THE CODE NAPOLEON AND THE COMMON-LAW WORLD

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Preface

ON MARCH 21, 1804, there occurred one of the most notable events in all legal history. For it was on that day that the Code Napoleon was voted into law. The French Civil Code is the first great modern codification of the law. It abrogated the law of the *Ancien Régime*—based largely on local custom, and anything but the unified system demanded by a large national State—and substituted for it a coherent code, logically arranged and clear and precise in its terms.

It should be noted that the popular title of this monumental work, the *"Code Napoleon,"* is no mere figure of speech. Attempts at codification had been made for many years, and even the Revolution had not seen them come to fruition. It was the all-powerful will of the First Consul that was the necessary catalyst. It was his energy that brought to completion the work so long awaited.

Napoleon himself realized from the beginning the monumental significance of the codification that bears his name. At Saint Helena, near the end of his life, he wrote: "My glory is not to have won forty battles, for Waterloo's defeat will destroy the memory of as many victories. But what nothing will destroy, what will live eternally, is my Civil Code."

The framers of the Code Napoleon were dominated by the desire to present the law in a form readily accessible to all. Like Jeremy Bentham, they sought to be able to say: "Citizen, what is your condition? Are you a farmer? Then consult the chapter on Agriculture."

Of course, they did not wholly succeed in their aim. But the instrument that they drew up as a codification of all of the private law is remarkable for its brevity and lucidity of style. The entire Code contains only 2,281 sections and, even in its modern form, can

readily be printed in a convenient pocket-size volume. The Code itself, after six short preliminary sections, is divided into three parts. The first deals with Persons; the second with Property; and the third with the different ways whereby property may be acquired.

The French Civil Code today is in its essentials what it was when Napoleon ordered it drawn up, because its dominant characteristic was the spirit of moderation with which it was drafted. Though it was a product of the French Revolution, its provisions were anything but revolutionary. But neither was it a reactionary document seeking to undo the work of the men of 1789. On the contrary, it sought to preserve the sound portions of their work—such as the equalitarian ideal, so vital to a democratic legal and economic system—while renouncing the radical and violent measures of the later Revolution.

As noteworthy as its effect on French law has been the territorial expansion of the Napoleonic Code. It has served as the model for similar codes in most countries outside the Anglo-American world. In countries so diverse as Belgium and Japan, Italy and Egypt, the French Code has served as the basis for analogous codifications. And the Code itself has been not without influence in the common-law world. In both Canada (Quebec) and the United States (Louisiana) there are jurisdictions whose law is based on its provisions.

The sesquicentennial of an event as important to the history of law as the promulgation of the Code Napoleon is one that should be marked by appropriate celebrations throughout the legal world. And it is fitting that the largest public celebration was that held at Arthur T. Vanderbilt Hall on December 13, 14, and 15, 1954, under the sponsorship of the New York University Institute of Comparative Law. Few lessons that comparative law has to teach us are of greater significance than the experience under the French Code. This is particularly true for the Anglo-American world. In all the common-law countries there has been, during the past century, an

ever-increasing stream of legislation to supplement, and even to supersede, the law made by the courts. Since Bentham, informed jurists have questioned whether we could not bring some order out of the chaos of statute and case law by the use of the method of codification. The recent attempts at restatement of the law and at uniform state laws are manifestations of our concern with this problem. Certainly, in our attempts to deal with it, we should be aided greatly by an understanding of the first great modern Code and of the experience with it in practice.

That is why the theme of the sesquicentennial celebration was *The Code Napoleon and the Common-Law World*. What are the lessons for our system of a hundred and fifty years of the French Code? This theme was particularly emphasized during the third day, but it was present as the underlying motif in all three sessions. The participants were all eminent jurists, drawn from countries throughout the world. Their subjects were selected as those calculated to be of special interest to an American audience. The celebration itself, one of the largest public manifestations in this country of interest in comparative law, was decidedly a notable event in contemporary legal history.

The present commemorative volume contains, with one notable exception, the papers delivered by the participants in the Code Napoleon celebration. The exception is that of Dean Boris Mirkine-Guetzévitch, whose untimely death occurred before his paper could be completed. It is, however, gratifying, especially to the present writer, that Dean Mirkine could personally participate in the first session on December 13, as the last public event of a career so noted in the field of comparative law. In the place of Dean Mirkine's paper there is printed a short contribution by M. René Cassin, whose duties as head of the *Conseil d'Etat* made it impossible for him personally to attend the celebration.

Public thanks should be paid to all those who helped make the celebration a success, particularly to the participants and the chair-

men of the three sessions, M. Pierre Donzelot, Director of the Cultural Services of the French Embassy, Dr. Ivan Kerno, of the United Nations, and Russell D. Niles, Dean of the New York University Law School. This volume, which makes the result of their efforts more than merely transitory, should constitute a permanent contribution to comparative law.

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I

The Ideological and Philosophical Background

C. J. FRIEDRICH

VOLTAIRE, in a famous exclamation, demanded the total destruction of all existing law. "Do you want good laws? Burn yours and make new ones!"—"Voulez-vous avoir des bonnes lois? Brûlez les vôtres, et faites-en des nouvelles." The radical discontent with existing legal institutions under the *Ancien Régime* was here linked to the goal of radical reform, indeed a chiliastic hope that truth and goodness were known and ready to hand, and that all that was needed was the will to make a clean sweep of the past and to start afresh. Voltaire's dramatic demand symbolizes the revolutionary attitude that underlay the ardent search for a code of laws during the revolution that followed.

I do not propose to discuss in the following pages the content of these efforts at codification, the substantive law and how and to what extent it was in fact changed; for that is the concern of others contributing to this symposium. What I wish to explore is the background of political thought and ideas for the notion of codification as such. What made the revolutionaries think in those terms, and what instilled in Napoleon Bonaparte, the executioner in a double sense of the Revolution and of its ideology, the wish to see this task through? The content itself was, of course, bound up with, and to some extent expressive of, the aspirations of the spirit of 1789: all citizens are legally equals; primogeniture, hereditary

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nobility, class privileges, and executions are unjust; private property is sacred; the conscience is or ought to be free; government employment should be available to all, indeed general opportunity should be equal for all citizens; laws should be simple and legal proceedings public, efficient, and inexpensive; to put it all in a nutshell, personal liberty and civil rights should be inviolable[1] As Albert Sorel has said: "The *Code Civil* has remained, for the peoples (of the world), the French Revolution—organized. When one speaks of the benefits of this revolution and of the liberating role of France, one thinks of the *Code Civil,* one thinks of this application of the idea of justice to the realities of life."[2]

New laws, yes, but why a code? The idea of uniting all law in one great body or corpus is, of course, an old one. Indeed, Western legal development had been taking place through centuries under the shadow of the *Corpus Juris* of Justinian, and considerable parts of France, more especially the South, had lived by it for a long time.

Perhaps, then, one should rather ask: Why not a code?

It is, however, easily overlooked that the idea of a code and of codification appears in at least three clearly distinguishable forms. The Justinian Code just mentioned represents one of these types. It tries to bring together and "digest" a body of existing law, clarifying and systematizing it, but not intending to altar it in any significant way.[3] A second form tries to codify the law in terms of a natural law that provides a pattern for the systematization; that is to say, the clarification and therefore to some extent the reformation of the law. Reason is here assigned a distinctive role. This is the kind of code which the "Common Code for the Prussian Lands" *(Allgemeines Preussisches Landrecht)* and the "Common Civil Law Code" *(Allgemeines Bürgerliches Gesetzbuch)* of the Hapsburg Empire sought to be. Such codes were in line with the thinking of enlightened despotism and of the "heavenly city of the eighteenth century philosopher," to use Carl Becker's happy phrase.[4] Finally, there is a type of codification essentially inspired by the idea of lawgiving, which sets out to remake the law in the image of a new and better society.

The original French Revolutionary codes are of this type of "rationality." The lines between these three types of code may at times be a bit blurred, but the types embody nonetheless valid distinctions that are particularly important for an understanding of the ideological background of the *Code Civil*. For, as will appear in the sequel, the *Code Civil* was inspired by thinking along the lines of the third type, but was actually shaped into the second type. It is this fact that justifies A. Esmein in asserting that the drafters of the code, the commissioners of the Consulate and the members of the *Conseil d'Etat,* were simply those who did the final work, that they "built solidly the building the plan of which had been drawn before and the materials for which had been chosen and prepared by previous generations."[5] He quotes the commissioners themselves as saying: "The codes of people develop in time; properly speaking, one does not make them."[6] Whether this assertion is in fact true may be doubted. But the observation expresses well the sentiments of the historical school of jurisprudence. Actually, the Code embodied *in extenso,* as we have already noted, some of the very explicit lawmaking of the Revolution.

As bearing on certain notions common among American lawyers, it may be of interest to recall in this connection that Francis Bacon, as Lord Chancellor, at least twice raised the question of the possible wisdom of codifying the laws of England. And although he phrases his thought as if he had in mind merely the first type, a pure digest, the very heading of his proposal "for amending the laws of England" shows that he had the second type in mind. His well-known interest in a rational law of nature reinforces this conclusion. This is how he put it (in part): "The work which I propound, tendeth to the pruning and grafting the law, and not to the ploughing up and planting it again; for such a remove I should hold indeed for a perilous innovation. . . . But in the way that I shall propound, the entire body and substance of the law shall remain, only discharged of the idle and unprofitable or hurtful matter; and illustrated by order and other helps, towards the better understanding of it, and judgment thereon."[7] The proposal came to naught, for it

encountered the fierce opposition of the law guilds and more especially of Sir Edward Coke, always alert to their special interests and concerns. But its existence helps us appreciate the link between this kind of rational reform code and enlightened absolutism, since even in England the idea was thus projected.

In summing up this preliminary analysis we may say, then, that there are three types or forms of code: the digest type, the reform type, and the revolutionary type, and that the *Code Civil* appears to be not the revolutionary, but the reform type, though partaking through its revolutionary predecessors to some extent of the revolutionary inspiration. To elucidate and confirm this hypothesis, we now turn to a more detailed examination of its ideological antecedents.[8]

In raising this question we are approaching the Civil Code as historians. The codification is itself seen as part of that ebb and flow of ideas by which the law is molded as it evolves. The seamless web of history is seen not as torn apart by a code, but as merely reinforced. It is important to keep this difference in mind, because of the lingering prejudice that once upon a time was so forcefully urged by Karl von Savigny in his celebrated *Of the Calling of our Time for Legislation and Legal Scholarship.*[9] He there sharply attacked the Civil Code for its rationalizing radical alteration of existing law. But involved in Savigny's attack, precipitated as it was by a proposal for a German code along similar lines, was the great German scholar's belief in the importance of legal learning for the shaping of the law. The time seemed to him not ripe for the kind of codification that is defensible and sound; it is clear that he would not have objected to the digest type of code, and his lifelong interest in and concern with the *Corpus Juris* demonstrates that fact, confirmed as it is by his conviction that the Roman law was the best law, something of a model for all times. Recent clarifications of Savigny's outlook[10] have not basically affected this aspect of the matter. But since Savigny did not appreciate the extent to which custom had been conserved in the French Code, one may wonder

whether he might not have rendered a different verdict had he been more fully cognizant of the tradition-related character of the *Code Civil,* [11] which is not only universally acknowledged today, but is the ground for insistent demands that the Civil Code be altered and reformed.

Let us briefly review the historical development. The original draft of a code (1793) was strictly revolutionary in both intent and content. As the editors of the preparatory work pointed out, it was an enterprise meant to change everything at once, in education, in manners and customs, in the spirit and in the laws of a great people. They invited the Assembly to which the draft was submitted (August 9, 1793) to look at the Code as the fruit of liberty. "The nation will receive it as the guarantee of its happiness, and it will offer it one day to all the peoples. . . ." In the style of all good revolutionaries, they recognized only one truth, and this truth was now revealed in the proposed code.[12] But the Assembly did not share their confidence; if truth it was, it was still too complicated, too hard to comprehend for the ordinary citizen, and therefore a still shorter one was prepared by Cambacérès[13] and his collaborators, which they presented on September 9, 1794. It was composed of only 297 articles containing very general principles. It has been aptly remarked (Esmein) that this was much more a manual of practical morals than a code of civil law. It failed of adoption.

But after the 18th Brumaire, the project did not go into the limbo; quite the contrary. With the vigorous support of Napoleon Bonaparte, the project of a code was pushed forward until finally it achieved definitive form in a draft presented to the *Conseil d'Etat,* there vigorously and minutely discussed with the steadfast participation of the First Consul, and eventually adopted on March 21, 1804, in the form in which it has endured. Having abandoned the revolutionary position, the draftsmen were now content to say: "We have much less the pretension of being novel than that of being useful. We have consulted jurists who were recommended by public opinion and general esteem (Jacqueminot)." [14] And in the famous

introductory discourse (*Discours Préliminaire*) it was declared that "laws are not pure acts of power." The draftsmen added that it is necessary to be "sober" in face of proposed innovations in the law. In good Aristotelian manner and harking back to the perennial French liking for *bonne mesure,* they pontificated that "it would be absurd to adopt absolute ideas of perfection in matters which are susceptible only to relative goodness."[15] Here clearly the lawyers are speaking, the technicians who know and appreciate the weight of tradition and of the intellectual inertia that in all times and places supports it. But they do not by any means abandon the notion of useful reform. Indeed, this utilitarian standard, so characteristic of enlightened despotism, is the beacon light of their labors.

In this work of retrenchment they were aided enormously by the work of a great jurist of the previous generation, Pothier.[16] Purely in the spirit of a digest code, he had labored to demarcate the "area of agreement," as we nowadays say, of the many legal rules that had currency in the different parts of France. "While the commentators on the local customs had generally emphasized the originality of the [local] institutions . . . Pothier bringing to the study of the whole of French legislation the method of exposition . . . [of the Roman jurists] . . . , dwelt upon the central ideas and the elements of cohesion common to all customs. . . . His texts were often literally incorporated in the Code."[17] There were, of course, many other sources; but Pothier is not only the most outstanding by far, but also the one whose work most nearly approaches a codification by digest. It lacks, therefore, those ideas that only a rational natural law could superimpose upon the work. The Civil Code combines the reformist with the traditionalist outlook, progress with stability, justice with order. This balancing of countervailing values is no doubt the secret of its success.

But the analysis so far still leaves us without an answer to the question: Why a code? If the revolutionaries had a ready answer, they failed to carry through to realization the inspiration that Jacobin enthusiasm about Rousseau and the *volonté générale* had

generated for law and legislation. Why did Napoleon succeed where the revolutionaries had failed? In putting this question we intend to concern ourselves, not with practical politics, but rather with those ideas that were demonstrably alive in the thought of Napoleon as a heritage. The present writer believes that there are three clusters that ought to be analyzed separately: (a) those of Rousseau and the *philosophes* of the eighteenth century; (b) the ideology and the impetus of the revolutionaries, more especially the Jacobins; and (c) the rivalry with monarchical absolutism (enlightened despotism) and more especially with Frederick the Great.

Let us turn first to Jean Jacques Rousseau and the *philosophes.* Bonaparte's devotion to Rousseau, his intimate youthful acquaintance with the "Newton of the moral world," as Kant had called him, is well known.[18] But he developed the side of Rousseau that finds its most effective expression in the *Contrat Social,* rather than the Rousseau of the sentimental views in the essay on the *Inequality of Man.* Indeed, Bonaparte judged that the latter, which he read in the summer of 1791, was nonsense. "I do not believe any of this," he commented. And he proceeds to write down what he believes to have been the state of nature: sociable, focused on love and friendship, with village communities; one senses the background of rural Corsica. Napoleon's main point is that sentiment and reason are natural to man and the mainstay of his nature. It is clear that his views are close to the notions of Rousseau, when seen in their entirety, but with a decided stress on the national, collective, authoritarian side of Rousseau, the side that in our day has even been called "totalitarian."[19] Indeed, Napoleon's response to Rousseau's teaching might be made a mainstay of this argument, which I nonetheless consider in error. Neither Rousseau nor Bonaparte was a totalitarian at all, and the best and most convincing proof lies in the field with which we are here concerned: they were both convinced believers in the law and considered legislation the most important activity of government. As Napoleon was to write on Saint Helena: "My true glory is not to have won forty battles. . . . What nothing will efface,

what will live forever, is my *Code Civil,* the records of the proceedings in the *Conseil d'Etat."*[20] Though this judgment is no doubt affected by the thought of posterity, it is really very much in line with what Napoleon said in the *Conseil d'Etat* while the Code was under consideration.

We know that Napoleon tried to apply the ideas of the *Contrat Social* to the officers of his regiment; the idea of everyone's commitment to the whole was the essence of his conception of morale. Indeed, there is alive in Rousseau, especially in the *Contrat Social,* something of the spirit of ancient Rome, with its emphasis on the soldier and the marching column. But the crucial point is another one.[21] At the very heart of Rousseau's teaching we find the doctrine of the legislator who gives the political community its basic form. In Book II, Chapter VII of the *Contrat Social* Rousseau exclaims: "Gods are needed to give laws to men." To him the legislator is the engineer who invents the machine, whereas ordinary government merely operates it. In this connection Rousseau cites Montesquieu, who had written (in the *Grandeur et Decadence des Romains,* Chapter I) that at the birth of societies "the rulers of Republics establish the institutions, while afterwards it is the institution that molds the rulers." But not only the rulers: the laws will shape the entire citizenry. The man who makes these laws "ought to feel himself capable of changing human nature, of transforming each individual into a part of a greater whole. . . ." Rousseau repeats here his doctrine of man as oscillating between the poles of solitary independence and complete absorption in the political community, "from which in a way he receives his very life and being." The legislator who does this is akin to the gods, because he transforms a physical, brutal being, independent man, into a moral being who cannot exist without other men. And the more interdependent men become, the better: "if each citizen is nothing and can do nothing without the rest, . . . it may be said that legislation is at the highest point of perfection."

This notion is a far cry from the individualism and emphasis on

self-reliance characteristic of Roman law as contained in a considerably diluted form in the *droit écrit* of southern France, but it bears some strong kinship (if we may note this in passing) to the customary law of the north. In any case it shows the lawmaker as the molder of men and states; he "is, in all respects, an extraordinary man in the state." The reason is that his office is neither that of an executive (*souverain*) nor of a judge (*magistrat*). It is clear that what Rousseau has in mind is really the constituent power,[22] in the sense in which the lawmaker in the tradition of Lycurgus and Solon and *The Laws* of Plato is the builder of the political community. There is a contradiction here in Rousseau's thinking, as there often is; for the general will presumably continues to act as the source of some laws, though Rousseau's discussion of the legislator creates serious doubt whether he ever thought of the legislative power as a continuing activity in the political community. At the end of Book II, in a curious chapter dealing with the division of laws, he draws a distinction between the fundamental "political" laws (evidently the constitution), the civil laws, and criminal laws, all of which he refers in the last analysis to "the true constitution of the state," which is not (to quote his famous phrase) "graven on tablets of marble or brass, but on the hearts of the citizens."[23] This set of notions, which consists of "morality, custom, public opinion," is the "secret" concern of the great legislator; it forms the "immovable keystone" of the particular rules that the lawmaker formulates. And because this is so, the legislator cannot appeal to either force or rational argument, and he must therefore have recourse to an authority of a different order, "an authority which can lead without violence, and persuade without convincing." It is the appeal to the gods, the "intervention of heaven," as more particularly illustrated by the case of Lycurgus. But Rousseau also mentions specifically Calvin. This "divine reason" which rises above vulgar men is by the legislator imputed to the immortal gods.

It is not without interest that Rousseau here refers to Machiavelli, who in the *Discourses* had pointed out that there had not been an