel*) whose content is constituted by either the whole or an important part of a body of law, endowed directly or indirectly with binding force of law and possessing attributes capable of permitting a better knowledge of the law" (*id.* at 50-51). Jean-Louis Baudouin, in his closing address to the conference, observes that, as civil law becomes more global, more complex and less distinct from public law, a "new model" of codification is required; on that, however, he finds himself unable to synthesize, but only to register, the diversity of views that had been expressed at the conference: Baudouin, *Quo vadis?*, 46 C. DE D. 613 (2005). Other surveys: MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 839-64 (1922; Guenther Roth & Claus Wittich eds., various trans., 1978); CSABA VARGA, CODIFICATION AS A SOCIO-HISTORICAL PHENOMENON (Sánder Eszenyi et al. trans., 1991); Shael Herman & David Hoskins, *Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations*, 54 TUL. L. REV. 978 (1980); Günther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435 (2000).

works. There may be no principle of arrangement, although that will be feasible only for a very short document. Otherwise, the material may be arranged alphabetically, numerically, chronologically or thematically. Today, only a thematic arrangement could be deemed worthy of the name "code"—which overlaps with the next.

2. *Compilation*. Laws are collected together in a single work, arranged thematically. This is the least sense in which, today, a work might be categorized as a "code". In western history, the earliest surviving example is found in the fifth century CE—the thematically arranged collection of extracts from statutes that is known as the Code of Theodosius. It is followed in the sixth century by the much more ambitious work of Justinian, which has come to be known as the Corpus Iuris Civilis. In these works, however, the thematic depth is merely what is sufficient to permit arrangement. There is only classification, rather than an attempt at arrangement by concept or principle.
3. *Consolidation*. A number of existing statutes relating to the same area of law are fitted together in a single work, usually without innovation beyond what is required editorially. The arrangement is thematic, but only following the themes already present in those statutes. This exercise is often carried out by a private publisher. It may also be carried out officially, in which case it might itself have force of law.
4. *Codification*. An area of law is thoroughly restated, with a high degree of thematic organization. Unlike the preceding types, elements may be interpreted in the light of their place within the whole and by analogy with other elements. That additional factor, however, is also a feature of ordinary statutes. What is considered to distinguish a "code" in this relatively strict sense from an ordinary statute is its combination of comprehensiveness and exclusivity: it contains all (or almost all) of the law, or all (or almost all) of a certain branch of the law. Both comprehensiveness and exclusivity, however, are found more often as aspiration than as achievement.

These categories overlap, both in definition and in application. Their differences are of degree rather than of kind. In that case, degrees of what? Degrees of systematization, perhaps, but what is "systematization"?

B. The Name "Code"

From that point, one might be tempted into an etymological fallacy. One might suppose that the meaning of the word "code" as it is used today can be explained through its Latin origin, the word "*codex*". That by itself would be obviously naïve. But one might fall into this fallacy indirectly, when noting—correctly—that modern legislation that bears the name "code" does so because it bears, and was thought or claimed by its authors to bear, a resemblance to the surviving works of late antiquity that took the name "*codex*", the *codices* of Theodosius and Justinian. The fallacy is committed if one goes beyond noting a resemblance, to assuming that in late antiquity a *codex* was a category of legislation—because it was not.

The ancients wrote on whatever material was suitable and available. Clay was dirt cheap, but fragile unless fired, which would have escalated its cost. Stone distinctly lacked portability and would have been expensive to inscribe. Metals, such as bronze or copper, were also heavy but more manageable. Ivory was in high demand for, more suitably, carving into artworks and fashion items.[4] Most use was made of materials that were readily available, cheap, robust and portable: wood, papyrus and parchment.

In ancient Greece and Rome, both occasional writing and records intended to endure were often scratched into wax layered on a wooden tablet, or inked or chalked directly onto the tablet. These tablets were used both singly (some were very large) and, sometimes, bound together in sets. Such a set came to be known in Latin as a *codex* (or *caudex*), which in general meant a tree trunk or a block of wood. Writing on wooden tablets coexisted with writing on papyrus scrolls and on parchment sheets. Until late antiquity—at least in the Mediterranean world, where Egyptian papyrus was plentiful—the preferred medium for quality writing was the papyrus roll. Only gradually was there a transition to the more convenient form that was folded sheets, of papyrus or of parchment, bound between wooden covers.[5] In this way, the name "*codex*" came to attach to "a collection of sheets of any material, folded

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4. The first Roman code, the Lex Duodecim Tabelarum (Twelve Tables or, more exactly, Tablets) (*circa* 450 BCE), was probably inscribed on bronze, although copper and wood have been suggested, while the once source that speaks of ivory (DIG. 1.2.2.3-4) is doubted; ANCIENT ROMAN STATUTES 9-18 (Allan Chester Johnson et al. trans., 1961); A. ARTHUR SCHILLER, ROMAN LAW 143 (1978). Even linen sheets might have been used for publication of new laws: JILL HARRIES, LAW AND EMPIRE IN LATE ANTIQUITY 59 (1999).

5. C.H. Roberts, *The Codex*, 40 PROC. BRIT. ACAD. 169 (1954); *see also* TÖNNES KLEBERG, BUCHHANDEL UND VERLAGSWESEN IN DER ANTIKE ch. 3 (2d ed. 1969); FREDERIC G. KENYON, BOOKS AND READERS IN ANCIENT GREECE AND ROME (2d ed. 1951).

and fastened together at the back or spine and usually protected by covers".[6]

Substitution of the *codex*, in that sense, for the papyrus roll was a considerable technological advance. A roll was hard to arrange under headings and harder to skip around in, but a *codex* could readily be sectioned, paginated, provided with a table of contents, flipped through and, if not too large, held in one hand.[7] How the text was formatted, however, did not alter. The basic features of layout remained horizontally the line and vertically the column. A roll would be unrolled horizontally and written in vertical columns (like the pages of a book on microfilm); a *codex* with wide pages, perhaps broader than high, might have two or three columns per page. There was "no essential connection between format and material", any more than "between either and the styles of writing".[8] Thus, if by the third century CE the name *codex* had come to refer to a "book" as we understand it, a "self-contained unit", it was still "independent of material or format".[9]

It is, accordingly, not surprising that neither of the great Roman codifiers, Theodosius and even Justinian, emphasizes the name *codex*. Theodosius does not title his work "*codex*", but merely refers to it as a "*codex*" when introducing it to the Senate.[10] Justinian does title part of his work "*codex*", but only the part that is an update of Theodosius' book.[11] Nor is that part the most systematic of Justinian's work: it is simply an arranged collection. Greater (although not very great) depth of thematic arrangement is found in the other two parts of Justinian's work—the Digest, which collects extracts from juristic writings, and the Institutes, a textbook introducing the Code and the Digest.[12]

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6. Roberts, *supra* note 5, at 169.

7. *Id. passim.*

8. *Id.* at 183.

9. *Id.* at 181 (quoting Paul, *Sententiae*, 3.6.87).

10. THE THEODOSIAN CODE AND NOVELS AND THE SIRMONDIAN CONSTITUTIONS (Clyde Pharr trans., 1969).

11. ANNOTATED JUSTINIAN CODE (Fred H. Blume trans., 2d ed. by Timothy Kearley), http://uwacadweb.uwyo.edu/blume&justinian/default.asp. It is not known how many *codices* were required for each of Justinian's works, but it would have been difficult to fit the Digest or the Code into a single *codex*. In the standard Latin edition by Theodor Mommsen and others, the Digest runs to more than 900 pages, closely printed in two columns, and the Code to nearly 500—even allowing for the editors' extensive annotations: CORPUS IURIS CIVILIS (from 1866); http://www.archive.org/details/corpusiuriscivil03krueuoft. Justinian's Institutes are much shorter.

12. On the composition of the Theodosian Code, see Tony Honoré, *The Making of the Theodosian Code*, 103 Z.R.G. (R.A.) 133 (1986). As to Justinian's work, see TONY HONORÉ, TRIBONIAN (1978); David Pugsley, *On Compiling Justinian's Digest: The Victory Riots and the Appendix Mass*, 11 OXFORD J. LEGAL STUD. 325 (1991); *On Compiling Justinian's* Digest *II: Plans and Interruptions*, 13 J. LEGAL HIST. 209 (1992); *On Compiling Justinian's* Digest *(3): "The Florentine Index"*, 14 J. LEGAL HIST. 94 (1993).

What had changed, intellectually, was not the format or style of a text but its *accessibility*.[13] Yet the advantage as to accessibility concerned handiness rather than price. There is no reason to suppose that parchment was cheaper than papyrus, although the price of papyrus must have increased with distance from the source of supply, Egypt, while parchment could be manufactured anywhere. The *codex* was in one respect intrinsically cheaper than the roll, in that the sheets could be read, and therefore written, on both sides; yet that does not seem to have been its main attraction. Its attraction, rather, was its convenience for both shelf and hand. Being written on both sides as well as compactly bound, the average content of a *codex* was perhaps six times that of a roll; *codices* could be stacked in libraries more easily than rolls; and they were far more convenient for the traveler.[14] Not all *codices*, however, were small. A large volume, with very compact writing, could contain the complete works of Virgil or even of Homer; an edition of the *Aeneid* alone is said to have occupied 330 pages, i.e., 165 parchment sheets,[15] about the same as a modern printed edition.[16] The weight of the volume would have depended mainly on the size of a page.

For religious and legal texts—texts bearing authority—there was the further advantage that interpolation was more difficult: "once a codex, in the sense of an authorized collection, had been issued with title and list of contents it was more difficult to make additions or substitutions than it was to interpolate a forged roll in a collection of rolls".[17]

Thus the name "*codex*", in antiquity and late antiquity, is not attached to any particular intellectual form. If the name "code" now does have such an attachment, its connection with its forebear "*codex*" is therefore mainly historical. The connection is that the books, and even more the ambitions, of Justinian were taken as models for works that were titled "code" even though, in them, those ambitions were very differently pursued. They were pursued in a way that *tied the idea of a legal "code" to that of a bound volume*. I will examine *the emergence of that tie and then its current dissolution*. My principal focus will be on the work that is still taken as a paradigmatic example of a legal "code", the French Code civil (Code Napoléon) of 1804.

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13. This change has been compared with the introduction of the paperback: Roberts, *supra* note 5, at 179; paperbacks had become widespread in the 1930s.

14. *Id.* at 177, 191-92, 202.

15. KLEBERG, *supra* note 5, at 76-77.

16. Such as that in P. VERGILI, MARONIS OPERA (R.A.B. Mynors ed., 1969).

17. Roberts, *supra* note 5, at 200.

II. THE CODE NAPOLÉON—FROM BOOK TO DATABASE

A. Comprehensiveness, from Constantinople to Berlin

Theodosius had aimed to codify all of the law, although he got only as far as laws made by earlier emperors. Justinian revived that ambition and claimed to have fulfilled it. By the modern period of codification, that had become a pipe-dream. For Frederick the Great of Prussia:

> A body of perfect laws would be the human spirit's masterpiece in matters of government: one would observe in it a unity of design as well as rules so precise and well proportioned that a state that was run according to those laws would be like a watch, all of whose springs are fashioned to the same end; one would find in it a profound awareness of the human heart and of the nation's genius [. . .] everything would be foreseen, all would interlock, and nothing would be left at risk: but perfect things cannot spring from human nature.[18]

More modest, therefore, were the aims of the Allgemeines Landrecht für die Preußischen Staaten (General National Law for the Prussian States) (PrALR), promulgated in 1794 by his nephew Frederick II.[19] This code was intended less to make new law than to consolidate, organize and clarify existing laws, and yet to bring them into conformity with "the law of nature and of justice (*dem Recht der Natur und der Billigkeit*)".[20] The code did not contain quite all of the law. It consisted mainly of civil law, criminal law and some public law. Some areas of law were not covered and to a limited extent Roman law and Germanic customary law continued to be permitted as supplements. Nonetheless, it was an enormous work, comprising more than 19,000 articles. It remains historically important, although it has been overshadowed by the French Code civil and by its own successor, throughout Germany from 1900, the Bürgerliches Gesetzbuch (Civil Code) (BGB).[21] Its importance lies not only in its ambition toward complete comprehensiveness, in which few but Bentham would persist, but also in its ambition to serve justice. Justice would be served by providing in advance for as much as possible, so as to eliminate the risks involved in judicial discretion.

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18. *Dissertation sur les raisons d'établir ou d'abroger des lois* (1750), *in* 9 ŒUVRES DE FRÉDÉRIC LE GRAND 9, 27 (1848), http://friedrich.uni-trier.de/oeuvres/9. His preferred language was French and the play on "spring (*ressort*)" is his own.

19. PrALR: http://www.smixx.de/ra/Links_F-R/PrALR/pralr.html. English translation: ALEXANDRE AUGUSTE DE COMPAGNE ET AL, THE FREDERICIAN CODE: OR, A BODY OF LAW FOR THE DOMINIONS OF THE KING OF PRUSSIA (1761), http://www.archive.org/details/fredericiancode00prusgoog.

20. Royal order commissioning the work, 1780, para. 1, http://www.smixx.de/ra/Links_F-R/PrALR/PrALR_Plan.pdf.

21. In English, http://www.gesetze-im-internet.de/englisch_bgb.

B. The French Codifiers

The French Revolutionaries proceeded by parts. The Code civil codified only one area of the law, albeit a huge area. A few other major areas were covered by other codes (all of which have now been replaced): criminal law, commercial law, criminal procedure and civil procedure.[22] The Code civil, in its first official edition, is a book of 582 pages, including a detailed table of contents.[23] It is not a collection of extracts, as with Theodosius and Justinian, but a thorough rewrite of the law. Its text is set out as Articles, which are arranged—similarly to the codes of Theodosius and Justinian but with greater analysis—by Books, Titles, Chapters and Sections. The arrangement may not have the geometrical consistency or clarity that the Enlightenment had sought.[24] Nonetheless, to be able to find all (it was hoped) of *le droit civil* in a single, rationally arranged volume with a detailed table of contents was an enormous advance.

It did not have to be named "code". The Germans chose differently: earlier, "*Landrecht*" (national law) and, later, *"Gesetzbuch"* (literally, "statute book"). But *l'empereur des français* would have been happy to acknowledge Justinian as an ancestor.[25]

C. The Code civil from Book to Database

However, only historians any longer read the Code civil in just that form. If one wants only the current text, one can find it free online[26]; but the text alone is useful only as a starting point. True, to discover what is the law on any particular topic, one still begins with a printed volume. The most commonly used texts are those by the commercial publisher Dalloz; but these add extensive further material, updated annually.[27]

The Code civil Dalloz used to come only in what is now termed the "small" version, but there are now three versions: "small", "expert" and "mega".

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22. Code pénal 1810 (replacing a Revolutionary code of 1791), Code de commerce 1806, Code de procédure civile 1807, Code d'instruction criminelle 1808.

23. Code civil des français—édition originale et seule officielle, 1804, Bibliothèque Nationale de France (Gallica), http://gallica.bnf.fr/ark:/12148/bpt6k1061517.r=.langFR.

24. KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 85-97 (Tony Weir trans., 3d ed. 1998).

25. *Compare* Eric Hobsbawm & Terence Ranger (eds.), THE INVENTION OF TRADITION (1983).

26. Officially: Légifrance, http://www.legifrance.gouv.fr/Droit-francais. Unofficially: Institut Français d'Information Juridique, http://www.droit.org; and others.

27. DALLOZ, http://www.editions-dalloz.fr. The description of the Mégacode civil is from March 2012.

The "small (*petit*)" version, the 2012 edition[28] of which is the 111th, is a chunky paperback volume, of nearly 3,000 pages on thin paper, measuring 19 x 13 cm and weighing about 1,300 g. It adds extensive annotations from related codes, statutes and judicial decisions. There are a detailed table of contents at the beginning and an extensive index at the end. It is just about able to be held in one hand while the other hand is, perhaps, flourished toward the bench. At 40 euros, it is cheap.[29] A digital version, which may be consulted online, costs 34 euros.

The "expert (*expert*)" version has the same cover size but contains additional material drawn from authoritative scholarly writings (*la doctrine*) in journals from the same publisher and weighs about 1,500 g. Its text is provided both on paper and on CD-ROM. This version costs 190 euros, but for the extra money one gets not only the extra material but also hypertext links among what is now an otherwise barely manageable mass of materials.

However, there is also the "mega (*méga*)" version, now in its ninth year. It too combines paper and CD-ROM. The paper text runs to 3,762 pages, measures 24.5 x 16 cm and weighs all of 2,537 g. It costs 160 euros—less than the "expert" edition, which appears to be aimed at practitioners. The publisher describes it as:

> The whole of the "small" Code civil Dalloz [. . .] enriched, article by article, with a supplementary set of annotations providing, through many case references drawn from databases, up-to-date access to unpublished decisions (of lower courts and appeal courts, as well as unpublished decisions of the Cour de Cassation), to the ideas behind them, to directions of development in specific areas of litigation, and to their possible divergences from "official" (i.e. published) lines of decision.
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> [. . . T]he Mégacode civil 2012 is issued in two interdependent media, paper and CD-ROM. The texts that complement the Code civil as such (extracts from other codes, from particular legislation on leases, co-ownership etc, and from international conventions) are provided in their complete form only on the CD. In the paper version, these texts are only mentioned, together with a pictogram referring to the CD. The paper and CD versions are not available separately.

The Code civil is now a long way from being just a book, or perhaps even a book at all. It is, at least in its expert and mega editions, *less a book than a database*.[30] The physical form has radically altered.[31]

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28. Dalloz codes are dated for a particular year and are usually published in the second half of the previous year.

29. Other editions, in the Prat series and the Litec series, are even cheaper.

30. It would be interesting to know how far French lawyers use the digital texts as supplements to the paper texts or the paper texts as backup to the digital texts.

III. IS CODIFICATION STILL POSSIBLE? FROM SCROLLS TO SCROLLING

A. Life of the Code civil

This change in the physical form of the Code civil has been a way of managing the vast additional material that Dalloz has seen fit to attach. The actual text of the Code civil, as we have it today, is not very much longer than it was in 1804: it has expanded from 2,281 articles to 2,534 (not counting some ancillary new articles). The main problem for codification in France today is not the length of the Code civil or perhaps the length of any of the codes currently in force,[32] but the number of codes.

Between 1880 and 1945, the Code civil was so far supplemented by statutes and by major decisions of the Cour de Cassation that the rôle of the Code civil, it has been said, became "residual".[33] This period of "decodification" has been followed, recently, by one of enthusiastic new codification.[34] France now has more than 60 statutes of general application that are named "code", as well as "codes" applicable only in overseas territories.[35] These deal with many novel areas of law, such as consumer law and environmental law. By the 1990s, this burgeoning of codes produced a crisis as to the sources of law, which came to look like "a landscape turned over and over, in which legal rules seem to pop up everywhere, at any moment and from any direction".[36]

B. Too Much Codification?

Perhaps, to some French conservatives, the main problem is the emergence of new areas of state regulation that they have political reasons to regret. Yet, as has been seen, concern about the very proliferation of codes has recently been expressed by the body that is

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31. It does not seem necessary now to consider loose-leaf publication, a cumbersome method that may be regarded as superseded by digitization.

32. The Code de la légion d'honneur et de la médaille militaire (Honours Code) has only 173 articles.

33. P. Remy, *La recodification civile*, 26 DROITS 3, 10 (1997); *quoted*, Rémy Cabrillac, *Les enjeux de la codification en France*, 46 C. DE D. 533, 535 (2005). Also, its principles may not have been particularly Revolutionary and, even so, may have been bypassed: James Gordley, *Myths of the French Civil Code*, 42 AM. J. COMP. L. 459 (1994).

34. Cabrillac, *supra* note 33, at 536.

35. Légifrance, "Les codes en vigueur", http://www.legifrance.gouv.fr/initRechCode Article.do.

36. MIREILLE DELMAS-MARTY, POUR UN DROIT COMMUN 52 (1994); *quoted*, Cabrillac, *supra* note 33, at 536. Similar deep frustration was expressed in 1997 by Édouard Balladur, Prime Minister of France from 1993 to 1995: CARACTÈRE DE LA FRANCE 193 (1997); *quoted*, Cabrillac, *supra* note 33, at 536. I have not yet had access to RÉMY CABRILLAC, LA RECODIFICATION CIVILE EN FRANCE (2008).

charged with drafting them.[37] The Commission Supérieure de Codification states:

> The Commission observes that the age of drawing up new codes is probably reaching its end. The aim of a nearly complete codification of the law is no longer pursued, for three reasons: firstly, the technical developments by which texts are provided in non-physical form offer to users modes of access that are comparable in many ways to those available through a code; secondly, the creation of new codes encounters a kind of law of diminishing returns in that, the more progress that is made in the development of new codes, the trickier it becomes to determine in which code particular provisions should be located; and, finally, it is clear that certain kinds of provision [. . .] are unsuitable for codification, since codification makes sense only when it involves provisions that possess sufficient generality.[38]

The "aim of a nearly complete codification of the law" does not envisage a reduction of all the law to a single code. The Revolutionaries had envisaged, rather, a reduction of all the law to a set of codes, each complete for its own particular area—albeit, in each case, very large areas and most prominently "civil law". They had also envisaged that the elements of each code would be general norms, to be particularized in application. The Commission finds even this now to be impractical, for the second and third reasons that it gives, and, for the first reason, probably no longer necessary. That first reason, which I will call the "technological" reason, will be the principal focus here.

The Commission does not contemplate abandoning codes already in existence. The technological reason, however, must relate to codes already in existence as well as to those in prospect. And the reference to "technical developments by which texts are provided in non-physical form" problematizes the very idea of a legal "code".

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37. This may not have been welcome news in Luxembourg, which has recently embarked upon major codifications—including an eight-volume, paper and online, CODE ADMINISTRATIF: LEGILUX, http://www.legilux.public.lu/leg/textescoordonnes/compilation/index.html. Nor, either, to those engaged in the project for a European Civil Code: European Legal Studies Institute, Study Group on a European Civil Code, http://www.sgecc.net. It may have provoked chagrin in the European Commission, which understands as "codification" what is characterised above as "consolidation": http://ec.europa.eu/dgs/legal_service/codifica_en.htm.

38. COMMISSION SUPÉRIEURE DE CODIFICATION, VINGT ET UNIÈME RAPPORT ANNUEL 2010 (2011) 13. The Commission now estimates that diminishing returns would set in after completion of its current codification projects—when 60% of legislation will have been codified—and proposes that further codifications envisaged should be abandoned: VINGT-DEUXIÈME RAPPORT ANNUEL 2011 (2012) 21. Both reports are at: http://www.legifrance.gouv.fr/Droit-francais/Codification/Rapports-annuels-de-la-CSC.

Let us now consider the Commission's points in relation to the existing range of French codes.

C. The French Codes Today

Bell divides the French codes into three sets.[39] The first set are the Napoleonic codes, of which only the Code civil remains. The second set, says Bell, are "similar in that they constitute a serious review and restatement of the law in a systematic and principled fashion", an example being the Code pénal (Penal Code) of 1994 "which was the product of many years in a ministerial committee and then in Parliament".[40] The third set are only "consolidations" of existing legislation—for example the Code de justice administrative of 1999 which "sets out the rules governing procedure in the administrative courts"; this set is a form of reorganization, not of innovation. It will be seen that Bell's first set corresponds to what was characterized earlier as "codification", his second set partly to "codification" and partly to "consolidation" and his third set to "consolidation".

Two important features that are commonly ascribed to codification, says Bell, are found intensively in the first of these sets, less so in the second and not at all in the third. One of these features is that a code is to be "self-contained and a new departure". I would separate those two features. A code may be self-contained if it only restates the existing law, provided that the existing law is wholly replaced by the restatement. A "new departure" on the Napoleonic scale, a radical innovation as to both form and content, will be likely to fail unless it both corresponds to radical social and political change and has powerful political backing.[41]

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39. JOHN BELL, FRENCH LEGAL CULTURES 56-58 (2001). *Compare* Cabrillac, *supra* note 33, at 537-40.

40. However, the Commission complains that time is wasted through a lack of political will, referring to two recent codes that, after the Commission had completed its work of drafting, were stalled for more than a year before being submitted for approval to the Conseil d'État: COMMISSION SUPÉRIEURE DE CODIFICATION (2010 REPORT), *supra* note 38, at 8. Political conditions appear to be a major determinant of the speed with which codification can be carried out, together with the ambitions of the task: H.R. Hahlo, *Codifying the Common Law: Protracted Gestation*, 38 M.L.R. 23 (1975). A European Civil Code (*supra* note 37), first requested by the European Parliament in 1989 (O.J.E.U. (C 158) 400), is not yet in sight: Hector L. MacQueen, *The Common Frame of Reference in Europe*, 25 TUL. EUR. & CIV. L.F. 177 (2010); Matthias Storme, *The Foundations of Private Law in a Multilevel Structure: Balancing, Distribution of Lawmaking Power, and other Constitutional Issues*, 20 E.R.P.L. 237 (2012).

41. Cabrillac, *supra* note 33, at 541-45. One might compare the westernization of Japanese law in the late nineteenth century: ZWEIGERT & KÖTZ, *supra* note 24, ch. 21; JOHN OWEN HALEY, THE SPIRIT OF JAPANESE LAW (2006). Also codification in post-Communist central and eastern Europe: Attila Harmathy, *Codification in a Period of Transition*, 31 U.C. DAVIS L. REV. 783 (1998).

The Code civil was very successful, but, as I have shown, today it is far from self-contained and, of course, its novelty has long worn off.

One can compare here one of the new codes, the Code de justice administrative, which provides for the procedures of the Conseil d'État and the administrative courts (*tribunaux administratives*, *cours administratives d'appel*). It clearly falls into Bell's third set. It is a work entirely of consolidation and the material consolidated is drawn not only from statutes but also from regulations. These are not integrated with each other but are placed in separate parts: in the "*partie legislative* (legislation part)", articles are designated "L" for "*législatif*", while in the "*partie réglementaire* (regulation part)" they are designated "R" for "*réglementaire*".

The Commission's second point, about a law of diminishing returns, can be restated—and perhaps with greater force—from the standpoint of the user. If the producers of law have trouble working out where to put it, how much more must the consumer of law have trouble finding it?

However, the Commission's first point, comparing codes with databases, might be restated in a more encouraging way. Returning to the Code de justice administrative[42]: the official online text in Légifrance provides hyperlinks between the two parts, as well as to the laws (*lois*, *ordonnances*, *décrets*) in which the provisions originated. These links, in fact, draw one into the whole web that is the Légifrance database. The texts in Légifrance are continually updated. As of 8 July 2012, Légifrance gives for the Code de justice administrative a "*Version consolidée au 20 juin 2012* (20 June 2012)" and, for the Code civil, a "*Version consolidée au 2 juin 2012* (2 June 2012)".

Thus the French codes, old and new, are *less books than databases*, in two ways which at present are separate. On one hand, as has been seen with the Code civil, a code is or can be *a database by extension*—the core element in a database for its own branch of the law. On the other hand, as has been seen with the Code de justice administrative, it can be *included in a database*.

D. Codes, from Books to Databases

A wider database need not, by any means, be confined to legislation. It could embrace the whole of the law. Putting that conversely: *the "law in books" can be a database*. It would then make

42. I do not have access to a paper copy of this code, but the Dalloz Web site says that the Code de justice administrative is included in what is titled a Code administratif (35th ed. 2012), price 68 euros (online version 51 euros). Dalloz describes this volume as a "code of codes".

sense, to say that all the law could become a code. I will pursue that thought for a little while, to consider in this light some of the advantages that are usually claimed for codification.

IV. JUSTINIAN: ACCESS, COMPREHENSIVENESS AND EXCLUSIVITY

A. Access—Physical and Intellectual

Justinian, apparently, would have loved this development[43]—probably Napoleon, too. And of course Jeremy Bentham, with his dream of a "Pannomion", a code of all laws available to all.[44] The main aims of Justinian's codification are *physical access* (including low cost) and *intellectual access*.

I will distinguish these immediately as *intrinsic* aims of codification—aims that depend upon the form, both physical and intellectual, of the work. Only the intrinsic aims will be considered here. I will not consider what may be distinguished as *extrinsic* aims of codification—purposes independent of the work's physical and intellectual forms,[45] such as legal unification[46] or assertion of cultural identity.[47]

The intrinsic aims of physical and intellectual access are to be fulfilled interdependently—by setting out the law in a relatively concise form, which might be copied readily and at small cost.[48] Instead of

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43. Justinian's work is now available online, complete in Latin and most of it also in English: hyperlinks are in *Wikipedia* (English), "Corpus Iuris Civilis".

44. JEREMY BENTHAM, CONSTITUTIONAL CODE, VOLUME 1 (F. Rosen & J.H. Burns eds., 1983); FREDERICK ROSEN, JEREMY BENTHAM AND REPRESENTATIVE DEMOCRACY: A STUDY OF THE CONSTITUTIONAL CODE (1983). Only the constitutional part was completed. *See also* Bentham's denunciation of judge-made law as "dog-law": *Truth* versus *Ashhurst* (1792), Bentham Project, http://www.ucl.ac.uk/Bentham-Project/tools/bentham_online_texts/truthvash. However, Bentham's ideas will be sidelined here in favour of attention to codes actually promulgated.

45. This distinction is similar to Varga's sociologically outdated distinction between "form" and "function" of a code: VARGA, *supra* note 3. *See also* review of this book by Pierre Legrand, *Strange Power of Words: Codification Situated*, 9 TUL. EUR. & CIV. L.F. 1 (1994). On legal form and function, compare KARL RENNER, THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS (1904; Agnes Schwarzchild trans., 1949). My distinction is not intended to be essentialist, but to be subordinate to identifying the differences among forms of publication that are commonly termed "codes" as differences only of degree. I do not exclude the possibility that an extrinsic aim may be the principal aim.

46. The Code civil unified, by replacing and to an extent restating, customary and feudal laws of northern France and Romanist laws of the south.

47. As, today, in Québec: Aline Grenon, *Codes et codifications: dialogue avec la common law?*, 46 C. DE D. 53 (2005).

48. Small, perhaps, relative to the wealth of the few in the eastern empire who could read Latin. Although imperial administration was conducted in Latin, there was actually a shortage of Latin-speakers. Justinian's own native language was Latin, having been born in Macedonia. But he did envisage translation into the *lingua franca* of the Eastern Empire, which was Greek—in

expensive confusion, not only lawyers and administrators but "all men", Justinian promises, might have

> laws that are straightforward as well as brief, and easily available to all, and also such that it is easy to possess the books (*libros*) containing them, so that men may not need to obtain with a great expenditure of wealth volumes containing a large quantity of redundant laws, but the means of procuring them for a trifling sum (*uilissima pecunia*) may be given to both rich and poor (*tam ditioribus quam tenuioribus*) and great learning be available at a very small cost (*minimo pretio*).[49]

Justinian is stating two aims. One of them is plainly achieved: to replace a mass of books, often out of date, with a single collection that can be officially updated. The other is, equally plainly, obscure: how would it be possible to produce those large works for a "trifling sum"? Before looking at that question, however, it can be observed that neither of these aims entails anything about the internal structure of the works that are to serve them. These aims tell us what the works will not be—they will be not be dispersed or expensive, including being expensive because dispersed. But the aims do not tell us what, taken for themselves, those works will be like. They do not tell us—as we look back with expectation—what it means, to be a "code".

B. Physical Access—Cost

The cost of blank sheets of papyrus and parchment has been debated; the quality of the sheet may have been much more important than whether it was of papyrus or parchment.[50] The cost of writing must also have varied considerably—as to who did it, how, and how well.[51] Yet low-cost writing seems to have been possible, with use of mass dictation to scribes.[52] This might have been suitable for legal texts, if Skeat is correct that writing at dictation was not necessarily more error-prone than visual copying. Yet Justinian is speaking of availability to the poor and Skeat identifies a great "extent and depth" of "errors and corruptions" in one manuscript as evidence that it must have been written

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attic, ecclesiastical and demotic dialects—and literacy in Greek was not rare. Some of his later legislation was also issued in Greek. *See generally* William A. Johnson & Holt N. Parker (eds.), ANCIENT LITERACIES: THE CULTURE OF READING IN GREECE AND ROME (2009).

49. CON. *Tanta* 13 (533).

50. Roberts, *supra* note 5, at 179.

51. Some copyists, at least, could write both fast and well. Martial, in the first century CE, says that his copyist could get through his "little book (*libellus*)"—540 lines of poetry—inside an hour: *Epigrams*, 2.1; KLEBERG, *supra* note 5, at 31.

52. T.C. Skeat, *The Use of Dictation in Ancient Book-Production*, 42 PROC. BRIT. ACAD. 179 (1956).

at dictation as "a mass-produced copy designed for sale to the semi-educated".[53] Yet Skeat goes on to suggest that what is important is less error as such than the type of error; a text written at dictation that is full of errors that are so obvious and superficial that they may be discounted might actually be more reliable than one that has been copied visually.[54] That might be so for a literary text, where for example a character's name might be mis-spelt once or twice. For a legal text, however, the possibility of an undetectable error that would change the meaning of a passage is high.[55] The question for a legal text, much more than for a literary text, is not only to have a text at all but also, and as importantly, to have a text that is reliable.

Beyond these estimates of relative cost when texts are written in different physical forms, little is known about actual price. A common way to obtain a copy of a work was to borrow one from a friend and either copy it oneself or have one's servant or slave copy it.[56] In ancient Greece and Rome, most of the scribes in publishing houses were slaves.[57] But, if the slave's recompense was meagre, nonetheless there was the foregone benefit of the slave not being put to other labor. Few price figures are available, and what values they represent are uncertain owing to lack of information about price fluctuations.[58] Moreover, these figures are from antique Greece and Rome, not from Justinian's time or place. For the same reason, they probably concern papyrus rolls and not *codices*.

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53. *Id.* at 198-99.

54. *Id.* at 206. This is necessarily speculative, since it can be uncertain whether a particular kind of error is a sign of a particular way of copying: Napthali Lewis, *The Process of Promulgation in Rome's Eastern Provinces*, *in* STUDIES IN ROMAN LAW IN MEMORY OF A. ARTHUR SCHILLER (Roger S. Bagnall & William V. Harris eds., 1986).

55. It has been the source of centuries of debate on the accuracy of surviving texts of Justinian's work: SCHILLER, *supra* note 4, at 62-88. Albeit that much of the debate was over the different and highly speculative question of how accurately Justinian's team had reproduced the writings that they included, given also that they had been licensed to amend and left no record of their amendments. More to the present point are the recent doubts about the accuracy of the transcripts that Mommsen relied on for his classic edition of Justinian's work: Charles M. Radding, *Vatican Latin 1406, Mommsen Ms. S and the Reception of the Digest in the Middle Ages*, 110 Z.R.G. (R.A.) 501 (1993); Charles M. Radding & Antonio Ciaralli, *The Corpus Iuris Civilis in the Middle Ages: A Case Study in Historiography and Medieval History*, 117 Z.R.G. (R.A.) 274 (2000).

56. Raymond J. Starr, *The Circulation of Literary Texts in the Ancient World*, 37 CLASSICAL Q. 213 (1987). Starr estimates that in Rome the trade in used books, apart perhaps from schoolbooks, was small: *The Used Book Trade in the Roman World*, 44 PHOENIX 148 (1990).

57. KLEBERG, *supra* note 5, at 35.

58. *Id.* at 56-59.

One might get some light upon this puzzle by asking why copies of laws were to be made at all. Firstly, there were certified official copies. In 438 CE, when a copy of the Theodosian Code arrived in Rome, the Roman Senate had at its service some experienced scribes and carefully prescribed how further official copies were to be made from that copy.[59] It seems to have been assumed that the official copyists could produce a sufficient supply, but by 443 it was thought necessary to ban bootleg editions under threat of fine and possible death.[60] Justinian too would place a very high premium on reliability. Repeatedly, he condemns with criminal and civil penalties any copying of the Corpus texts in which "coded signs and obscure abridgments"[61] are used, even for the names of authors and titles of works cited, instead of writing the text out in full.[62] This ban is placed together with the bans on commentary and on the citing of superseded texts.

One of Justinian's reasons for codification was a shortage of texts. Constitutions (*constitutiones*: imperial decrees) had been taking up to four years to reach the hands of law students.[63] Justinian would have needed an army of latinate scribes. Yet, in most of the eastern empire, Latin was now a foreign language—although it was the language of the higher administration, including the courts. Even in the law schools, instruction was in the *lingua franca*, Greek.[64] However, it may be suggested that an army of volunteers, or at least "volunteers" army-style, was to hand. Justinian commanded that the works of the Corpus be made available to students in the approved law schools.[65] That meant a large number of copies. The curriculum covered extensive parts of the texts. The students themselves, already requiring literacy in Latin in order to understand the texts, would have been able to make their own copies. It accordingly seems reasonable to speculate that Justinian intended to use law students.[66] That was the practice in mediaeval

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59. *Minutes of the Senate of the City of Rome* (438 CE), *in* THE THEODOSIAN CODE AND NOVELS AND THE SIRMONDIAN CONSTITUTIONS, *supra* note 10, at 3-7, *Min. Sen.* 7; JEAN GAUDEMET, LA FORMATION DU DROIT SÉCULIER ET DU DROIT DE L'ÉGLISE AUX IV^e^ ET V^e^ SIÈCLES 47 (1957).

60. *Minutes*, *supra* note 59, *Min. Sen.* 8. The passage prescribes both a fine and "the penalty of sacrilege", which Pharr notes was usually death—the basis being that everything connected with the emperor, including laws, was considered to be sacred and divine (*id.* at 3 n.15, 7 n.11).

61. Apparently a reference to copyists' practice of using signs and abbreviations to save space.

62. CON. *Deo auctore* 13 (530); CON. *Tanta* 22 (533); CON. *Omnem* 8 (533).

63. J. INST. pr 3.

64. GAUDEMET, *supra* note 59, at 93.

65. CON. *Omnem* 7 (533).

66. *Compare* Pugsley, *supra* note 12, (1993), at 102 n.56 (on 105).

Bologna, where students were expected to possess their own copies of the principal texts: "Authorised booksellers, known as *stationarii exempla tenentes*, held certified copies of the texts, which they hired out to students so that they could make their own copies."[67] To hire in instalments, such as single books (*libri*) of the Code and the Digest, could have reduced the number of copies that had to be simultaneously available. The Bolognese students took their personal copies away with them and no doubt Justinian's students would have done so too. Since Justinian's law students were expected to become officials (there was no legal profession as such), that would largely have taken care of officials' need for copies of the major texts. Although there was a great deal for each student to copy, the task could have been spread through the five-year course.[68] It would have been in the student's own strong interest, to copy reliably.

Yet Justinian is talking about sale to the public. Since few of the poor would have been able to read Latin, he may be thinking mainly about sale of Greek translations. However, translations have their own degrees of reliability and, in any case, could not have been cited in court. There remains a possibility, perhaps a likelihood, that Justinian's talk of a "trifling sum" is a mere flourish. He could have got away with it, since those who were actually likely to read these texts were unlikely to be poor. All the same, it's a worthy idea.

C. Access and Democracy

Justinian's work, as has been mentioned, has three parts: the Digest or Encyclopaedia (*Digesta seu Pandectae*)[69] consists of extracts from juristic writings; the Code (*Codex*)[70] consists of extracts from statutes; and these are supplemented by a textbook, the Institutes (*Institutiones*),[71] which contains some additional material. All three parts have force of law.[72] There had been earlier compilations of statutes apart from that by Theodosius, both official and unofficial, and earlier textbooks.[73]

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67. PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 53 (1996).

68. CON. *Omnem* 2-5 (533).

69. THE DIGEST OF JUSTINIAN (Alan Watson trans., 1985, rev. ed. 1998). *See also* discussion of this translation in Roman Law Resources, http://iuscivile.com/materials/digest.

70. ANNOTATED JUSTINIAN CODE, *supra* note 11.

71. THE INSTITUTES OF JUSTINIAN (J.A.C. Thomas trans., 1975); JUSTINIAN'S INSTITUTES (Peter Birks & Grant McLeod trans., 1987).

72. CON. *Tanta* 20a (533).

73. Justinian's Institutes are modeled on the second-century Institutes of Gaius, who also appears frequently in Justinian's Digest: THE INSTITUTES OF GAIUS (F. de Zulueta trans., 1946); THE INSTITUTES OF GAIUS (W.M. Gordon & O.F. Robinson trans., 1988).

Nonetheless, nothing earlier could compare in scope with Justinian's endeavor.[74]

A desire for physical accessibility, however, is not to be confused with a desire for democracy. For Bentham and for the French Revolutionaries, they went hand in hand. But *imperator Iustinianus* had been interested less in hearing the voice of the people than in the people hearing the "voice of the emperor".[75] In a very long view, such as that of Varga, codification may be merely a form that can be made to perform various and conflicting functions.[76] But, if with Varga one reaches way back to Hammurabi, then the idea of "codification" is diluted so far as to be barely distinguishable from that of systematization. If, instead, one takes the idea of a "code" to involve a high degree of thematic rationalization, then there is still no necessary connection with democracy. What one might say is that *codification does not require democracy, but democracy requires codification*.[77] At least, that is, as long as the preferred physical form of codification remains the book.

D. Intellectual Access

As to intellectual accessibility, Justinian made two bold claims about his codification, which, although unachievable today, remain relevant as possible aspirations: *complete comprehensiveness* and *complete exclusivity*. The Digest is to be permanently comprehensive: the fifty books (*libri*) in which the juristic extracts are thematically arranged "have within them all disputed questions and the legal solution thereof".[78] The Digest, the Code and the Institutes taken together are also

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74. The Digest alone is said to said to pull together all existing juristic work (CON. *Tanta* 10 (533)), edited from "nearly two thousand books and more than three million lines" (CON. *Tanta* 1 (533); *compare* CON. *Omnem* 1 (533)). While this may be an exaggeration, the labor was certainly vast.

75. J. INST. pr 3.

76. VARGA, *supra* note 3.

77. Max Weber's "England problem" does not arise here. Weber wondered how England's exceptional economic development had been possible without codification: David Sugarman, *In the Spirit of Weber: Law, Modernity and "the Peculiarities of the English"*, *in* Claes Peterson (ed.), HISTORY AND EUROPEAN PRIVATE LAW: DEVELOPMENT OF COMMON METHODS AND PRINCIPLES (1997). That economic development had been achieved with a very limited commitment to democracy. Codification in British colonies, however, sometimes accompanied the attainment of self-government: Barry Wright, *Criminal Law Codification and Imperial Projects: The Self-Governing Jurisdiction Codes of the 1890's*, 12 LEGAL HIST. 19 (2008). Codification has been specially important for criminal law, so that it can be applied far from any law library. A theme that arises from the English example, but which cannot be explored here, is how far a need for codification may stem from absence or weakness of a centralized judiciary: *see also* John W. Cairns, *Attitudes to Codification and the Scottish Science of Legislation, 1600-1830*, 22 TUL. EUR. & CIV. L.F. 1 (2007).

78. CON. *Tanta* 1 (533).

to be completely exclusive: all earlier laws are entirely superseded. It is forbidden "to compare these laws with the former ones or, if there is any discrepancy between them, make any enquiry, since whatsoever is set down here, we resolve that this and this alone be observed". In any legal proceedings or "any other contested matter where laws are applicable", anybody who cites anything outside the Institutes, the Digest and the Code, "together with the judge who permits such things to be heard", will be charged with forgery and subjected to "the most severe penalties".[79] Albeit that, in this imperfect world, new issues may arise and the new solution required is to be sought from the emperor himself.[80] In fact, Justinian continued to legislate and the Code as we have it is its second edition; his legislation after that[81] was presumably to be incorporated in a further edition of the Code and it would have been easy to produce supplements to the Institutes. The voice of the emperor, at any rate, remains completely exclusive.

The insistence on exclusivity extends to the form of the codification's texts. They may be translated into Greek, but there shall be no commentaries on them, except for brief notes on obscure passages or the making of indexes.[82]

E. Access and Databases

Today, the issue of physical access is addressed wonderfully by databases—effectively, it disappears. The issue of intellectual access is more complex.

Comprehensiveness can be assured. Resources are required for hosting the database—accommodation, hardware, software and staffing. Yet the cost is so small in proportion to the amount and importance of the information provided that free provision is feasible. Resources are also required, through decreasing over time, to digitize existing material—but new material will already be in digital form and it can be arranged that the formatting will match. The greatest payoff is that, instead of having to either hire a scribe or borrow a copy and do it oneself, texts can be downloaded with complete accuracy and for not just a "trifling sum" but actually at negligible expense.

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79. CON. *Tanta* 19 (533). The penalty for forging coinage could be death, by beheading or fire: CODE JUST. 9.24.

80. CON. *Tanta* 18, 21 (533); *compare* DIG. 1.3.11.

81. Later collected unofficially as the Novels (*Novellae Constitutiones*, "new decrees").

82. CON. *Deo auctore* 12 (530); CON. *Tanta* 21 (533).

Exclusivity is not affected, since it was never a problem of the material itself[83] but of managing the material. Today, as in Justinian's era, the state determines what will count as law[84] and therefore what may be admitted in legal argument. Within that sphere, a database enormously facilitates access to legal materials. The danger of information overload is less that actually inappropriate materials will be referred to than that lawyers will use search engines to ferret out the obscure.

V. STYLE, LOGIC AND AUDIENCE

If laws, to all intents and purposes, will live on databases, how are they to be written? This is a mixed question of style, logic and audience.

A. Style and Logic—Portalis

The other feature of codes identified by Bell, with the Code civil in mind, is that a code is marked by a distinct legislative style. It will "state principles in short phrases", adopting a style that is to be "succinct and inspiring, rather than to cover every eventuality".[85] Bell quotes on this, for the Code civil, the principal among the four jurists commissioned to write it, Portalis. I will look at Portalis more extensively. One reason to do this is to swim under the mythology that has attached to the Code civil and, through it, to the idea of codification in general.[86]

Bell is referring to Portalis's *Discours préliminaire*, prepared in 1801 among the *travaux préparatoires* of the Code civil and signed by all four of the commissioners appointed to write the Code.[87] In the *Discours*, it is important that Portalis speaks separately of the "*magistrat*" and the "*juge*". He appears to be using the word *magistrat* in the sense of the Roman *magistratus*, a class that embraced all of the senior public officials, including consuls and praetors. The functions of this class were more often administrative than judicial; they could also be legislative or

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83. Justinian did not try force lawyers to destroy their old books. It is presumably through disuse, that law books of that period and earlier have almost all disappeared.

84. The Christian church could not interfere with Theodosius or Justinian, since the emperor was head of both state and church.

85. BELL, *supra* note 39, at 57.

86. There has emerged a mystically foundational "mytho-logic" which has merited study on its own account: JACQUES LENOBLE & FRANÇOIS OST, DROIT, MYTHE ET RAISON (1980); summarized in Jacques Lenoble & François Ost, *Founding Myths in Legal Rationality*, 49 M.L.R. 530 (Iain Stewart trans., 1986).

87. JEAN-ÉTIENNE-MARIE PORTALIS, DISCOURS PRÉLIMINAIRE DU PREMIER PROJET DE CODE CIVIL, http://classiques.uqac.ca/collection_documents/portalis/discours_1er_code_civil/discours_1er_code_civil.doc (not paginated). Selections from the *Discours* are translated, with historical commentary, *in* Alain Levasseur, *Code Napoléon or Code Portalis?*, 43 TUL. L. REV. 762 (1969), but I have made my own translations.

religious.[88] I will render *magistrat* as "magistrate"; although that sense of the English word has died out, it will serve to convey Portalis's meaning. When Portalis speaks of the "*juge*", he may be taken to be referring to judicial functions of a *magistrat* rather than to a specialized judiciary, of which the Revolution had taken a dim view.[89]

For Portalis, "Law (*le droit*) is universal reason, supreme reason grounded in the very nature of things. Laws (*les lois*) are, or ought to be, only law reduced to positive rules, in accordance with particular precepts." However, he says, the widespread expectation that a code could consist of only a small number of provisions, provided that they are formulated both with precision and so as to cover all eventualities, is mistaken. A "host of things" are "necessarily left to usage, to discussion by educated men and to the arbitrament of judges". "The rôle of laws (*l'office de la loi*) is to set out, taking a broad view, the general maxims of law: to establish principles that will be fruitful in the conclusions that may be drawn from them, and not to descend into the detail of questions that may arise in relation to each particular matter. It is for the magistrate and the jurist, imbued with the general spirit of the laws (*pénétrés de l'esprit général des lois*), to direct their application."

There will be two types of interpretation. Interpretation "by way of doctrine" is for the judge, who is to "grasp the true meaning to be found in the laws (*le vrai sens des lois*), to apply them even-handedly and to supplement them in cases that are not covered by any rule". Interpretation "by way of authority" is for the legislator and not for the judge: it "consists of resolving questions and doubts, by way of making a rule either for the particular issue or of general application (*par voie de règlements ou de dispositions générales*)". In either case: "When the law (*la loi*) is clear, it must be followed; when it is obscure, it will be necessary to go deeply into its provisions (*en approfondir ses dispositions*). If there is no applicable law (*manque de loi*), it will be necessary to consult usage or equity. To have recourse to equity is to return to natural law, where positive laws are silent, conflicting or obscure."

Legislator and magistrate pursue two, very different kinds of legal "science". "The science of the legislator consists of finding in every

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88. H.F. JOLOWICZ & BARRY NICHOLAS, HISTORICAL INTRODUCTION TO ROMAN LAW 45-57 (3d ed. 1972); SCHILLER, *supra* note 4, at 171-87.

89. In the same spirit of republican nostalgia, Portalis refers to the "*jurisconsulte*" (Latin, *jurisconsultus*); as scholars of Roman law do, I have rendered this as "jurist". It can also be noted that he refers to "usage (*usage*)" rather than to "custom (*coutume*)", perhaps because the latter predominated in northern France, in contrast and conflict with the predominance of Roman law in the south. One of the aims of the codification was to supersede that divide.

matter the principles most favourable to the common good. The science of the magistrate is to put these principles into action, to elaborate them, to extend them, through wise and properly reasoned application, to issues involving individuals (*hypothèses privées*); to study the spirit of the law when the letter kills; and not to expose oneself to the risk of being by turns slave and rebel, and of becoming disobedient through a spirit of servility."

Portalis distinguishes between statutes (*lois*) and mere regulations (*simples règlements*), although by "*règlement*" he may mean both a statement and the act of making that statement, the action of regulating. He says: "The function of laws is, for each matter, to set (*poser*) basic rules and to determine their essential forms." Mere regulations are appropriate for such things as the detailed execution of a law: "in short, all the things that require attention of the authority responsible for administering a law far more than intervention by the power that has issued or created it. Regulations are acts of magistracy, while laws are acts of sovereignty (*Les règlements sont des actes de magistrature, et les lois des actes de souveraineté*)."

An awful lot here is left to "spirit (*esprit*)". Although it is a commonplace of the age—and there is homage here to Montesquieu's already renowned *De l'esprit des lois* (*The Spirit of Laws*) of 1748—it sounds awfully like a "vibe".[90] Only for the place and time is it tied down to Enlightenment or Revolutionary ideals, although those themselves were often vague and always contested.[91] It could work, even there and then, only if the "magistracy" were to be united in its frame of mind. The outcome, however, was a lawyer's rather than a bureaucrat's dream: the Code civil has been called an "elegant practitioners' work".[92] It has lived long and more or less prospered because its "spirit" has been understood or defined, but in any case continually renovated, by lawyers. Not only by practitioners, however, but also and perhaps even more by academics.

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90. *The Castle* (Australian film, 1997).

91. The idea of "spirit" would soon be turned against the Code civil itself by Savigny, who opposed against modern codification—and specifically the Code civil, still used in the Rhineland—a *Volksgeist* that allegedly could be found in custom as an expression of national consciousness: FRIEDRICH CARL VON SAVIGNY, VOM BERUF UNSRER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT (1814), *in* Hans Hattenhauer (ed.), THIBAUT UND SAVIGNY: IHRE PROGRAMMATISCHEN SCHRIFTEN (1973). Savigny developed his own mytho-logic of "custom".

92. ZWEIGERT & KÖTZ, *supra* note 24, at 51 (perhaps, however, "elegant" only as practitioners' works go).

B. Audiences

That had also, *mutatis mutandis*, been Justinian's intention. His Institutes were the core of a reform of legal education. The "young enthusiasts for law"[93] would emerge from the law schools established in major cities, steeped in the general spirit of their emperor's codification and thus fitted to serve in imperial administration.

Commentaries on the Code civil quickly abounded. Napoleon may not actually have said "*Mon Code est perdu!* (My Code is lost!)", but his friend and memorialist Emmanuel de Las Cases would protest: "Gentlemen, we have cleansed the Augean stables; in the name of God, let us not fill them up again!".[94] Yet, as has been seen, Portalis envisaged a partnership: "It is for the magistrate and the jurist, imbued with the general spirit of the laws, to direct their application." Together, they would cope with perpetual changes in society; though Portalis was wary of "subtle" and "tedious" commentators who might push a personal agenda. Overall, as law libraries testify, Portalis won.

If the audience for the Code civil is lawyers and, in the first place, legal practitioners, that is surely not so for many of the recent French codes. To take just a few: Code de l'aviation civile (Civil Aviation Code), Code du cinéma et de l'image animé (Code for the Cinema and the Moving Image), Code de la construction et de l'habitation (Building and Dwellings Code), Code général des impôts (General Tax Code). All of these are areas in which lawyers may be relatively few and, from the point of view of non-lawyer practitioners in each area, hopefully not required. The audiences to whom these codes are addressed must often be, so far as they are practitioners, people without legal training or, as for example with tax accountants, who have some legal training but are not specialist lawyers. Each area will have its own "spirit", hence its own way of seeking to understand the code that applies to it. That can happen even within the public service, as between "hard" and "soft" ministries.[95] Within the public service, that problem may be resolving itself as all sectors move into a "spirit" of economic rationalism. But that resolution of a difference within the public service may produce a problem for the whole service, which moreover would not be confined to the public

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93. J. INST. pr.

94. "Messieurs, nous avons nettoyé l'écurie d'Augias, pour Dieu ne l'encombrons pas de nouveau": *quoted*, Legrand, *supra* note 45, at 12.

95. MICHAEL PUSEY, ECONOMIC RATIONALISM IN CANBERRA (1991). Pusey traces how, whichever party was in government, economic rationalism dominated policy because the choices offered to ministers had come to be formulated, predominantly in the "hard" ministries such as Treasury, by senior public servants who had degrees in "dry" economics.

service—the relation, if any, between the mindset or *mentalité* of economic rationalism and any mindset that is characteristic of a lawyer. The result may be to misunderstand law or to suppose that legality does not matter when it gets in the way of good "management".

If the principal audience for a code will be lawyers, then the importance of the code for democracy will be mainly indirect—that is, through lawyers. At the same time, lawyers involved might be not only practitioners but also scholars. In some countries a scholar may be a public figure, even a politician.

Several overlapping audiences, or types of audience, have now been identified: legislators; lawyers, whether practitioner or academic and whether in government or in private practice; practitioners or professionals who do not have legal training or, if they do, are not specialist lawyers; other public servants; and the general public. Assuming that none of these should be excluded from access to a legal database, to answer the questions of style and logic one still has to know which of them actually *needs* a legal database. Perhaps all of them do, although not equally.

C. Legal Databases

So far, the term "legal database" has been used to refer only to the provision of "hard" law. But "soft" law also exists on databases. Public servants who apply law normally do not read the law itself but operate in accordance with officially produced manuals and guides, which combine summary of the law with statements of the agency's procedural policies. For the manual's user, there is little if any difference between its legal content and its policy content. A departure from the manual might have legal consequences, but they would be consequences for the agency rather than for the individual officer. What the individual officer has to fear are disciplinary consequences, which may arise from getting the agency into legal trouble or from any other departure from the manual. Outside the public service, also available on databases or government Web sites are statements of rules, standards and other criteria for particular undertakings, such as the "building codes" of local authorities.

That is still to look only at *primary* legal databases, databases that contain laws. Both legal practitioners and others, however, make use of *secondary* legal databases, which contain information about the law but often in such detail that for most purposes the reader need not look further. Some secondary legal databases are official. Government Web sites, in "plain language" for the public, set out not so much a summary of the law as a statement of the agency's procedures and expectations.

This is often together with an online facility for dealing with the agency, such as making an application (e.g., for a passport). Other secondary legal databases are unofficial and usually subscriber-only. They may be summaries of the law, formerly or also published in series of volumes or in loose-leaf format, such as *Halsbury's Laws*; or they may be treatises, formerly or also published in hard copy, such as *Cross on Evidence*.[96]

All of this reduces, and may nearly eliminate, any need for a legal database to be composed in a style and with a logic that is user-friendly for non-lawyers. In sum: there may be little need for anyone but lawyers to use a legal database. It should be available to all, but need not be tailored to all. The issues of physical access and intellectual access are divided: physical access is for all, but intellectual access need be only for the legally trained.[97]

VI. ACCESS TO AND ACCESS IN (SEARCHABILITY)

Whoever may be the audience, the question of intellectual access is one not only of access *to* but also of access *in*. The question of access *in* is termed, with regard to databases, that of *searchability*.

A. Example: The Code civil

The Code civil was provided, from the beginning, with a detailed table of contents. The table displays a logic of classification. As Portalis says, deduction has entered into the classification and is expected to enter into the Code's application. Overall, however, the relations among the elements of the Code are relations of classification and this has become more pronounced as the Code has been amended.

Book I "Persons" may be taken as an example. In the first edition, Title II "Certificates of Civil Status" contains six Chapters: I "General Provisions", II "Birth Certificates", III "Marriage Certificates" and then IV "Death Certificates". So far, this might be seen as a deductive order. However, deduction is interrupted by the next Chapter, V "Certificates of Civil Status Concerning Military Personnel Outside the Territory of the Republic"; yet it returns with Chapter VI "Rectification of Certificates of Civil Status". In the current text, a new Chapter VI has been inserted, "Civil Status of Persons Born Overseas who Acquire or Resume French

96. HALSBURY'S LAWS and CROSS ON EVIDENCE are available from the major legal publisher LexisNexis Butterworths. Both works have Australian editions. A competitor for Halsbury in Australia, in paper and online, is THE LAWS OF AUSTRALIA (published by Lawbook Co.).

97. These developments, especially when combined with video-conferencing and satellite communication, also allow legal proceedings to be conducted almost anywhere.

Nationality", after which the former Chapter VI becomes Chapter VII. Still, however, deduction predominates.

Nevertheless, deduction takes a dive with revision of the beginning of Book I. The original edition has eleven Titles: I "Enjoyment and Deprivation of Civil Rights", II "Certificates of Civil Status", III "Domicile", IV "Absence", V "Marriage", VI "Divorce" and then other Titles concerning family matters. In the current version of the Code, Title I has no Chapter I but begins with a set of unclassified Articles. Title I is now followed by an extensive Title I *bis* "French Nationality", which is an area of public law rather than of private law. Other Titles added to the end of the Book, however, remain generally within the topic of "Persons".

Légifrance provides the table of contents as the opening page of the Code. Unlike the original edition, which refers to pages, Légifrance shows the set of Articles that are included in each Chapter or Section and makes each range of Articles—e.g., "Articles 517 à 526"—a hyperlink. Clicking on an internal hyperlink is not very different from turning to a page. But Légifrance has already, in its homepage for French law, provided two ways to access a Code. One can choose a code complete and then access it through the table of contents; or one can search directly for a particular Article of a particular code. At this point, deduction is not involved—only identification. The search can also be conducted through a global search engine such as Google: e.g., in Google France, for "code civil article 517".[98] However, the first source that this search leads to is not Légifrance but EasyDroit, which kindly adds references and links to relevant judicial decisions.[99] EasyDroit, even more kindly, provides access to Facebook and Twitter. So, if an Article is 140 characters or less . . . .

B. Current Developments

Another search development, which is available on several Australian legal Web sites, is point-in-time legislation, where one can find a legislative text in the wording that it had on a particular date, such as the date of an alleged crime. A further development, which I have not yet seen on a legal Web site but which can be predicted to spread, is an ability to highlight a word or phrase and begin searching from it as if it

98. In English-language versions of Google, unless "legifrance" is added the search will go to the official English translation.

99. EASYDROIT, http://www.easydroit.fr.

were an index entry.[100] At this point, search and research become integrated.

A still further development, which is used extensively in the media and could be applied to any digitally published legislative text, could be to provide on the Web site or in association with it an area for blogging or other form of public response. This could be an effective early stage, as crowdsourcing, in any project for law reform. It has been a major resource, along with public meetings, in both of the recent major initiatives for federal constitutional reform in Australia.[101] It has also already been used for new constitutions.[102]

A point can be reached, *where a legal database is not just an advantage but a necessity*. The most ambitious development so far in legal databases appears to be the European Union's database EUR-Lex. It contains all of EU law, which without a database would be unmanageable—especially because every law has to be available in most of the official languages of the 27 EU member states, currently 23 languages. EUR-Lex also contains a database of national legal databases, N-Lex. Searchers are assisted by the "multilingual thesaurus" EuroVoc, which currently covers 22 languages and has links for three more (including Russian).[103]

In sum: digital texts are enormously more searchable than printed texts, however well contents-tabled or indexed. So much so, that for the searcher the difference between texts as individual entities and as

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100. This is available in the current user guide for an Apple iPad2, http://manuals.info.apple.com/en/ipad_user_guide.pdf. The highlighted word or phrase can also be annotated.

101. In 2009 for a bill of rights: National Human Rights Consultation, http://www.humanrightsconsultation.gov.au/Report/Pages/default.aspx. And in 2011 for constitutional recognition of Indigenous peoples: YOU ME UNITY, http://www.youmeunity.org.au. Both initiatives received thousands of submissions.

102. Iceland has recently done this in drafting a new constitution, which would eventually be presented for approval in a conventional referendum: Haroon Siddique, "Mob Rule: Iceland crowdsources its next constitution", THE GUARDIAN (June 9, 2011), http://www.guardian.co.uk/world/2011/jun/09/iceland-crowdsourcing-constitution-facebook; Todd Wassermann, *Iceland Unveils Crowdsourced Constitution*, MASHABLE SOCIAL MEDIA (July 30, 2011), http://mashable.com/2011/07/29/iceland-crowdsourced-constitution. Constitutional reform using crowdsourcing has also been attempted in Morocco and Egypt: Tanja Aitamurto & Hanna Sistek, *The Cloud in Egypt: Help or Hype?*, SPOT.US (July 14, 2011), http://spot.us/pitches/986-the-cloud-in-egypt-help-or-hype/updates/1072-constitutional-crowdsourcing-site-launched. Wikilaws become, well, possible . . . .

103. EUR-LEX, http://eur-lex.europa.eu/en/index.htm; N-LEX, http://eur-lex.europa.eu/n-lex/index_en.htm. N-Lex allows searching within national databases, maintained by each member state (further integration would require adoption of a common format, which for one thing would be disruptive for the national legal systems). EUROVOC, http://eurovoc.europa.eu/drupal. One can also trace the progress of proposed EU laws, in PRELEX, http://ec.europa.eu/prelex/apcnet.cfm?CL=en.

elements of a database begins to dissolve. Further developments may blur the boundaries between access and interaction, and between audience and participation.[104]

VII. SKIPPING THE AGE OF CODIFICATION—AUSTRALIA

Australian law will now be briefly considered in this light. Like other common-law countries, Australia has never had a widespread movement toward codification. Nonetheless, if one looks for legislation that in other countries, such as France, would probably be named "code", one can find quite a lot. For example, among Australian federal statutes there are: Commonwealth Electoral Act 1918, Corporations Act 2001, Criminal Code Act 1995, Fair Work Act 2009 and Migration Act 1958. These are "codes" in the sense that they are comprehensive: they contain all or almost all the law in their area. But whether any of them are exclusive is debatable. Among the examples just given, the Migration Act is the most relevant to administrative procedure. In fact, it is so much litigated in the High Court[105] that it is coming to dominate (and, because it is untypical, possibly to distort) the development of administrative law. The Migration Act looks very much like an exclusive code of migration law; there is no other migration legislation, apart from regulations made under the act. Yet it has been judicially determined that the Migration Act does not exclude government use of executive power, outside the act, in relation to migrants.[106]

In a conventional sense of "code", then, Australian law is extensively codified. So, where does one find these laws? From my office window, I can almost touch a splendid new university library—which I visit perhaps twice a week. My access to non-legal materials is mostly online, through the library's journal subscriptions. My access to legal materials is almost entirely online. Most of that access is through a world-leading legal database: the Australasian Legal Information

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104. These issues of relations among texts are also different from those concerning relations among norms. The *Stufenbaulehre* has shown that a legal order is not primarily a deductive order: *see, e.g.*, Iain Stewart, *The Critical Legal Science of Hans Kelsen*, 17 J.L. & SOC'Y 273, 285-88 (1990). It may be, however, that a legal order is not, or not primarily, hierarchical but some other kind of system such as a network or a game: *see, e.g.*, MICHEL VAN DE KERCHOVE & FRANÇOIS OST, LE SYSTÈME JURIDIQUE ENTRE ORDRE ET DÉSORDRE (1988)—Iain Stewart trans., LEGAL SYSTEM BETWEEN ORDER AND DISORDER (1994); MICHEL VAN DE KERCHOVE AND FRANÇOIS OST, LE DROIT OU LES PARADOXES DU JEU (1994).

105. Australia's highest court, with original jurisdiction in some spheres and final appellate jurisdiction in all spheres: Constitution Ch. III.

106. By a majority of the Full Court of the Federal Court: *Ruddock v Vadarlis (Tampa Case)*, (2001) 183 ALR 1. The federal government intervened with legislation before the case could be appealed to the High Court.

Institute (AustLII). It contains, for Australia and New Zealand: constitutions, statutes, regulations, decisions of courts and administrative tribunals, and law journals. This Web site need not be described further—it is simple to go there, access is free and it is easy to navigate.[107]

Then one click through AustLII lie, among many others: the British and Irish Information Institute (BAILII), the Institut Français d'Information Juridique (droit.org) and the World Legal Information Institute (WorldLII).[108] Into my Web browser, I have put bookmarks for the legal Web sites of the federal government and some of the state governments. These include the legislation Web sites of the Australian federal government[109] and the government of my own state.[110] Some courts and tribunals publish their own decisions, but most of them, including the High Court, also send the decisions to AustLII.[111]

That is one sense in which one might say that Australian law is extensively "codified". Yet, if one privileges the idea of comprehensiveness, one finds that almost all Australian law is "codified" in the sense that it is readily available free online from a single source—comprehensive but not, of course, exclusive.

CONCLUSION

A "book", we are accustomed to think, is a bound volume, or set of volumes, of printed paper, self-sufficient or autonomous for its meaning. But the "coming of the book"[112] was an immensely protracted process, whose turning points turned out to be so mostly in retrospect. A few of those points have been reviewed here. Others, such as the appearance in the west of paper in the twelfth century and of printing in the fifteenth, are well known. Then there have been many transformations of printing.

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107. Australasian Legal Information Institute (AustLII, pronounced "ostly"), http://www.austlii.edu.au. Extensive government documentation is available in PANDORA, Australia's Web Archive: http://pandora.nla.gov.au/about.html.

108. British and Irish Legal Information Institute (BAILII, quaintly pronounced "bailey"), http://www.bailii.org; World Legal Information Institute (WorldLII, delightfully pronounced "worldly"), http://www.worldlii.org.

109. COMLAW, http://www.comlaw.gov.au.

110. New South Wales: http://www.legislation.nsw.gov.au.

111. The one drawback of AustLII is that, being funded by donations, it is sometimes short-staffed and thus not always up to date. For up-to-date legislation, in particular, one needs to go to the official Web sites. On those sites, the accuracy of legislative texts is sometimes guaranteed, so that those texts may be cited in court. For some law reports, a photographic image of a printed copy is available on a commercial legal Web site.

112. LUCIEN FEBVRE & HENRI-JEAN MARTIN, THE COMING OF THE BOOK: THE IMPACT OF PRINTING 1450-1800 (David Gerard trans., 1976).

Parallel to and interdependent with this has been the vast expansion of basic literacy.

"The book" is outliving the prognostications of its demise. But its survival is uneven. The book as a source of pleasure, such as the novel, is alive and kicking. The book as a mixed source of pleasure and information, such as the cookbook, is also well. Yet the book as a source only of information does seem to be falling away. As I write, after almost a quarter of a millennium the *Encyclopædia Britannica* announces that its 2010 edition will be its last in print.[113] Sets of laws may be a source of pleasure for some, but even for them a set of laws is first of all a source of information. One can therefore expect sets of laws that are in book form to go the way of printed encyclopaedias. And that is what, both in France and in Australia, can be observed.

There does not appear to be any privilege in this for a set of laws that is, by any name, a "code". Nor—since, as I hope to have shown, even the name "code" itself is only loosely attached to any particular legislative form—is a deliquescence of codes likely to be troublesome. In the digital age, handling laws has become a different kind of exercise. What had been the good aims of codification are being pursued in very different ways.

113. *Change: It's Okay. Really*, ENCYCLOPÆDIA BRITANNICA (Mar. 13, 2012), http://www.britannica.com/blogs/2012/03/change.