# CODIFICATION OF CONTRACT LAW: SOME LESSONS FROM HISTORY

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Writing in *The Australian* on the 23rd of March this year, the Attorney-General introduced *A discussion paper to explore the scope for reforming Australian contract law*[1] to the wider Australian public. She admitted that 'I expect there to be both passionate reformers and trenchant defenders of the status quo. And, I look forward to the debate ahead'.[2] The first stage of the debate will certainly be brief. A deadline for submissions on the discussion paper was fixed at just four months.[3] There are signs that the Government is more enthusiastic about the project of contract codification than in the recent past.[4] The new Attorney-General has signalled a change of tone: 'It would be foolish for Australia to stand still without at least carefully considering opportunities that may deliver productivity gains for Australian businesses and new job opportunities for working Australians'.[5] Having observed that contract law reform is 'not an all or nothing affair',[6] the discussion paper considers three options. These are labelled restatement, simplification and reform.[7] The possibility of retaining the status quo barely gets a mention.[8] Whether reform of Australian contract law is necessary, desirable and possible is a question best left to those who have devoted many years to its careful study.[9] It would be presumptuous for an outsider to comment. The aim here is different. It is simply to raise some concerns about the difficulties inherent in codification in general and contract codification in particular. These are issues not touched upon in a discussion paper which is relentlessly upbeat.[10] It is easy to portray those who do not wholeheartedly support codification as stuck in the past, but only by being realistic about what codification can and cannot do and the costs involved, is reform of any sort going to be achievable.

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1 Attorney-General's Department (Cth), 'Improving Australia's Law and Justice Framework: A discussion paper exploring the scope for reforming Australian contract law' (22nd March 2012) <http://www.ag.gov.au/Consultationsreformsandreviews/Pages/Review-of-Australian-Contract-Law.aspx>.

2 Nicola Roxon, 'Time for the great contract reform', *The* Australian, 23 March 2012. The discussion paper contains a similar statement, ibid i.

3 Ibid ii.

4 Compared with the position in 2008: Attorney-General's Department (Cth), Australian Government Response: 'Harmonisation of legal systems within Australia and between Australia and New Zealand'' (2008) 16. ('The Government is not convinced that sufficient evidence exists supporting the codification of contract law'.)

5 Roxon, above n 2.

6 Attorney-General's Department (Cth), above n 1, 18.

7 Ibid iii, 18-19.

8 Within the main body of the paper references to the status quo are confined to a rather unrewarding diagram: see ibid, 18.

9 Some Australian contract scholars regard contract codification as both necessary and desirable. For instance, Professors Wright and Ellinghaus have consistently pressed for a contract code. See their evidence before the House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Harmonisation of Legal Systems within Australian and between Australia and New Zealand*, Parliamentary Paper No 425/06 (2006) 148 [4.186]-[4.196].

10 The academic literature on contract codification in Australia also underplays the difficulties, Dan Svantesson, 'Codifying Australia's Contract Law - Time for a Stocktake in the Common Law Factory' (2008) 20 *Bond Law Review* 1.

## I CODIFICATION AND UTOPIANISM

Utopians of all types have been attracted by codification for centuries. In Thomas More's, *Utopia*, first published in 1516, there are no lawyers and the few laws that exist are codified:

> For, according to the Utopians, it's quite unjust for anyone to be bound by a legal code which is too long for an ordinary person to read through, or too difficult for him to understand.[11]

A hundred years later the Protestant radical Gerrard Winstanley also supported codification[12] which, for a brief period either side of the English Revolution, actually seemed like a realistic possibility.[13] This fragile codification movement was soon crushed by idealism of a different sort which regarded the common law as the perfection of reason.[14] Sir William Blackstone, one of the common law's great champions, recognised the existence of '*lex scripta*', the written or statute law,[15] and yet the subject was almost invisible in his four volume *Commentaries on the Laws of England*.[16] The omission cannot entirely be explained by Blackstone's preference for the common law. Statutes were also less common-place than a century later.[17] Sitting in Blackstone's lectures was a young man who would come to hold very different views on the role of codification.[18] His name was Jeremy Bentham.

In *A Comment on the Commentaries*,[19] the critique of Blackstone[20] that made his name, Bentham argued that 'the common law is but the shadow of statute law,

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11 Sir Thomas More, *Utopia* (Paul Turner trans, Penguin, 1965) 106.

12 James Davies, *Utopia and the Ideal Society: A Study in English Utopian Writing 1516-1700* (Cambridge University Press, 1983) chapter 7. For a classic account of Winstanley, see Christopher Hill, *The World Turned Upside Down* (Penguin, 1991) chapter 7.

13 Barbara Shapiro, 'Codification of the Laws in Seventeenth Century England' (1974) *Wisconsin Law Review* 428. The debate about the merits of codification took place against the backdrop of a wider law reform movement: see Donald Veall, *The Popular Movement for Law Reform* (Clarendon Press, 1970); Barbara Shapiro, 'Law Reform in Seventeenth Century England' (1975) 19 *American Journal of Legal History* 280.

14 When statute was discussed it tended to be in the context of the debates about the need for a consolidation of existing statutes: David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge University Press, 2002) chapter 9.

15 William Blackstone, *Commentaries on the Laws of England* (1765) vol I, 63. The same division had already been used by Matthew Hale. See, Charles Gray (ed), Sir Matthew Hale, *The History of the Common Law of England* (University of Chicago Press, 1971) 3.

16 Harold Hanbury, 'Blackstone in Retrospect' (1950) 66 *Law Quarterly Review* 322, 323.

17 For a comparison of the eighteenth and nineteenth centuries, see Sheila Lambert, *Bills and Acts Legislative Procedure in Eighteenth Century England* (Cambridge University Press, 1971) 52. For the growth in statutes in the late eighteenth and early nineteenth centuries, see Simon Devereaux, 'The promulgation of statutes in late Hanoverian Britain' in David Lemmings (ed), *The British and their Laws in the Eighteenth Century* (Boydell Press, 2005) chapter 4.

18 Blackstone's Commentaries were based on a series of lectures delivered in Oxford in the 1750s and 1760s. For an account, see Wilfrid Prest, *William Blackstone Law and Letters in the Eighteenth Century* (Oxford University Press, 2008) 109-118. Bentham describes attending Blackstone's lectures in Timothy Sprigge, *The Correspondence of Jeremy Bentham vol 1 1752-76* (Anthlone Press, 1968) 84-85, 9 Dec 1764 in a letter to his brother.

19 James. Burns and Herbert Hart (eds), Jeremy Bentham, *A Comment on the Commentaries* (Clarendon Press, 2008).

although it came before it'.[21] In Bentham's positivist vision of a legal system,[22] legislation 'is the act of making Laws'.[23] The common law was not law at all. It was a cause of 'dark chaos'[24] which could only be rectified by legislation. After spending the 1770s working on a digest of the common law and statute,[25] Bentham switched attention to an even more ambitious project: the construction of a 'pannomion' or a complete body of law. Bentham believed that 'utility, notoriety, completeness, manifest reasonableness'[26] could be achieved by a code of civil, penal and constitutional law, alongside codes dealing with legal procedure and the legal system.[27]

Certainly a very good case could be made for the need for a code in late eighteenth century England. The 'dark chaos' of legal procedure and criminal law in particular is well documented.[28] This does not mean that codification was a realistic aim. Bentham devoted much of his life from the 1780s to his death in 1832 to making and putting forward a good case.[29] His efforts were not confined to his home country. Bentham's belief that governments in America, Russia, Spain, Portugal, Greece and elsewhere would take up his invitation to codify their laws proved to be groundless.[30] The fact that a genius like Bentham was unable to achieve his objectives should serve as a warning to others. Without some sort of idealism no major reform would ever take place. At the very least, there must be a belief that there is something better. Nevertheless, the fact that codification looks superficially attractive is unlikely to guarantee its success. Idealism alone will only take any codification project so far. Most attempts at codification have met with opposition. Any would-be-codifiers are well advised to familiarise themselves with the likely arguments.

## II TRADITIONALIST OPPOSITION TO CODIFICATION

Bentham was an idealist but not entirely an innocent.[31] He was only too well aware of the likely opposition that a code would face from 'sinister interests'.[32] The greater legal certainty that he envisaged would flow from codification would benefit the public but not the lawyers:

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20 For Bentham's critique, see Gerald Postema, *Bentham and the Common Law Tradition* (Clarendon Press, 1986) chapters 5-9; Lieberman, above n 14, chapter 11.

21 Bentham, above n 19, 119.

22 For a discussion of Bentham's legal philosophy from a number of different perspectives, see Herbert Hart, *Essays on Bentham* (Clarendon Press, 1982).

23 Lieberman, above n 14, 222-223.

24 Ibid 198.

25 For details of this project, see ibid, chapter 12; Michael Lobban, *The Common Law and English Jurisprudence 1760-1850* (Clarendon Press, 1991) chapter 6.

26 Philip Schofield and John Harris (eds), Jeremy Bentham, *'Legislator of the World' Writings on Codification, Law and Education* (Clarendon Press, 1998) 168; see also '*Principles of a Civil Code'* in John Bowring (ed), *The Works of Jeremy Bentham* (1859) vol 1, 302.

27 The precise details changed over time: see John Dinwiddy, *Bentham* (Stanford University Press, 1989) 60.

28 Douglas Hay et al, *Albion's Fatal Tree* (Verso, 1976); Edward Thompson, *Whigs and Hunters: the origin of the Black Act* (Penguin, 1990).

29 See Dinwiddy, above n 27, chapter 4; Philip Schofield, 'Jeremy Bentham: Legislator of the World' (1998) 51 *Current Legal Problems* 115.

30 Schofield and Harris, above n 26, xxii-xxxv.

31 Not entirely anyway. John Stuart Mill described him as 'essentially a boy', see John Robson (ed), John Stuart Mill, *The Collected Works of John Stuart Mill* (University of Toronto Press, 1985) vol 10, *Essays on Ethics, Religion and Society*, 115.

32 Philip Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham* (Oxford University Press, 2009) chapter 5.

> [S]ay that a lawyer has no interest in the uncertainty of the law, as well might you say, that a gunpowder maker has no interest in war, or a glazier in the breaking of windows.[33]

The reasons why Bentham's codification project failed to make headway in England are complex.[34] He certainly faced strong opposition but he cannot entirely escape some blame. Bentham devoted a great deal of energy to the cause of codification but he failed actually to produce a complete code. Its absence meant political supporters like Samuel Romilly and Francis Horner were unwilling to take the battle for codification to the House of Commons.[35] Even when Bentham found an ally in Daniel O'Connell, the result was just the same.[36] He was not the only advocate of codification to suffer disappointment.

James Humphreys', *Observations on the actual state of the English laws of Real Property with the Outlines of a Code* appeared in 1826.[37] Humphreys' attempt to simplify the labyrinthine law of real property generated furious opposition from lawyers. Edward Sugden, the future Lord Chancellor, argued that, 'a greater calamity could not befall the country than the adoption of the proposed code'.[38] Humphreys made two tactical mistakes. He highlighted the deficiencies of the current system a little too starkly and he called his project a code. Just over a decade after the end of the Napoleonic wars, this was unlikely to recommend his scheme to patriotic Englishmen. What happened next shows the extent to which radical codification projects run the risk of death by a thousand strokes of the pen as much as frontal assault. A Real Property Commission actually began work in 1828 but the reform proposals fell a long way short of Humphreys' code.[39] As a result, major reform of real property was delayed by a century.[40] A Criminal Law Commission was set up with high hopes in 1833 but, in the face of Parliamentary and legal opposition, the final reforms were modest.[41] Such was the state of things that two years before Bentham's own death in 1832, the Law Magazine had already announced that 'Codification … has become a dead letter in England'.[42] It would be a generation before the idea was revived.

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33 Schofield, above n 29, 133.

34 Gunther Weiss, 'The Enchantment of Codification in the Common-Law World' (2000) 25 *Yale Journal of International Law* 436, 490-93.

35 Schofield, above n 32, 244.

36 Ibid 319-320.

37 Bernard Rudden, 'A code too soon. The 1826 property code of James Humphreys: English rejection, American reception, English acceptance' in Peter Wallington and Robert Merkin, *Essays in Memory of F.H. Lawson* (Butterworths, 1986) 101.

38 Ibid 103. Sugden was something of an expert on real property. He was also conservative in his views and resistant to reform of the Court of Chancery: Joshua Getzler, 'Sugden, Edward Burtenshaw, Baron St Leonards' in *Oxford Dictionary of National Biography* (Oxford University Press, 2004).

39 Stuart Anderson, 'Property' in William Cornish et al (eds), *The Oxford History of the Laws of England* (Oxford University Press, 2010) vol 12, *1820-1914: Private Law,* 49-78.

40 For accounts of the struggle for real property reform, see Avner Offer, *Property and Politics 1870-1914* (Cambridge University Press, 1981); J. Stuart Anderson, *Lawyers and the Making of English Land Law* (Clarendon Press, 1992).

41 Lindsay Farmer, 'Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833-45' (2000) 18 *Law and History Review* 397; Keith Smith, 'Criminal Law' in William Cornish et al (eds), *The Oxford History of the Laws of England* (2010) vol 13,*1820-1914: Fields of Development,* 193-205.

42 *Law Magazine* (1830) 4, 244 cited by Smith, ibid, 192.

Across the Atlantic, Louisiana adopted a Civil Code as early as 1808.[43] As a State with a mixed Common and Civil Law heritage it was in a special position. But the codification movement in America in the nineteenth century was not confined to Louisiana. It was very different to its contemporary English counterpart. In America supporters of codification were lawyers rather than idealists.[44] Its best known manifestation was the Code of Civil Procedure, or Field Code, after its author David Dudley Field, which became law in New York in 1848.[45] Field had envisaged that the procedural code would be the first of many. A civil code was drawn up but was only ever implemented outside of New York.[46] In substantive terms the civil code was not particularly radical. There were some Civilian influences it is true,[47] but to a large extent it merely restated the common law of New York of the mid-nineteenth century. The objections were less to the content than the very idea of codification.[48] The New York Bar were against it and at its instigation, James Coolidge Carter,[49] raised a number of objections. The 'greatest mischief' he said, was that codification arrested the development of private law.[50] He also argued that far from reducing uncertainty and disputes, codification actually ran the risk of increasing them.[51]

Even with some support from the legal profession, it has to be expected that any attempt at codification, especially in a common law system, will encounter objections. Advocates of codification tend to caricaturise these complaints as no more than self-interested special pleading by lawyers.[52] No doubt some of them are. Lawyers are not a homogenous group all the same. Their views and expectations about contract law (and much else) may differ.[53] It may be genuinely difficult to secure a consensus. The extent to which a code will 'tax the capacity'[54] of legal practitioners may depend on the outcome of the proposed reforms. A restatement would be familiar in substance if not in method. Even here there is risk that a code will result in, if not increased uncertainty, then increased litigation as the boundaries of the new legislation are tested.[55] At best a

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43 John Hood, 'The History and Development of the Louisiana Civil Code' (1958-59) 33 *Tulane Law Review* 7; Rodolfo Batiza, 'The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance' (1971) 46 *Tulane law Review* 4.

44 Charles Cook, *The American Codification Movement: A Study in Antebellum Legal Reform* (Greenwood Press, 1981) 70.

45 Lawrence Friedman, *A History of American Law* (Touchstone, 2005) 293-298.

46 Civil Codes were adopted in some other States, notably California: see Maurice Lang, *Codification in the British Empire and America* (1924) 153-56; Weiss, above n 34, 511-513.

47 Rodolfo Batiza, 'Sources of the Field Civil Code: The Civil Law Influences on a Common Law Code' (1971-72) 60 *Tulane Law Review* 799.

48 For a summary of the debates, see Weiss, above n 34, 503-511.

49 Gilbert Clarke, *Life sketches of eminent lawyers: American, English, and Canadian* (1895) vol 1, 130-132.

50 James Carter, *The proposed codification of our common law* (1884) 86.

51 Ibid, 84. Carter argued that this was one consequence of the earlier code of procedure.

52 For example, Justice Kirby, in his forward to Manfred Ellinghaus and EdmundWright, *Models of Contract Law* (Themis Press, 2005) vi-vii.

53 John Gava and Peter Kincaid, 'Contract and Conventionalism: Professional Attitudes to Changes in Contract Law in Australia' (1996) 10 *Journal of Contract Law* 141.

54 Herman Hahlo, 'Here Lies the Common Law: Rest in Peace' (1967) 30 *Modern Law Review* 241, 253.

55 A good example is provided by the English Bill of Sale Act 1878 (UK), see E Cooper Willis, 'Observations on the working of the Bills of Sale Act 1878, Amendment Act 1882' (1887) 3 *Law Quarterly Review* 300. I am grateful to Ms Karen Fairweather for drawing the example to my attention. The *Insurance Contracts Act* 1984 (Cth) provides a more recent Australian example: see Malcolm Clarke, 'Doubts from the dark side – the case against codes' (2001) *Journal of Business Law* 605, 610. This cannot be dismissed as mere 'transitional uncertainty', Kirby, above n 52, vii.

code might reduce, to some extent, the need for lawyers to trawl through a large body of authority.[56] It will not render case law obsolete.

## III CODIFICATION AND THE PUBLIC

Advocates of codification frequently argue that it will render the law more intelligible to the wider public.[57] The great English contract lawyer, Sir Frederick Pollock wrote to Oliver Wendell Holmes in 1877 that:

> Laws exist not for the scientific satisfaction of the legal mind, but for the convenience of lay people who sue and are sued. Now to say that law is for practical purposes more certain without a code than with one seems to me sheer paradox.[58]

According to the discussion paper 'greater accessibility'[59] not only has intrinsic value but would also ensure that contract law was better able to 'set acceptable standards of conduct'.[60] Whether or not the law of contract is really an effective mechanism for setting acceptable standards of conduct,[61] it is difficult to see how any code can really achieve these aims and still 'take account of the needs of different people from different cultural backgrounds or experiencing different cultures'.[62] This is an argument for legal pluralism rather than a fixed standard of behaviour.[63] No-one sensible thinks that the law of contract should be deliberately obtuse. But to suggest that a code will render it accessible to the wider public is wildly optimistic.[64] Even supposing a code could be drawn up that was simple enough for most people to understand, any code will still have to be interpreted by judges. The process of doing so is likely to add uncertainty and complexity. Even if the law was made accessible it may not change very much. The average consumer is rarely in a position to negotiate rather than accept standard terms.[65] Even if a code ensures that the rules relating to remedies for breach of contract are accessible, the average consumer is likely to find them difficult and expensive to pursue in practice.

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56 Aubrey Diamond, 'Codification of the Law of Contract' (1968) 31 *Modern Law Review* 361, 368.

57 Mary Arden, 'Time for an English Commercial Code?' (1997) 56 *Cambridge Law Journal* 516, 532-533.

58 Mark De Wolfe Howe (ed), *The Pollock-Holmes Letters* (Harvard University Press, 1942) vol 1, 8.

59 Attorney-General's Department (Cth), above n 1, 3.

60 Ibid 4.

61 The way in which contract law influences behaviour is a complex. There may be something in the view that it has a deterrent effect: Eric Posner, *Law and Social Norms* (Harvard University Press, 2002) chapter 9.

62 Attorney-General's Department (Cth), above n 1, 4. Which is different from the legitimate concern that culture and language may create vulnerabilities in contracting: Australian Law Reform Commission, *Multiculturalism and the Law,* Report No 57 (1992).

63 Determining what Australian contract law actually is may be difficult: see Manfred Ellinghaus,'An Australian Contract Law?' (1989) 2 *Journal of Contract Law* 13; John Gava, 'An Australian Contract Law – a reply' (1998) 12 *Journal of Contract Law* 242.

64 Francis Bennion, *Bennion on statutory interpretation: a code* (LexisNexis Butterworths, 5th ed, 2008) 804-805 describes this view as 'facile'. It may be significant that 46 per cent of adult Australians have poor literacy skills; Australian Bureau of Statistics, *Adult Literacy and Life Skills Survey* (2006). For a contrary view, see Aubrey Diamond, above n 56, 370-372.

65 For a recent perspective, see Omri Ben-Shahar (ed), *Boilerplate: the foundation of market contracts* (Cambridge University Press, 2007).

Small and medium sized businesses are sometimes at a disadvantage when contracting.[66] They do not have the same access to legal advice as large corporations. A code may make it easier for them to know where they stand and organise their affairs.[67] Even here there are still limits to what a code can do. Smaller businesses may often have no better negotiating strength or resources than consumers. Contract law may not even be the dominant factor in determining how businesses behave. Commercial reputation and the preservation of long standing relationships may matter much more.[68]

A code enacted with the support of business has a greater chance of success than one that does not. One common justification for codification especially when it results in harmonisation is that it brings economic benefits.[69] It is difficult to think of many attempts at codifying even a part of the common law of contract which have succeeded without at least some support from commercial parties. The movement to codify large parts of English contract law at the end of the nineteenth century, which saw statutes on bills of exchange, partnership, sale of goods and marine insurance,[70] was partly a product of commercial lobbying.[71] Some businessmen wanted to go further and introduce a more far-reaching mercantile code but this came to nothing.[72] It was a similar story in the United States. The Uniform Commercial Code was first published in 1952 and soon adopted by most State legislatures.[73] The code was drawn up by academics and lawyers, but the leading critics[74] and supporters alike[75] acknowledged the role played by the business community in shaping the legislation.

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66 The courts are well aware of this as illustrated by the way in which the doctrine of economic duress is applied, Andrew Stewart, 'Economic Duress – Legal Regulation of Commercial Pressure' (1983-1984) 14 *Melbourne University Law Review* 410. For a particularly clear example, see *Atlas Express Ltd v. Kafco (Importers and Distributors) Ltd* [1989] QB 833.

67 Attorney-General's Department (Cth), above n 1, 5.

68 See the seminal, Stewart Macaulay, 'Non-Contractual Relations and Business: A Preliminary Study' (1963) 28 *American Sociological Review* 55.

69 Attorney-General's Department (Cth), above n 1, 6. For a discussion in relation to the Organisation for the Harmonisation of Business Law in Africa, see Nelson Enonchong, 'The Harmonization of Business Law in Africa: Is Article 42 of the OHADA Treaty a Problem?' (2007) 51 *Journal of African Law* 75; Gbenga Bamodu, 'Transnational Law, Unification and Harmonization of International Commercial Law in Africa' (1994) 38 *Journal of African Law* 125. For the economic argument for European codification, see Dominik Kallweit,'Towards a European Contract Law: For a Prosperous Future of International Trade' (2004) 35 *Victoria University Wellington Law Review* 269; Christian Twigg-Flesner, *The Europeanisation of Contract Law* (Routledge-Cavendsih, 2008) 182-85; Ole Lando, 'Why Codify the European Law of Contract?' (1997) 5 *European Review of Private Law* 525, 535.

70 *Bills of Exchange Act* 1882 (UK); *Partnership Act* 1890 (UK); *Sale of Goods Act* 1893 (UK); *Marine Insurance Act* 1906 (UK).

71 Mackenzie Chalmers, 'An Experiment in Codification' (1886) 2 *Law Quarterly Review* 125; Mackenzie Chalmers, 'Codification of Mercantile Law' (1903) 19 *Law Quarterly Review* 9, 14-15; Robert Ferguson, 'Legal Ideology and Commercial Interests: The Social Origins of the Commercial Law Codes' (1977) 4 *British Journal of Law and Society* 18.

72 Lord Rodger, 'The Codification of Commercial Law in Victorian Britain' (1992) 108 *Law Quarterly Review* 570. For a contemporary account, see Anon., 'The Proposed Mercantile Code', (1885) 29 *Journal of Jurisprudence* 186.

73 For the early history, see Robert Braucher, 'The Legislative History of the Uniform Commercial Code' (1964) 2 *American Business Law Journal* 137.

74 Frederick Beutel, 'The Proposed Uniform [?] Commercial Code should not be adopted' (1952) 61 *Yale Law Journal* 334, 335.

75 Grant Gilmore,'The Uniform Commercial Code: A Reply to Professor Beutel' (1952) 61 *Yale Law Journal* 364, 365-66.

## IV CODIFICATION AND POLITICS

Its supporters often like to present codification as a politically neutral activity. The fact that codification will make the law easier to understand, clearer, simpler and benefit business is often emphasised. Empirical evidence for these claims is not usually forthcoming.[76] In fact codification is rarely or ever a politically neutral activity.[77] The great nineteenth century Civilian codes were the products of political upheavals of the most dramatic sort.[78] There was support for the idea of codification in France going back to the sixteenth century[79] but only with the French Revolution did it become a reality.[80] Napoleon even took a personal interest in the *Code Civile*.[81]

The situation in Germany was very different. Various German States including Prussia and Bavaria had codified their laws in the eighteenth century.[82] The codes were designed to harmonise local laws and impose Natural law principles.[83] Codification was a relatively straight forward exercise in a monarchy. By the nineteenth century, demands for German codification were bound together with broader movements pushing for unification.[84] A Commercial Code was enacted in 1861.[85] Following the emergence of a unified German State in 1871 a much more extensive civil code was drafted. Codification was both a product of, and contributed towards, a united Germany. By the time the *Bürgerliches Gesetzbuch* (*BGB*) came into effect on the 1st of January 1900, the majority of other states of central, southern and eastern Europe had codified their laws.[86] For some, like Italy, the process was also a vital component of nation building.[87]

Codes also feature prominently in the history of British India during the same period. Once again the climate was favourable. The first law member of the Governor-General's Council, Thomas Macaulay, observed that codification was easier in an

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76 For a rare and valuable empirical study on comprehension and application, see Ellinghaus and Wright, above n 52. For empirical studies on economic aspects of European codification, see below n 97.

77 For some of these debates in relation to Europe, see Martijn Hesselink (ed), *The Politics of a European Civil Code* (Kluwer Law International, 2006).

78 For a detailed discussion of the politics of common law codification in nineteenth century Canada, see Brian Young, *The Politics of Codification: The Lower Canadian Civil Code of 1866* (McGill-Queens University Press, 1994).

79 Olivia Robinson, TD Fergus and William Gordon, *European Legal History* (LexisNexis Butterworths, 3rd ed, 2000) 204-205.

80 Peter Stein, *Roman Law in European History* (Cambridge University Press, 1999) 114-115.

81 Basil Markesinis, 'Two Hundred Years of a Famous Code: What Should We Be Celebrating' (2004) 39 *Texas International Law Journal* 561, 565-567.

82 Stein, above n 80, 111-114; Robinson et al, above n 79, 257-260.

83 The Natural law movement was at its height at the time. For an account, see Tim Hochstrasser, *Natural Law Theories in the Early Enlightenment* (Cambridge University Press, 2000).

84 Micheal John, *Politics and the Law in Late Nineteenth-Century Germany* (Clarendon, 1989). For a wider discussion of unification, see Gordon Craig, *Germany 1866-1945* (Oxford University Press, 1990) chapter 1.

85 E Kraehe, 'Practical Politics in the German Confederation: Bismarck and the Commercial Code' (1953) 25 *Journal of Modern History* 13.

86 Robinson et al, above n 79, chapter 16, Reinhard Zimmermann, 'Codification: history and present significance of an idea' (1995) 1 European Review of Private Law 95.

87 The *Codice Civile* was enacted in 1865, a mere four years after unification: see Robinson et al, above n 79, 268-269. On unification more generally, see Denis Mack-Smith, *The making of Italy, 1796-1866* (Macmillan, 1988).

authoritarian state than in a democratic one.[88] He planned a Benthamite code of criminal law based around first principles. Even in India the codification process was to prove frustrating. The Indian Penal Code was drafted by 1837. It was not enacted until 1860. The history of the Indian Contract Act 1872 is hardly less tortuous.[89] Even in the British Raj in its pomp, codification was characterised by delay.

There were several motivations behind Indian codification.[90] Nevertheless the political is almost always irrevocably intertwined with the legal. Much the same can be said of recent events in Europe.[91] The *Draft Common Frame of Reference* has raised the possibility of a Europe wide code of private law.[92] This may be difficult to achieve. Problems of compatibility with English law, in particular, remain unresolved. The process also raises deeper questions about nationhood, accountability and legal culture.[93] Advocates of European codification are understandably keen to both downplay differences between legal systems and stress the practical value of codification.[94] On some level they have a point. English contract law has some Civilian features.[95] Yet any code would mean going much further. Wholesale adoption is very different from piecemeal borrowing.[96] Practical or economic arguments favouring a unified European code are not yet decisive one way or another.[97]

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88 'A Speech Delivered in the House of Commons, 10 July 1833' in Thomas Macaulay, *The Complete Works of Lord Macaulay* (1898) 139.

89 For a detailed account, see Stelios Tofaris, *A Historical Study of the Indian Contract Act 1872*, unpublished PhD, University of Cambridge (2011).

90 Barry Wright, 'Maccaulay's Indian Penal Code: Historical Context and Originating Principles' in Wing-Cheong Chan, Barry Wright, Stanley Yeo, *Codification, Maccaulay and the Indian Penal Code* (Ashgate, 2011) 19, 53, 'to dismiss the IPC as entirely or simply an instrument of British imperial rule is, however, unscholarly reductionism'.

91 Martijn Hesselink, 'The Politics of a European Civil Code' (2004) 10 *European Law Journal* 675.

92 The editors state that 'It may be that at a later point in time the DCFR will be carried over at least in part into a CFR, but that is a question for others to decide': see Christian Von Bar and Eric Clive (eds), *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference* (2010) 3. There is no consensus about the precise effect and intention behind the DCFR. It has been suggested that it can be viewed as a non-legislative code, see Nils Jansen and Reinhard Zimmermann, 'A European Civil Code in all but name: discussing the nature and purpose of the draft common frame of reference' (2010) 69 *Cambridge Law Journal* 98. Simon Whittaker has argued that the dominant purpose of the DCFR 'is to provide the basis for the future codification of civil law to be used either as an optional instrument or as the basis for some future legislative codification': see Simon Whittaker, 'A framework of principle for European contract law'(2009) 125 *Law Quarterly Review* 645.

93 Ruth Sefton-Green, 'Cultural Diversity and the Idea of a European Civil Code' in Hesselink, above n 77, chapter 5.

94 Ole Lando, 'Liberal, social and ethical justice in European Contract Law' (2006) 43 *Common Market Law Review* 817, 825 'The national contract laws differ, but often more in the formulations and techniques than the results'.

95 In the nineteenth century the so called classical model of contract fused English common law with Civilian ideas derived from the work of Robert-Joseph Pothier: see Warren Swain, 'The Classical Model of Contract : the Product of a Revolution in Legal Thought?' (2010) 30 *Legal Studies* 513.

96 Gunther Teubner, 'Legal irritants: good faith in British law or how unifying law ends up in new divergences' 61 (1998) 61 *Modern Law Review* 11.

97 Helmut Wagner, 'Economic analysis of cross-boarder legal uncertainty' and Jaap Hage, 'Law, Economics and Uniform Contract Law: A Sceptical View' in Jan Smits**,** *The need for a European contract law : empirical and legal perspectives* (Europa Law, 2005) chapters 2-3; Stefan Vogenauer and Stephen Weatherill 'The European Community's Competence to Pursue the Harmonisation of Contract Law – an Empirical Contribution to the Debate' in

The fact that academics are involved in the process in Europe does not guarantee neutrality. The various bodies working on contract codification over the last few decades[98] have had slightly different aims and methodologies but all have supported codification.[99] There are plenty of sceptics too.[100] But there is no group arguing against codification. Advocates of European codification make little effort to disguise their agenda which is summed up in the phrase of one of them who has argued that a code is an 'important psychological boost to the integration process'.[101] Some supporters of codification also regard the process an opportunity to further social justice.[102] Whether or not one agrees with this agenda or not,[103] it is difficult to disagree with the notion that despite claims to the contrary it is impossible for a code to be neutral on such questions.

In Australia the political dimensions are rather different. There is no clash between Civil and common law. The variations between the contract law of different States and Territories are nothing like as significant as those between member states of the European Union. There are problems all the same. Justice Paul Finn has recently summarised these:

> Australian contract law, unhelpfully, has six potential sources – the common law, equity, Commonwealth statute, State or Territory statute, incorporated international instruments, for example the CISG, and, finally, the terms of the contract themselves. Having such a diverse range of sources has, in my view, been a recipe for incoherence and for inertia in the legal development of contract as such.[104]

One of the strongest arguments for codification, namely the harmonisation of contract law across Australia,[105] may also be one of the most difficult objects to achieve. Federal law reform bodies in Australia have traditionally shied away from these sorts of questions.[106] The Competition and Consumer Act 2010 shows that

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Stefan Vogenauer and Stephen Weatherill (eds), *The Harmonisation of European Contract Law* (Hart, 2006) 105-148.

98 Twigg-Flesner, above n 69, 12-17.

99 Some of the leading figures are clear on this point: Ole Lando, 'Can Europe Build Unity of Civil Law While Respecting Diversity?' (2006) 2 *Europa e diritto private* 1. Von Bar is more circumspect but his aims are no less clear, Christian Von Bar, 'From Principles to Codification: Prospects for European Civil Law' (2002) 8 *Columbia Journal of European Law* 379.

100 Pierre Legrand, 'Against a European Civil Code' (1997) 60 *Modern Law Review* 44; Horst Eidenmüller et al, 'The Common Frame of Reference for European Private Law – Policy Choices and Codification Problems' (2008) 28 *Oxford Journal Legal Studies* 659. The project of European civil codification has faced individual criticism since the 1970s, Michael Bonnell, 'The need and possibilities if a codified European contract law' (1997) 5 *European Review of Private Law* 505.

101 Arthur Hartkamp, 'Perspectives for the Development of a European Civil Code' in Mauro Bussani and Ugo Mattei, *The Common Core of European Civil Law* (Kluwer Law International, 2003) 67, 78.

102 Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: A Manifesto' (2004) 10 *European Law Journal* 653; Hugh Collins, *The European Civil Code The Way Forward* (Cambridge University Press, 2008) chapter 9.

103 For a cogent and convincing critique of social justice as a concept, see Friedrich Hayek, *Law Legislation and Liberty Volume 2: The Mirage of Social Justice* (Routledge, 1976) 97.

104 Justice Finn, 'Internationalisation or Isolation: The Australian Cul De Sac? The Case of Contract' in Mary Hiscock and William Van Caenegem (eds), *The Internationalisation of Law: Legislating, Decision-Making, Practice and Education* (Edward Elgar, 2010) 145, 160.

105 Attorney-General's Department (Cth), above n 1, 5.

106 Micheal Tilbury, 'The History of Law Reform in Australia' in Brian Opeskin and David Weisbrot (ed), *The Promise of Law Reform* (Federation Press, 2005) 3, 17.

harmonisation, albeit in a narrower field, is possible, although it remains too early to tell whether the legislation has achieved its aims. Other precedents are less happy.[107]

There is some explicit allusion to public policy in the discussion paper. This mainly focuses on the need to internationalise Australian contract law in ways which make it more attractive to trading partners.[108] At the same time the discussion paper attributes the fact that English law is attractive to 'high-end commercial users' to the fact that equitable doctrines have not been developed there to the same extent and the absence of a general statutory prohibition on misleading or deceptive conduct.[109] Any system of contract law reflects multiple values. The prospect of reconciling certainty in contract law and at the same time allowing equity to evolve is just something that has to be faced.[110] The debate is hardly novel.[111] Even with cross party support and coherent policy objectives codification frequently runs into serious practical difficulties.

## V CODIFICATION: SOME PRACTICAL PROBLEMS

Codes are not usually the work of a single person.[112] Even someone with Bentham's energy and intelligence found the task of singlehandedly drawing up a code too demanding. As a result a committee is inevitably used. The drawbacks associated with these bodies are well documented.[113] Yet sometimes the process works well enough. The *BGB* originated in the work of just eleven judges, officials and professors.[114] A draft was completed in thirteen years – a remarkable achievement given the size of the project. Re-codification in Quebec, in contrast, involved nearly two hundred people at the outset. Many decades passed between the original reform proposals and the enactment of a new civil code.[115] The latest Dutch Civil Code took forty five years from the start of drafting to fully come into force.[116]

It is important to employ the right personnel. Napoleon chose well.[117] Other codification exercises have not been so fortunate. The delays in enacting the Indian Penal Code after Maccaulay left India was partly the fault of his less energetic successors. It needed a mutiny before the project was given new impetus. Tension can sometimes arise between the various bodies involved in codifying and were much in

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107 Reform of company law is perhaps the most glaring example: *New South Wales v. Commonwealth of Australia* (1990) 90 ALR 355. I am grateful to Professor Ross Grantham for drawing this incident to my attention.

108 Attorney-General's Department (Cth), above n 1, 4, 6, 11-14.

109 This overlooks the fact that the *Misrepresentation Act* 1967 (UK) and various common law doctrines are not entirely without teeth.

110 For the prominent role of equity in Australian contract law, see Anthony Mason, 'The Impact of Equitable Doctrine on the Law of Contract' (1998) 27 *Anglo-American Law Review* 1. On the value of certainty in contract, see Lord Steyn, 'Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 *Law Quarterly Review* 438.

111 In eighteenth century England, Lord Mansfield was accused of creating uncertainty by introducing equitable principles into contract law: see Anthony Lincoln and Robert McEwen (eds), *Lord Eldon's Anecdote Book* (Stevens & Sons, 1960) § 238.

112 The Swiss Civil Code is the partial exception: see Robinson et al, above n 79, 282.

113 Cyril Northcote Parkinson, *Parkinson's Law* (Penguin, 2002) 40-49.

114 Zimmermann, above n 86, 119.

115 For accounts, see Hector MacQueen, Antoni Vaquer, Santiago Espiau, *Regional Private Laws and Codification in Europe* (Cambridge University Press, 2003) chapter 12; Pierre Legrand 'Codification in Quebec' (1993) 1 *Zeitschrift für Europäische Privatrecht* 574.

116 Bea Verschraegen, 'The Dutch Civil Code and its Precedents' in Stefan Grundmann and Martin Schauer, *The Architecture of European Codes in Contract Law* (Kluwer Law International, 2006) chapter 5.

117 Markesinis, above n 81, 568-570.

evidence in the lead up to the Indian Contract Act of 1872. The cause of all the trouble was the insistence by the Indian Law Commission on including clauses in the legislation which those governing out in India thought ill-suited to local conditions and sought to resist. It was claimed that the proposal to abolish *nemo dat* would encourage theft of cattle.[118] Relations deteriorated further when the Indian legislature drew up their own Bill with the *nemo dat* rule included.[119] The intervention of the Duke of Argyll, the Secretary of State for India, in support of the Commission soured relations even further.[120] The Indian legislature still refused to enact the original Bill. Relations between Henry Maine as Indian Law Officer and the Commission were also decidedly cool. He returned to England in 1869.[121] In July 1870 the entire Commission then also resigned, complaining that despite much 'time and labour' their proposals had still not been implemented.[122] An Indian Office minute noted dryly that such delays were not unusual.[123] Their final letter to the Secretary of State concluded petulantly:

> We must repeat that no information which has reached the Commissioners does in our opinion explain the inaction of the legislature to which we adverted in our former letter, and which we have been obliged to consider as systematic and persistent.[124]

With a new Law Officer, James Fitzjames Stephen, and a new Law Commission, the Secretary of State conceded defeat and ordered the Indian legislature to deal with the matter as it saw fit.[125] The squabbling was over and the Indian Contract Act was enacted two years later.[126]

The Indian experience is far from unique. Even small scale reforms can fall victim to events like the partial reform of English contract law which was scuppered by the Second World War.[127] Disagreements about ideology and the direction reform should take can all too easily damage the prospects for a code. Proposals for a contract code for the UK in the 1970s stalled because of disagreements between the English and Scottish Law Commissions.[128]

The Australian proposals are much less ambitious than some of these other projects. A code of contract law rather than an entire civil code is all that is proposed.

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118 IOR/L/PJ/5/15 (Fitzpatrick), (Baden-Powell), (Oliphant).

119 *Report of the Select Committee on the Bill to Define and Amend the Law Relating to Contracts* (1868) IOR/L/PJ/5/15.

120 George Rankin, *Background to Indian Law* (Cambridge University Press,1946) 84.

121 On Maine's departure and his part in securing Stephen's succession, see George Feaver, *From Status to Contract A biography of Sir Henry Maine 1822-1888* (Longmans, 1969) 106-107.

122 Cited by Courtney Ilbert, 'Indian Codification' (1889) 5 *Law Quarterly Review* 347, 351-52.

123 IOR/L/PJ/5/438 July 1870.

124 Cited by Ilbert, above n 122, 352.

125 *Abstracts of the Proceedings of the Council of the Governor-General of India 1871*, 757; IOR/V/9/11-12.

126 For the subsequent history of the legislation, see Dato Sethu, 'The History, Impact and Influence of the Indian Contracts Act 1872' (2011) 28 *Journal of Contract Law* 31.

127 *Law Revision Committee Sixth Interim Report (Statute of Frauds and the Doctrine of Consideration)* (Cmd 5449) (1937). For a contemporary account, see Robert Chorley et al, 'The Law Revision Committee's Sixth Interim Report' (1939) 1 *Modern Law Review* 97.

128 Hector MacQueen, 'Glory with Gloag or the Stake with Stair? T B Smith and the Scots Law of Contract' in Elspeth Reid and David Carey Miller, *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (2005) 138, 159-161. For accounts of these events from the English and Scots participants, see LCB Gower, 'Reflections on Law Reform' (1973) 23 *University of Toronto Law Journal* 257, 264-265; TB Smith, 'Law Reform in a Mixed Civil Law and Common Law Jurisdiction' (1974-75) 35 *Louisiana Law Review* 927, 946-948.

This ought to reduce the time between draft and implementation. All the same, if previous codification projects are anything to go by, then significant obstacles may still lie ahead. Codes, even contract codes, take a long time to draft. There are several recent examples. The Commission on European Contract (or Lando Commission) was founded in 1982. Its work, the *Principles of European Contract Law*, was published in three parts. The first appeared in 1995 and the last in 2003.[129] The Study Group on a European Civil Code was formed in 1998. Even with the *Principles of European Contract Law* as its foundation a *Draft Common Frame of Reference* was not published until 2009.[130] Australian codifiers are not faced with reconciling so many different legal systems. Any differences between States and Territories are much less significant but it will still present a challenge. Deciding what to include in the new code and what to miss out will not be easy.

## VI THE CONTENT AND SCOPE OF A CONTRACT CODE

When drawing up a code it is very difficult to begin afresh. Although the *Code Civile* was a product of the revolution, it did not entirely break with the past.[131] The *BGB* was heavily influenced by the Pandectists and can therefore trace its ancestry to Roman Law.[132] The Indian codifiers were operating in an imperialist context. This gave them considerable freedom to innovate. They were able to draw more liberally on the work of Robert-Joseph Pothier than was possible in England.[133] Yet, despite a freer hand, the contract code was still a compromise. Existing English contract doctrine was preserved. Consideration, for example, was retained, but in a much reduced form.[134]

Whilst its English roots are still plainly visible, Australian contract law has long gone its own way. For decades, equity has played a much more prominent role than in England.[135] But escaping the past entirely is not so easy. One radical option would be to use a contract code as an opportunity to start afresh. When Ellinghaus and Wright drafted an Australian contract code for the Law Reform Commission of Victoria,[136] they emphasised this aspect:

> Working with the Code will require a sympathetic approach and fresh way of thinking on the part of lawyers. It is essential that they be released from their familiarity with the terminology of the old apparatus.[137]

The same sentiments were also reflected in Article 3 of their proposed code: 'Neither past nor future decisions govern the application of the code'.[138] The same

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[129] Ole Lando, 'Has PECL Been a Success or a Failure?' (2009) 17 *European Review of Private Law* 367.

[130] Christian Von Bar, Eric Clive, Hans Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law DCFR Outline Edition* (Sellier, 2009).

[131] Alan Watson, *The Evolution of Western Private Law* (John Hopkins University Press, 2001) 11-14.

[132] Stein, above n 80, 119-123.

[133] The secretary to the Commission, William Macpherson, had written a book which drew heavily on Pothier, *Outlines of the Law of Contract as administered in the Courts of British India* (1860).

[134] Indian Contract Act 1872 ss 2 (d), 25, 63.

[135] Paul Finn, 'Equity and Contract' in Paul Finn (ed), *Essays on Contract* (Law Book Company, 1987) chapter 4.

[136] *An Australian Contract Code* (1992). A copy of the code is also reproduced in Nicholas Seddon and Manfred Ellinghaus, *Cheshire and Fifoot's Law of Contract* (Lexis Nexis Butterworths, 2002) 54-58.

[137] Ibid 11.

philosophy is evident in the content. In place of the doctrines of offer and acceptance and consideration there is a simple statement of enforceability in Article 6.[139] The proposed abolition of the doctrine of consideration provides a much neater and more coherent solution than is currently possible at common law.[140] More problematic are those doctrines that are retained in some form. It is expecting a great deal from lawyers to approach old problems in new ways. The experience of the Indian Contract Act was that despite codification English case law continued to play a pivotal role.[141] Equally, German courts continued to refer to pre-code cases after 1900.[142] None of this is very surprising. A recent study has concluded that statutes and common law are not oil and water. They are mutually dependent.[143]

The original Ellinghaus and Wright code contained just twenty seven articles. Brevity was favoured over detail. The authors adopted this approach following an empirical study[144] which showed that detailed rules gave no more predictable outcomes than broad principles. They also found that broad principles gave greater predictability in easy cases, led to more just outcomes, were more accessible and more efficient. More recently though they have conceded that a workable code may need between fifty and seventy five articles.[145]

Most of the existing contract codes are very much longer than seventy five articles. Despite being limited to contracts for the sale of goods, the *United Nations Convention on Contracts for the Sale of Goods* (CISG) contains just over one hundred articles. The UNIDROIT *Principles of International Commercial Contracts* are more ambitious in scope and twice as long. The *Principles of European Contract Law* are, as they stand, very similar in length.[146] Even contract codes designed for single jurisdictions tend to be weighty documents. The English Law Commission code on contract compiled by Harvey McGregor QC contains 673 clauses.[147] The American *Second Restatement of the Law of Contract* is shorter than the first but still contains nearly four hundred clauses. When the commentary is included, it runs to six volumes.[148]

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138 In the revised code of 1999 this clause appears as 'Precedents do not determine the application of the Code'.

139 Ibid 20-21.

140 Rather than retaining the rule and limiting its application, which was the technique used in cases like *Williams v. Roffey* [1991] 1 QB 1.

141 This is discussed in detail in Tofaris, above n89, 232-239.

142 Hein Kötz 'Taking Civil Codes Less Seriously' (1987) 50 *Modern Law Review* 1, 11.

143 Andrew Burrows, 'The relationship between common law and statute in the law of obligations' (2012) 128 *Law Quarterly Review* 232. For an Australian perspective on the same debate, see William Gummow, *Change and Continuity* (1999) chapter 1.

144 For the full study, see Ellinghaus and Wright, above n 52. For a summary, see Manfred Ellinghaus and Edmund Wright, 'The Common Law of Contracts: Are Broad Principles Better Than Detailed Rules - An Empirical Investigation' (2005) 11 *Texas Wesleyan Law Review* 399.

145 University of Newcastle Law School: 'Global Law of Contract Project: AAC Reflections' < http://www.newcastle.edu.au/school/law/research/global-law-of-contract/acc-reflections.html>.

146 And not just in length. For similarities between the Draft Common Frame of Reference (which is largely based on PECL) and UNIDROIT principles, see Stefan Vogenauer, 'Common Frame of Reference and UNIDROIT Principles of International Commercial Contracts: Coexistence, Competition, or Overkill of Soft Law' (2010) 6 *European Review of Contract Law* 143.

147 Harvey McGregor, *Contract Code Drawn Up on Behalf of the English Law Commission* (Guiffré, 1993).

148 (American Law Institute, 1982).

Any codifier faces a dilemma. A very detailed code runs the risk of being too rigid. It may lead to undesirable results not foreseen by those who drafted it.[149] There is nothing of course to stop a periodic review, the efficacy of which will partly depend on how frequently they occur. However, the precedents are not encouraging. The first American *Restatement of the Law of Contract* was published in 1932 and the second only appeared fifty years later. One solution would be to subject the code to on-going and permanent review through a body such as the Australian Law Reform Commission.[150] The practicalities would need to be worked out. A mechanism for raising problems and solving them would need to be put in place.

Article 5 of the *Code Civile* states that 'Judges are forbidden to decide the cases submitted to them by laying down general rules'. But even in France the role of judges is not confined to that of interpreter.[151] Equally the general clauses in the *BGB* relating to public policy and good faith allow German judges considerable room to innovate.[152] Even within the most detailed codes there are bound to be gaps. A short code of general principles may be more comprehensible and able to evolve more easily, but also potentially leaves the law hardly more certain than when it was un-codified. This need not be an all or nothing exercise. Many codes combine broad principles and precise rules side by side.[153]

## VII CODIFICATION: A FEW OBSERVATIONS

Writing in the 1870s, Sheldon Amos, the English jurist remarked that, 'No one who has practically tried his hand at the Codification of the English Law can be unaware of the extraordinary difficulties by which the task is beset'.[154] Amos was writing as a strong believer in codification. There are plenty of contemporary supporters of codification. These include several judges in Australia and England. Perhaps it is no coincidence that two of the most formidable advocates, Justice Kirby and Lord Scarman, were both Chairmen of their country's Law Commission[155] and committed to the cause of law reform.[156] It is of course perfectly possible to espouse the cause of law reform and at the same time be sceptical about the merits of codification. One English Law Commissioner, Professor Burrows, has argued that in relation to the law of obligations, 'Non-binding codes are invaluable. Binding codes are dangerous'. [157]

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149 Stephen Waddams, 'Codification, Law Reform and Judicial Development' (1996) 9 *Journal of Contract Law* 192.

150 Lord Scarman, *Codification and Judge-Made Law* (Birmingham University Press, 1966) 16-17.

151 Bernard Rudden, 'Courts and Codes in England, France and Soviet Russia' (1973-1974) 48 *Tulane Law Review* 1010, 1025-1026.

152 Basil Markesinis, Angus Johnson, Hannes Unberath, *The German Law of Contract: a comparative treatise* (2006) 23-25.

153 Kötz, above n142, 7-9.

154 Sheldon Amos, *An English Code* (1873) 1.

155 Kirby's admiration for Scarman is evident from his lecture 'Law Reform and Human Rights - Scarman's Great Legacy' English Law Commission (2006) <http://lawcommission.justice.gov.uk/>. On the relationship between Scarman and Kirby, see Ian Freckelton and Hugh Selby (eds), *Appealing to the Future* (Law Book Company, 2009) 7, 15. Arden LJ, another supporter of codification, was also Chair of the Law Commission, see Arden, above n 57.

156 Leslie Scarman, *English Law: The New Dimensions* (Stevens, 1974); Michael Kirby, *Reform the law: essays on the renewal of the Australian legal system* (Oxford University Press, 1983).

157 Andrew Burrows, 'Legislative Reform of Remedies for Breach of Contract: The English Perspective' (1996-1997) 1 *Edinburgh Law Review* 155, 156.

Codification has always appealed to the rationalist mind even within the common law. Over a century ago, Frederick Pollock advocated introducing a contract code into English law. It was, he said, only 'ignorance, timidity, and the extreme cumbrousness of our legislative procedures' which was standing in the way.[158] Nevertheless, the objections cannot be easily dismissed as 'misguided or exaggerated'.[159] The evidence from history across many legal systems is that they are very real concerns. Proper consultation is critical. An informed debate needs to take account of the views of sceptics as well as supporters. The process must not be used as a fig-leaf for a pre-ordained outcome.[160] In Europe, codification has been hijacked by those who, in the face of all the overwhelming evidence, remain committed to the cause of further European integration. In Australia, the stakes are lower. But it is important to decide what the code is trying to achieve. Clear and transparent aims are needed. This is not just a question of whether the code will be a reform or restatement. It will also dictate the detailed structure and format of any code. Identifying a set of values is rather easier than producing concrete proposals. The *Discussion Paper* explains that some of the limitations on freedom of contract 'reflect historical foundations and may undercut the autonomy and true intentions of the parties'. It will be difficult to decide which are justifiable on 'public interest grounds' and which are not. The New Zealand contract statutes tried to solve some of these problems by not fully addressing them. Judges were given broad discretion instead. Despite some vocal criticisms,[161] the New Zealand Law Commission has largely resisted calls for reform.[162]

Calls for an Australian contract code are nothing new.[163] Whether one finally comes to fruition and the form that it will take remains to be seen. A combination of politics and inertia may have the final say. At the very least it is to be hoped that any code that is produced does not earn the epithet attached to the original Indian Contract Bill by one Bengal Barrister: 'a painful and cruel infliction'.[164]

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158 Frederick Pollock, *Essays in Jurisprudence and Ethics* (1882) 93.

159 Svantesson, above n 10, 25.

160 This has been the case in recent times in Europe: see Mel Kenny, 'The 2003 action plan on European contract law: is the Commission running wild?' (2003) 28 *European Law Review* 538.

161 David McLauchlan, 'Contract and Commercial Law Reform in New Zealand' (1984) 11 *New Zealand Universities Law Review* 36; FG Barton, 'The Effect of the Contract Statutes in New Zealand' (2000) 16 *Journal of Contract Law* 233; John Farrar, 'The Codification of Commercial Law' in Jeremy Finn and Stephen Todd (eds), *Law, Liberty, Legislation* (Lexis Nexis, 2008) chapter 3.

162 New Zealand Law Commission, *Contract Statutes Review*, Report No 25 (1993).

163 JG Starkie, 'A Restatement of the Australian Law of Contract as a First Step Towards an Australian Uniform Contract Code' (1978) 49 *Australian Law Journal* 234.

164 The Barrister in question was JB Money an Assistant Secretary in Bengal. He was writing in 1868, IOR L/PJ/5/15.