NAPOLEON AND HIS CODE[1]

"I will go down to history with the code in my hand." — BONAPARTE.

AS we pass the centennial of the great tragedy of Waterloo it may seem surprising to find the fame of its principal victim more secure than ever. Napoleon Bonaparte has unquestionably become the most striking figure in modern history. Others may have been more conspicuous in a single country, as Washington in America, or in some particular line of human activity, as Shakespeare in literature, or Darwin in science; but no modern character has so completely riveted the attention of the entire world for so long a time, and become so distinguished in so many different lines as Napoleon.

We know him best as a strategist. But he was also distinguished as a diplomatist; not less so as a statesman and an administrator, and finally, and most successfully of all, as a lawgiver.

It is with the last-named rôle that we are concerned here. Napoleon's military achievements have largely vanished; they were spectacular and highly successful from a temporary standpoint, but as he himself predicted, they have become "lost in the vortex of revolutions" and yielded no permanent results except to mili-

[1] BIBLIOGRAPHICAL NOTE. — The literature of the Code Napoléon is voluminous and constantly increasing. The CAMBRIDGE MODERN HISTORY alone (Vol. IX, 808, 809) contains a bibliography of about fifty titles, mostly French. The discussions accompanying the Code at its publication filled no less than eight volumes, while the memorial papers published in connection with the observance of its centennial (at which the American government was officially represented) number forty and are contained in two portly tomes.

In English the most complete discussion of the origin and history of the Code appears to be that from the pen of Prof. H. A. L. Fisher, of Oxford University. The translation in the CONTINENTAL LEGAL HISTORY SERIES of Brissaud's Manual has opened a wealth of material to English readers and, with the suggestive, though all too scant, articles of Esmein (Professor of Law in the University of Paris) in the new ENCYCLOPAEDIA BRITANNICA (Vols. VI, X), clarify the subject from the French viewpoint. The centenary of the Code is the subject of an article by Sir Courtenay Ilbert in the JOURNAL FOR THE SOCIETY OF COMPARATIVE LEGISLATION (N. S.), Vol. VI, 218. In 1906, Mr. U. M. Rose delivered an address on the Code before the bar associations of Arkansas and Texas, which was afterward published in 40 AM. L. REV. 833–54, and there are other magazine articles in English on the subject. See, *e. g.*, "The Code Napoléon," by W. W. Smithers, 40 AM. L. REV. (N. S.) 127.

tary science. His diplomacy brought little to France that remains. His statesmanship and administration benefited that country and their results continue there. But his greatest achievement, that which endures to-day, the one feature of Napoleon's career which now influences the world beyond France and which is growing in recognition as the years pass, was his work as a lawgiver and a codifier.

Earlier Schemes of Codification

The legal chaos that prevailed in France before the Revolution had engaged the attention of eminent Frenchmen for centuries. A single code for the whole country was the dream of King Louis XI in the fifteenth century, of Dumoulin (1500–66) and Brisson in the sixteenth, of Colbert and Lamoignon in the seventeenth, and of D'Aguesseau in the eighteenth. The four last named made substantial contributions toward such a project — Brisson,[2] by his compilation of the Ordinances in force under Henry III, Colbert and Lamoignon, through the more celebrated Ordinances [3] bearing the name of Louis XIV, and D'Aguesseau, whose Ordinances on wills, gifts, and entails appeared between 1731 and 1747, and "were thorough codifications." [4]

The States-General of 1560 voted for a code, and those of 1576 and 1614 again recommended one, and when, on June 17, 1789, that body became the National Assembly and seized the sovereign power, these juridical evils of the old régime were among the first to be denounced. Everyone recognized their enormity, but prac-

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[2] "About 1580, a celebrated jurisconsult, Barnaby Brisson (Brissonius), Advocate-General of the Parliament of Paris, and author of a widely used dictionary of law ('De verborum significatione'), compiled a systematic collection of the principal provisions contained in the Ordinances in force under Henry III. This prince, ambitious, it was said, to rival the glory of such men as Theodosius and Justinian, was about to give it royal sanction; but his death in 1589 prevented this. Brisson's work was published after his death under the title of 'Code Henri III, Basilica.'" Brissaud, Manuel d'histoire du droit français, § 3, 346 *et seq.*, translation in 1 Continental Legal History Series, 264.

[3] These included the *Civil Procedure Ordinance* of 1667, intended to expedite and cheapen litigation but which also limited judicial discretion; the *Criminal Ordinance* of 1670, really restricted to procedure and antiquated in many of its provisions though possessing "much merit"; the *Ordinance of Commerce* (1673), mainly the work of Jacques Savary, a Paris merchant; and the *Ordinance of the Marine* (1681), a careful codification of maritime law. *Id.*, 264–65, 279.

[4] *Id.*, 279. *Cf.* 269.

tical remedies were wanting. The deputies all said: "We must have a code," and after more than a year they adopted a resolution calling for "a general code of clear and simple laws."

But, notwithstanding the fact that nearly one half the membership of the *Assemblée Constituante* was composed of lawyers, nothing further in that direction seems to have been accomplished by that body. The Constitution of 1791, framed by the same Assembly, embodied the promise of a code and the short-lived Legislative Assembly of the same year dealt with the problem in a feeble way. Its successor, the National Convention, which contained very few lawyers, took up the subject in 1793, impelled, it is thought, by the accumulating mass of new legislation, and in July of that year, appointed a committee "to replace the chaos of old laws and customs" and ordered it to report a draft within one month. The Committee consisted of Cambacérès, probably the most learned lawyer in the Convention, Treilhard, Berlier, Merlin de Douai, and Thibaudeau, and its draft, mainly the work of the first named, as chairman, was presented,[5] pursuant to order on August 9.

"This plan was remarkable for its excessive brevity; there was only one article for certificates of civil status, only one for domicile, and the rest in proportion; the whole consisted of six hundred and ninety-five articles. Such a Code would have been very dangerous, for many important points were not touched upon, and judges would have found themselves without guidance and without control. This feature of it, however, was deliberately adopted by its drafters. The Convention professed a profound contempt for the Roman law and the Customary law, which they looked upon as barbarian and degenerate systems. They aimed (says Barrère) to realize the dream of philosophers — to make the laws simple, democratic, and accessible to every citizen. Besides this defect in form, Cambacérès' draft was too much inspired by the revolutionary ideas of the day." [6]

Mr. Rose[7] refers to it as "hardly anything more than a collection of moral maxims and in fact no code at all." On the other hand Mr. Smithers [8] thinks that "the ensemble . . . embraced a

[5] "In the bombastic language suited to the time and the occasion." Rose, "The Code Napoléon," 40 AM. L. REV. 833, 845.

[6] PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL, 5 ed., 1908, translation in 1 CONTINENTAL LEGAL HISTORY SERIES, 280.

[7] *Supra.*

[8] "The Code Napoléon," 40 AM. L. REG. (N. S.) 127, 139.

set of positive laws well suited to the whole of France." Be that as it may, the Convention considered the work "too complex" and on November third referred it back to the Committee to be "simplified." Nothing more came of it, however, nor of a subsequent draft of two hundred and ninety-seven brief articles which Cambacérès later presented to the Convention;[9] and after a vain effort by him to interest the Council of Five Hundred in the project, it was allowed to languish for the remainder of the eighteenth century.

Napoleon's Code Commission

Bonaparte was now first consul, and the victory of Marengo gave him leisure for the pursuits of peace. More than any man in France he saw that its greatest need was a thorough overhauling and unification of its laws. But still more he alone discerned the means by which reform was to be brought about. Napoleon discarded the old committee of the Assembly. He considered that it had demonstrated its incapacity, and on August 13, 1800, he proceeded to appoint a new commission to draft a real code. This was eleven years after the outbreak of the Revolution, one of the purposes of which was to reform the laws. Little had been accomplished in this direction in all that time, though startling changes had been taking place along other lines. Napoleon proceeded to look for the ablest and most competent men in the whole country; he disregarded all other considerations; he appointed no man as a codifier because of political affiliations; and he omitted none because of personal dislike. Of the four who were selected everyone was past middle age and a conservative, at heart attached to the old régime, and Napoleon knew it. He recognized perfectly well that their natural sympathies were with the past.

At the head of the commission he appointed Tronchet, aged seventy-three, and president of the *Cour de Cassation*. And what were Tronchet's antecedents? He was one of the counsel who had defended Louis XVI when prosecuted and finally executed by the revolutionists. In fact, he was called "The Nestor of the Aristocracy." Can one imagine a more remarkable appointment than that of a man who was practically the legal representative of the

[9] Planiol, *supra*.

old régime, and who was thus placed at the head of a commission to codify the laws of new France? Yet Napoleon said of him later that he had been "the soul of the debates in the Council of State." [10]

Next in importance was Portalis, a Provençal, who had suffered imprisonment during the Revolution. He has been called [11] "the philosopher of the commission," for he "was specially distinguished in the art of legal and philosophical exposition." [12]

Then came Bigot de Préameneu, a native of Rennes and a mild supporter of the Revolution, but obliged to hide during the Terror. At the time of his appointment he was "government commissioner" in the *Cour de Cassation*.[13] It has been said that his "adroitness and pliancy were destined to be proved in more fields than one."

Finally there was Malleville, who had been a practitioner at Bordeaux and later a judge of the *Cour de Cassation*. He is said to have been "profoundly versed in the Roman Law" and became "the first of a long line of commentators on the Code," which he assisted in drafting.[14]

And not only was this commission distinguished in its personnel from the individual standpoint; it was also collectively a representative one. For Tronchet and Malleville came from the bench, bringing to the work of the commission the benefits of judicial experience; Portalis and Bigot, *per contra*, represented the bar with a training no less valuable. Again Tronchet and Bigot came from "*le pays du droit coutumier*" and were schooled "in the *Parlement* and the custom of Paris." On the other hand, "Portalis and Malleville represented the legal traditions of the land of written law." This combination of elements and experience was ideal, and it is easy to understand how the outcome was a "compromise between northern Teutonism and the Latin inheritance of the south." [15]

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[10] 1 CONTINENTAL LEGAL HISTORY SERIES, 287.

[11] *Id.* The same author adds: "Possibly he has been too highly praised. As a philosopher, he certainly did not possess an original mind; he attained only the heights of mediocrity; and his style, filled with the phraseology of the period, was soon antiquated. But he was not a mere jurist; he was an enlightened man, with an open mind, and a marked moderation; and it is for this that we should especially thank him."

[12] 9 CAMBRIDGE MODERN HISTORY, 150.

[13] 1 CONTINENTAL LEGAL HISTORY SERIES, 281.

[14] 9 CAMBRIDGE MODERN HISTORY, 150.

[15] *Id.*, 151.

MODELS AND SOURCES[16]

The idea of a civil code, *i. e.*, one devoted exclusively to private, substantive law seems to have originated here. Certainly the Roman prototypes furnished no model. The nearest approach to one was probably the Institutes of Justinian with its four books, the first three of which treated respectively of Persons, Property and Obligations — the Gaian[17] order followed in the main by the French draftsmen. But the fourth book of the Institutes treated of actions, which the French now relegated to a separate code, that of *Procédure Civile*. Similarly the other special codes eventually evolved in France — Penal, Commercial, and Criminal Procedure (*Instruction Criminelle*) — were all departures from Roman prototypes. Justinian's Code, indeed, contained more public and criminal law than did the Digest, but neither was devoted exclusively to any particular branch, and no clear distinction was made between remedial and substantive law.

But if the scope and arrangement of the draft code were original its contents were not. Even the finished instrument contained little new law, and that seems to have been largely added by Napoleon himself. The original draft, as it came from the hands of the Commission, was mainly a purged reproduction in codified form of the existing French law.

"Little is known of the special training through which the true authors of this work had passed; but in the form which it ultimately assumed, when published as the Code Napoléon, it may be described, without great inaccuracy, as a compendium of the rules of Roman law then practised in France, cleared of all feudal admixture — such rules, however, being in all cases taken with the extensions given to them, and the interpretations put upon them by one or two eminent French jurists, and particularly by Pothier."[18]

COMMENTATORS. — The last-named author's *Traité des Obligations* had appeared in 1761, about a generation before these draftsmen began their work, and one writer goes so far as to say

[16] On this topic see generally DUFOUR, CODE CIVIL AVEC LES SOURCES OÙ TOUTES SES DISPOSITIONS ONT ÉTÉ PUISÉES (Paris, 1806), four volumes; DARD, CONFÉRENCE DU CODE CIVIL AVEC LES LOIS ANCIENNES, 4 ed., 1827.

[17] "It is, *mutatis mutandis*, practically the same division as that of Blackstone's Commentaries." Esmein, 6 ENCYCLOPAEDIA BRITANNICA, 11 ed., 634, 635.

[18] MAINE, VILLAGE COMMUNITIES, 7 ed., 356–58.

that "three-fourths of the Code were extracted" [19] therefrom, and that "the law of contract is taken almost bodily from Domat and Pothier." [20] Domat, whose work on *Lois Civiles* had been first published in 1694, was one of the few French counterparts of the English institutional writers like Coke, Hale, and Blackstone, all of whose works were then current in England. In fact, French legal literature then, as compared with English, or even Spanish, was meager. It has even been characterized as "pitiable," [21] though this hardly seems appropriate in view of other equally authoritative estimates of the preceding French jurists,[22] to say nothing of the encyclopedists who so profoundly influenced the legal as well as political philosophy of the Revolution. Their themes, however, were mostly remote from the paths followed by the framers of the Civil Code, who seem to have confined their study of commentaries to a few well-known ones which they, nevertheless, utilized thoroughly.

GRANDES ORDONNANCES. — "Certain parts (of the Roman law current in France) had already been codified," observes Esmein,[23] "in the *Grandes Ordonnances* which were the work of D'Aguesseau." Three of these, framed by that eminent chancellor during the years 1731–47, were especially important sources. "Upon the topics which they covered," it has been said, "— wills, gifts, and entails — he virtually wrote in advance entire chapters of the future Civil Code of Napoleon." [24] Other Royal Ordinances were utilized like that of April, 1667, relating to certificate of civil status, and to evidence; that of Moulins (1566) on the last-named subject, and the Edict of 1771 concerning mortgage redemption.[25]

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[19] Professor Fisher in 9 CAMBRIDGE MODERN HISTORY, 161. Of Pothier's works as a whole it has been said: "They extraordinarily simplified the work to be done by the framers of the Civil Code; it has been said of them that they were an advance Commentary upon the Code." 1 CONTINENTAL LEGAL HISTORY SERIES, 270.

[20] 9 CAMBRIDGE MODERN HISTORY, 162.

[21] *Id.*, 161.

[22] "Their juridical tact, their ease of expression, their fine sense of analogy and harmony, and (if they may be judged by the highest names among them) their passionate devotion to their conceptions of justice, were as remarkable as the singular variety of talent which they included, a variety covering the whole ground between the opposite poles of Cujas and Montesquieu, of D'Aguesseau and Dumoulin." MAINE, ANCIENT LAW, 80.

[23] 6 ENCYCLOPAEDIA BRITANNICA, 11 ed., 634.

[24] 1 CONTINENTAL LEGAL HISTORY SERIES, 269.

[25] *Id.*, 286.

CUSTOM.—Then there were the *Livres de Coutumes* and other sources of customary law. For just as in England there was a Custom of London,[26] so in France there arose the Custom of Paris — the legal system of the capital and the surrounding country which gradually acquired a predominance[27] over the other legal systems or "customs" of the realm. The Custom of Paris, *e. g.*, became the form of the French law that found its way to America when France first became a colonial power, and even acquired some foothold in territory subsequently formed into states of the Union.[28] At first these customs, like similar systems elsewhere, were unwritten, but "for at least two centuries before the Revolution, the French *Droit Coutumier*, though still conventionally opposed to the *Droit Ecrit*, or Roman law, had itself become *written* law; nobody pretended to look for it elsewhere than in Royal Ordinances, or in the *Livres de Coutumes*, or in the tomes of the Feudists."[29] Thus the Custom of Paris had been reduced to writing before 1580, for the revised text of that year was used by the framers of the draft code and was especially familiar to Tronchet and Bigot. From this customary law was largely derived the material relating to the conjugal partnership, the disabilities of married women, and certain provisions as to succession.[30]

OTHER SOURCES. — The decisions of the *parlements* were resorted to for subjects like "absence," which bore likewise upon the marriage portion and the conjugal partnership.[31] Rules of the canon law governing legitimation and marriage were retained,[32] though the last named, as well as legal age and mortgages, had been the subject of revolutionary legislation.[33]

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[26] 1 BLACKSTONE'S COMMENTARIES, 75, 76; 3 *Id.*, 334.

[27] "The Code was drafted in Paris, in the very centre of the countries of Customs; most of the Councillors of State came from the provinces of the North; the Parliament of Paris had played a preponderating part in the old law. There is therefore nothing astonishing in the predominance of the spirit of the Customs; the opposite would have been an historical anomaly." 1 CONTINENTAL LEGAL HISTORY SERIES, 286.

[28] As Michigan, Lorman *v.* Benson, 8 Mich. 18, 25 (1860), and Wisconsin, Coburn *v.* Harvey, 18 Wis. 147 (1864).

[29] MAINE, VILLAGE COMMUNITIES, 7 ed., 363–64. The least use appears to have been made of the latter. 40 AM. L. REV. 851.

[30] 1 CONTINENTAL LEGAL HISTORY SERIES, 286.

[31] *Id.*

[32] *Id.*

[33] This was partly embodied in the BULLETIN DES LOIS DE LA RÉPUBLIQUE FRANÇAISE compiled by order of the convention after 1794 and containing not only the recom-

The Draft Code

Mr. Rose in his Bar Association address observes:

"The draft of the code was finished in four months. It is perfectly plain that such an expeditious result could not have been accomplished if it had not been for the previously accumulated materials and arduous labors of Cambacérès and his committees." [34]

The present writer has been unable to find confirmation of this view. "An expeditious result" was one of the conditions upon which the commission was set to work. It was appointed on August 12, 1800, "with instructions to bring the work to a conclusion in the following November." [35] And it seems clear that obedience to these instructions, rather than a feeling that the task was "finished," caused the draft to be reported when it was.

The Code has been called "a hasty piece of work," [36] and this was certainly the view taken in the Tribunate when the draft was before it.[37] At any rate the "materials" were limited and were quite as accessible to the draftsmen as to their predecessors. Besides, it was Napoleon's experience with the old committee and his belief that in six years it had accomplished practically nothing which appears to have led him to insist now upon prompt action. Here, as always, he was looking for results. And just as the Austrian generals, whom he had vanquished — sometimes with half their force — had complained, "This man violates the principles of strategy," so now the reactionary defenders of the old legal régime saw in expedition only innovation. But Napoleon was equally at home whether opposing an armed force or an outworn jurisprudence, and the outcome in either case usually vindicated his methods.

Reference and Revision

The draft was never intended by its promoter to be anything more than what the French call a *projet* — a mere step toward the final result. Napoleon wanted these men of learning in the old law

mendations of the Cambacérès committee but other legislation. See Smithers, "The Code Napoléon," 40 Am. L. Reg. (N. S.) 127, 139, 140.

[34] 40 Am. L. Rev. 833, 849.

[35] 9 Cambridge Modern History, 150.

[36] *Id.*, 162.

[37] *Id.*, 153.

to construct a framework upon which he and others could labor by dissecting, discussing, testing and remodelling so as to fit modern conditions. Following the same policy he directed the draft to be sent next to the judiciary for comment and criticism to be submitted *within three months.* This done, the instrument was submitted for examination and revision to the legislative section of the Council of State, and then to the whole Council, where Napoleon's direct participation commenced.

NAPOLEON'S PART

In the opinion of Professor Esmein [38] "the part that Napoleon took in framing it [the Code] was not very important" and "interesting as his observations occasionally are, he cannot be considered as a serious collaborator in this great work." But the same author states that, "in the discussions of the general assembly of the council of state that Napoleon took part, in 97 cases out of 102 in the capacity of chairman" [39] and it seems clear from this that his share in the process of codification was by no means formal or perfunctory — much less a nominal one like Justinian's. Moreover other critics, even if unfriendly to Napoleon, are disposed to place a higher estimate upon the value of his labors in this connection. One [40] of them summarizes Napoleon's direct contributions to the subject matter of the Code as including the articles governing the civil status of soldiers (Arts. 93–98) and aliens (Arts. 11, 726, 912), the latter being discriminatory, and the systems of adoption and divorce by mutual consent. But his influence extended much farther.

A none too friendly critic [41] observes:

". . . his contributions to the discussion were a series of splendid surprises, occasionally appropriate and decisive, occasionally involved in the gleaming tissues of a dream, but always stamped with the mark of genius and glowing with the impulses of a fresh and impetuous temperament.

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[38] 6 ENCYCLOPAEDIA BRITANNICA, 11 ed., 634.

[39] *Id.* Mr. Rose (40 AM. L. REV. 832, 850) speaks of "102 sessions, over 57 of which he presided," while the CAMBRIDGE MODERN HISTORY (Vol. IX, 151) mentions 35 out of 87.

[40] 1 CONTINENTAL LEGAL HISTORY SERIES, 288.

[41] H. A. L. Fisher in 9 CAMBRIDGE MODERN HISTORY, 151, 164.

". . . to Bonaparte's presence we may ascribe the fact that the civil law of France was codified, not only with more scrupulosity than other portions of French law, but also with a livelier sense of the general interests of the State. What those interests were, Bonaparte knew. They were civil equality, healthy family life, secure bulwarks to property, religious toleration, a government raised above the howls of faction. This is the policy which he stamped upon the Civil Code."

We have, too, the testimony of an eye-witness, Thibaudeau, as to the ease with which he maintained his positions in debates with men who had made law a lifelong study. Another has said:

"On some points his influence may seem to have been unfortunate. But how small a price for the rest? His all-powerful will was the lever removing all obstacles. His energy and (why ignore it?) his ambition were the instruments to which we owe the achievement of the great task, — a task which had been unfulfilled for centuries, and, but for him, might still in our own day have remained undone." [42]

Yet Napoleon, though the son of a lawyer, never took a law course; his training was only at a military school; and he had a hearty dislike for the *noblesse de la robe*, as the bar is called in France, though he never allowed this feeling to deprive the country of needed professional talent. How did he learn his law? Simply by utilizing all his odd moments. Once, while a lieutenant, he committed some trivial offense and was confined for several days in the guardhouse. The room contained a Latin copy of Justinian's Digest, which Napoleon's intensely active mind seized upon, and, through his prodigious memory, absorbed.[43] When presiding over the deliberations of the Council upon the draft code he was always quoting the Digest, and the members were asking each other: Where did the First Consul get his knowledge of Roman law? They might have found the answer in the poet's words:

"The heights by great men reached and kept
Were not attained by sudden flight;
But they, while their companions slept,
Were toiling upward through the night."

How applicable this to one who did a giant's work, sleeping only four or five hours out of twenty-four.

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[42] 1 CONTINENTAL LEGAL HISTORY SERIES, 289.

[43] WELLS, THINGS NOT GENERALLY KNOWN, 105.

Napoleon had also studied [44] Montesquieu, and although he did not accept all of the latter's political philosophy he could hardly have escaped (and evidently did not) the influence of writings of whose author it has been said:

"He is the first to conceive of the law as a true science, to identify its method with that of the natural sciences, to discover the laws of the growth of law, and to subsume all its facts within the boundaries of general formulæ. His scheme may have since been perfected as to detail; but the conception has remained the same; it has never been improved upon. And besides propounding this broad truth, in his 'Esprit des lois' (1748) he touched upon the essential points, and suggested the concrete solutions of the future. No more entails (for they hamper economic progress); no more mortmains (for the clergy is a family which should not multiply); fewer rent-charges and more money-loans, — such was his program for property-law. For the law of persons, no more serfdom (for agriculture depends less on fertility of soil than on liberty of its occupants). For family law, no more indissoluble marriages. The law of successions should be preserved, on grounds of political welfare. For procedure, he advocates less of formality, more of conciseness and simplicity. Such was his enlightened forecast." [45]

Finally it was one of the secrets of Napoleon's greatness that he constantly utilized his time in some valuable direction. He was always a busy man. From his earliest youth until he went to St. Helena he lacked leisure, but he had a way of getting the most out of his associates. He was fond, in his campaigns, of taking specialists, jurists included, with him, and when on the march or in camp, while not actually engaged in battle, he had these men around him, questioning them, discussing their specialties with them and thus replenishing his own store directly from the best minds of his day. It was by utilizing the unusual situations and by making the most of his odd moments that Napoleon gathered legal knowledge. And this process continued even during these deliberations. As he debated he learned from those about him and he was not like one convinced against his will. Upon one occasion he acknowledged:

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[44] 3 CORRESPONDANCE, 313 (No. 2223), letter of September 19, 1797; 2 CONTINENTAL LEGAL HISTORY SERIES, 438.

[45] 1 *Id.*

"I first thought that it would be possible to reduce laws to simple geometrical demonstrations, so that whoever could read and tie two ideas together would be capable of pronouncing on them; but I almost immediately convinced myself that this was an absurd idea."

COMPLETION

From the Council the draft went successively to the Tribunate and the National Legislature, in each of which it encountered opposition. But the First Consul was undaunted and resourceful. He devised a plan that met all difficulties, and on March 21, 1804, the *projet* was approved by the legislature and promulgated.[46]

And so out of all this effort and discussion came the Code Napoléon,[47] as the instrument was to be known — the earliest practical realization of a dream five centuries old in France. But it was only the first fruits of the codification movement. The Code of Civil Procedure followed in 1806, the Code of Commerce in 1807, the Code of Criminal Procedure (*Instruction Criminelle*) in 1808, and finally the Code Penal in 1810.

Brissaud [48] says of them:

"These four Codes are very inferior to the Civil Code. Of the two Criminal Codes, one is as faulty as the other. Our criminal trial system, much out of date, is open to many criticisms; and there is some question of recasting it from top to bottom. Pending this vast undertaking, it has already been amended in important respects. The system of penalties established under the Empire was far too severe and inflexible, and has been improved on several occasions, especially in 1832 and 1863. The Code of Civil Procedure also calls for numerous reforms; the practice is too costly, the delays are too long, the forms are out of date; only the lawyers are satisfied with it. As to the Commercial Code, it was entirely inadequate. On most points the legislators had limited themselves to a reproduction of the Ordinance of 1673 (on commerce) and that of 1681 (on maritime commerce). Only its provisions upon bankruptcy

[46] VIOLLET, HISTOIRE DU DROIT CIVIL FRANÇAIS, 2 ed., 236.

[47] This title does not appear until 1807. "The Charters of 1814 and 1830 restored its original name. A Decree of March 27, 1852, reëstablished the title of 'Code Napoléon,' 'in order to defer to the historic truth,' said the framer of the Decree. However, since the year 1870, universal usage (following that of the government) terms it merely 'Code civil.' Today the term 'Code Napoléon' is more suitably used to designate the original form of the Code, in contrast with its existing form, which is appreciably different." 1 CONTINENTAL LEGAL HISTORY SERIES, 285.

[48] *Id.*, 292–93.

were new; but these were poorly drafted, and had to be recast in 1838. Many important laws have since been enacted on commerce, independently of the Code, on topics such as commercial partnerships, checks, warehouses, maritime mortgage, collisions, etc. In spite of these, our commercial law is very much behind the times. Colbert's laws, more than two centuries old, still form its basis, and yet since then commercial methods have made rapid strides and have altered to an extent as complete as it was unforseen."

Esmein's [49] estimate is somewhat more favorable. He says:

"The *Code de Commerce* was scarcely more than a revised and emended edition of the *ordonnances* of 1673 and 1681; while the *Code de Procédure Civile* borrowed its chief elements from the *ordonnance* of 1667. In the case of the *Code d'Instruction Criminelle* a distinctly new departure was made; the procedure introduced by the Revolution into courts where judgment was given remained public and oral, with full liberty of defence; the preliminary procedure, however, before the examining court (*juge d'instruction* or *chambre des mises en accusation*) was borrowed from the *ordonnance* of 1670; it was the procedure of the old law, without its cruelty, but secret and written, and generally not in the presence of both parties. The *Code Pénal* maintained the principles of the Revolution, but increased the penalties. It substituted for the system of fixed penalties, in cases of temporary punishment, a maximum and a minimum, between the limits of which judges could assess the amount. Even in the case of misdemeanours, it admitted the system of extenuating circumstances, which allowed them still further to decrease and alter the penalty in so far as the offence was mitigated by such circumstances."

Influence Abroad

Had the Napoleonic codification movement never spread beyond France it would have been one of the most remarkable in modern times, because of the difficulties overcome and the abuses remedied. But the movement did not stop with the French frontier, for other countries were soon to discover the merits of that legislation.

"The influence of the *Code Civil*," observes Professor Esmein, "has been very great, not only in France but also abroad. Belgium has preserved it, and the Rhine provinces only ceased to be subject to it on the promulgation of the civil code of the German empire." [50]

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[49] 10 Encyclopaedia Britannica, 11 ed., 906, 923.

[50] 6 *Id.*, 11 ed., 634, 635.

Professor Walton [51] adds, "It has, indeed, made itself, to a great extent, the code of all the Latin races."

The progressive extension of the Code Napoléon's influence throughout the world will appear from the following table showing the date of promulgation of the codes of those numerous countries which have made the French code their model:

Belgium	1804	Portugal	1867
Louisiana [52]	1808	Uruguay	1868
Austria	1811	Argentina	1869
Hayti	1825	Mexico	1870
Greece	1827	Nicaragua	1871
Holland	1838	Guatemala	1877
Bolivia	1843	Honduras	1880
Peru	1852	Spain [54]	1889
Chili	1855	Salvador	1889
Italy	1865	Venezuela	1896
Lower Canada (Quebec) [53]	1866		

ESTIMATES OF THE CODE

Aside from the great achievement of unifying French law the chief merits which Napoleon himself would probably have claimed for his code are clearness, conciseness,[55] and simplicity. To the Anglo-Saxon lawyer, indeed, the first impression of this and similar codes is that simplicity has been carried to the point of superfici-

[51] "The New German Civil Code," 16 JURIDICAL REV. 148, 149.

[52] "It was modeled on the draft of the Code Napoléon (for a complete copy of the latter was not at that time accessible), and the whole body of French legal learning was thus introduced into the arguments and decisions of the courts of Louisiana." Dean Wigmore, "Louisiana, The Story of its Legal System," 1 So. L. QUART. 12. *Cf.* City of New Orelans *v.* Camp, 105 La. 288, 29 So. 340 (1901).

[53] See 13 COL. L. REV. 213, 215.

[54] See the present writer's "A Spanish Object Lesson in Code Making," 16 YALE L. J. 411. The Spanish movement for codification in the nineteenth century received its inspiration from France, and the Civil Code of Spain, which is still in force, for the most part, in the Philippines, and Porto Rico follows the Code Napoléon so closely that article after article will be found practically a translation from the latter.

So the Spanish Penal Code, of which the present edition dates from 1870 and is still largely in force in the Philippines, is modeled closely on the French Penal Code, particularly in the subject of penalties.

[55] "The *precision* and the *clearness* of detail, in the phraseology of the articles, reached a grade which has never been surpassed and very rarely equalled. Certainly the laws passed in France since 1804 cannot bear comparison with the Code from this point of view; in contrast, the limpidity of the Code Napoléon becomes striking." 1 CONTINENTAL LEGAL HISTORY SERIES, 290.

ality. They purport to embrace within the compass of a single, small volume the law of a variety of subjects, each of which is treated under our legal system, in one or more portly tomes (not to mention statutes), such as Citizenship, Domestic Relations, Contracts, Torts, Real and Personal Property, Bailments, Liens, Wills, Intestate Succession, and many minor topics. Austin, the English analytical jurist, said:

"The code must not be regarded as a body of law forming a substantive whole, but as an index to an immense body of jurisprudence existing outside itself."

But the dangers lurking in this method did not escape the penetrating vision of Napoleon. Toward the close of the Council's deliberations on the Code he said:

"I often perceived that over-simplicity in legislation was the enemy of precision. It is impossible to make laws extremely simple without cutting the knot oftener than you untie it, and without leaving much to incertitude and arbitrariness."

It must be remembered, moreover, that the Latin theory of legislative expression is directly opposed to the Anglo-Saxon. According to the former a code or statute should express only general principles and rules applicable to a group of cases, leaving the details to be worked out as they arise in specific instances. The Anglo-Saxon lawmaker too often essays the task (impossible of attainment) of providing for every contingency and including every case that might arise, meanwhile failing to express the general principle at all. The difference is analogous to that existing between the early American state constitution, with its brief bill of rights and frame-work of government, and the latter-day instrument which often goes far into the field of general legislation. There is much to be said in favor of each theory, but the difference must be clearly understood before the French codes and their imitators can be appreciated.

The Code has never lacked critics, however, though they are far less conspicuous than formerly. When under discussion before the Tribunate, as we have seen, it encountered serious and, some still think, well-grounded opposition, including, *inter alia*, two distinguished jurists, Andrieux and Simeon, the latter a brother-in-law of Portalis, one of the four draftsmen.

"The Code Napoléon," says Brissaud,[56] "was attacked with fury, even in France, by certain political parties blinded by hatred of the Empire. Those whose ideals were the Decrees of the Convention could not help looking upon this Code with disdain . . ."

Outside of France it was criticized by some eminent authorities including Savigny who characterized its framers as "dilettanti" [57] and their work as "only a mechanical mixture of the Revolution and pre-Revolution laws . . . not even a logical whole, a formal unity that might be logically developed to meet new cases." [58] His main point of attack, however, was political and there, as Brissaud well says,[59] "his patriotism carried him too far."

Moreover this contemporary criticism was levelled chiefly at provisions which, it was charged, were not adapted to France, and this the lapse of time has largely silenced. Surely the French people have had opportunity to judge whether this code is suited to them. And surely also no piece of legislation has ever acquired such permanence in France. The sentiment toward it there is comparable only to the American reverence for the Federal Constitution.

Certain important omissions, indeed, are now recognized by French writers,[60] such as a satisfactory mortgage system, and adequate treatment of the law of movables (personalty), and especially literary or artistic property, of artificial persons, insurance, and bankruptcy, and any attempt to cover the subject of industrial relations. But as Esmein observes:

". . . this only proves that it could not foretell the future, for most of these questions are concerned with economic phenomena and social relations which did not exist at the time when it was framed." [61]

Subsequent Changes

After more than a century the number of articles (2281) in the Code remains the same — a not insignificant mark of permanence.

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[56] 1 Continental Legal History Series, 290–91, note.

[57] *Id.*

[58] 2 Continental Legal History Series, 577.

[59] *Supra.*

[60] 1 Continental Legal History Series, 290, 291; Esmein, 6 Encyclopaedia Britannica, 11 ed., 634, 635.

[61] *Id.*

There have been amendments and modifications averaging about one for each year [62] but their importance is not generally recognized.[63] At times a general revision has been mooted [64] but as Brissaud [65] says "up to the present time the idea of a general revision seems to find but a cool reception in the world of business. We must hope that the method of partial amendments will suffice for a long time to come."

Thus the identity of the Code as a whole is preserved intact. It has outlived all the dynasties and régimes that waxed and waned in France during the nineteenth century. Not even the restored Bourbons attempted to touch its contents; they merely sought to dim the fame of its chief promoter by omitting his name and calling it simply the Civil Code — an attempt as vain as it was petty.

A People's Law

It was surely a great achievement to have brought order out of the legal chaos that marked pre-revolutionary France. But to the Code Napoléon belongs an even greater distinction. As one critic observes:

"... it has diffused the knowledge of law, and made it comparatively easy for the ordinary Frenchman to become acquainted with the leading principles which govern the law of his own country." [66]

Nor has this result been confined to France. If Savigny, founder of the historical school of jurisprudence, thought he saw failure for the Code because it had been "drafted at an unfavorable epoch,"

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[62] Walton, "The New German Code," 16 Juridical Rev. 148, note. Among them was the repeal of the divorce provisions in 1816. These were mainly restored, however, in 1884, the ground of incompatibility by mutual consent being omitted. See Smithers, "The Code Napoléon," 40 Am. L. Reg. (N. S.) 127, 147.

[63] 1 Cour de droit civil français, 5 ed., 13. Esmein, 6 Encyclopaedia Britannica, 11 ed., 634, 635, however, says: "The Code needed revising and completing and this was carried out by degrees by means of numerous important laws."

[64] "Its entire revision was demanded at an early period; but this movement found little response until, in 1904, at the celebration of the centennial of the Civil Code, the Minister of Justice appointed a special commission to prepare a first draft of a revision." 1 Continental Legal History Series, 298.

[65] *Id.*, 298–99.

[66] Fisher, 9 Cambridge Modern History, 161. "The Code has been thumbed and discussed till it has become extremely familiar, with the result that there are few countries in which some knowledge of law is so widely diffused as in France." Walton, "The New German Code," 16 Juridical Rev. 148.

a successor, and perhaps greater than Savigny, in the same school, testifies to its phenomenal success:

"The highest tribute to the French Codes is their great and lasting popularity with the people, the lay-public, of the countries into which they have been introduced. How much weight ought to be attached to this symptom our own experience should teach us, which surely shows us how thoroughly indifferent in general is the mass of the public to the particular rules of civil life by which it may be governed, and how extremely superficial are even the most energetic movements in favour of the amendment of the law. At the fall of the Bonapartist Empire in 1815, most of the restored Governments had the strongest desire to expel the intrusive jurisprudence which had substituted itself for the ancient customs of the land. It was found, however, that the people prized it as the most precious of possessions: the attempt to subvert it was persevered in in very few instances, and in most of them the French Codes were restored after a brief abeyance. And not only has the observance of these laws been confirmed in almost all the countries which ever enjoyed them, but they have made their way into numerous other communities, and occasionally in the teeth of the most formidable political obstacles. So steady, indeed, and so resistless has been the diffusion of this Romanized jurisprudence, either in its original or in a slightly modified form, that the civil law of the whole Continent is clearly destined to be absorbed and lost in it. It is, too, we should add, a very vulgar error to suppose that the civil part of the Codes has only been found suited to a society so peculiarly constituted as that of France. With alterations and additions, mostly directed to the enlargement of the testamentary power on one side, and to the conservation of entails and primogeniture on the other, they have been admitted into countries whose social condition is as unlike that of France as is possible to conceive. A written jurisprudence, identical through five-sixths of its tenor, regulates at the present moment a community monarchical, and in some parts deeply feudalized, like Austria, and a community dependent for its existence on commerce, like Holland — a society so near the pinnacle of civilization as France, and one as primitive and as little cultivated as that of Sicily and Southern Italy." [67]

And as Esmein [68] observes with evident and just national pride,

"Its ascendency has been due chiefly to the clearness of its provisions and to the spirit of equity and equality which inspires them."

[67] MAINE, VILLAGE COMMUNITIES, 7 ed., 357–59.

[68] 6 ENCYCLOPAEDIA BRITANNICA, 11 ed., 634, 635.

And after comparing it with the German Civil Code "which, having been drawn up at the end of the 19th century, naturally does not show the same lacunae or omissions" he significantly adds:

"It is inspired, however, by a very different spirit, and the French code does not suffer altogether by comparison with it either in substance or in form."

No greater tribute could be paid the ill-fated Corsican than the fact that now, more than a century after its promulgation, his code stands higher in the world's judgment than ever before. Napoleon himself realized that this branch of his work was to be the most enduring. At St. Helena he wrote:

"My true glory is not in having won forty battles; Waterloo will blot out the memory of those victories. But nothing can blot out my Civil Code. That will live eternally." [69]

And that prophecy is being literally fulfilled. Men no longer read much about his battles; they have lost interest in his diplomatic triumphs; they give little heed to his display of administrative genius; but they are hearing more and more about his legislation. He is going down to history with the Code in his hand.

It was the writer's privilege once to visit Napoleon's tomb in the *Hôtel des Invalides* at Paris. It is probably the most magnificent of the world's mausoleums, not excepting the beautiful Taj Mahal at Agra, India — doubtless more delicate in construction, but not so imposing as that which lies beneath the dome of the *Invalides*. The historic associations, the superb embellishments, the "dim religious light" that falls through the shaded dome directly upon the sarcophagus of the hero — all unite to inspire the visitor with a feeling of awe. But to the writer the most impressive features of that entire structure were the bas-relief representing the Code and the inscription that encircles the great rotunda consisting of this sentence from Napoleon's will: "I desire that my ashes repose on the banks of the Seine, in the midst of the French people whom I have so loved."

Historians who have considered only his wars, the countless lives lost in his campaigns, the misfortunes that befell France after

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[69] 1 DE MONTHOLON, RÉCIT DE LA CAPTIVITÉ DE L'EMPEREUR NAPOLÉON, 401.

his death, — have denied that Napoleon had the welfare of the country at heart and considered these words as lacking sincerity. But the work which he accomplished in the reformation and restatement of the laws of France furnishes ample argument to the contrary. These codes which brought order out of chaos and furnished a model for the whole world, remain not merely a monument to him, but a proof of his attachment to what he was fondly wont to call "*la grande nation.*" It is this code that chiefly justifies now the tribute of our American poet, Leonard Heath:

> "Spirit immortal, the tomb cannot bind thee,
> But like thine own eagle that soars to the sun,
> Thou springest from bondage and leavest behind thee
> A name which before thee no mortal hath won."

Charles Sumner Lobingier.

UNITED STATES COURT,
SHANGHAI, CHINA.