R. C. van Caenegem,
An Historical Introduction to Private Law
translated by D. E. L. Johnston

(pp. 1–15)

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shaped it, and what texts their endeavours produced. The legal norms themselves are only occasionally discussed, in order to illustrate factors which influenced the course of events.

I hope that the English-reading world will welcome this attempt, and judge that the trees felled to produce the paper on which to print it have not fallen in vain.

It is my pleasant duty to thank the translator, Dr D. E. L. Johnston, who has devoted much of his precious time to this ungrateful task. I would also like to thank the Syndics of the Cambridge University Press who, having welcomed several of my earlier manuscripts, have once again decided to publish my work under their illustrious imprint.

Ghent R. C. VAN CAENEGEM

van C viii - 1

CHAPTER I

The origins of contemporary private law, 1789–1807

THE *CODE CIVIL* OF 1804: AN END AND A NEW BEGINNING

1 This book does not aim to sketch out a 'universal' history of law[1] but to give a historical introduction to the development of the private law currently in force in Belgium and the Netherlands. That law is made up of very old as well as very modern elements, and during its development it went through periods of stagnation and periods of rapid change. The most important of these periods was that of the great Napoleonic codifications, in particular the *Code civil des Français* promulgated in 1804. The *Code civil* is the culmination of several centuries of French legal evolution: much of it is old law, some of which goes back directly or even literally to the customary and Roman law of the Middle Ages and early modern times. None the less the *Code civil* of 1804 marked a decisive break in the gradual evolution of the law. It replaced the variety of the old law with a single and uniform code for the whole of France; it abolished the law which had previously been in force, in particular custom and Roman law (art. 7 of the law of 31 March 1804); it incorporated several ideological measures inspired by the Revolution of 1789; and it attempted to make the traditional role of legal scholarship superfluous, by forbidding doctrinal commentary on the codes, in the belief that the new legislation was clear and self-sufficient.

The French *Code civil* immediately came into force in Belgium, whose territory had been annexed to France and divided into *départements*. As in France, so in Belgium: the *Code* has never yet been replaced, although numerous measures have been amended, omitted

[1] See the encyclopaedic work of J. Gilissen, *Introduction historique au droit. Esquisse d'une histoire universelle du droit. Les sources du droit depuis le XIII^e siècle. Eléments d'une histoire du droit privé* (Brussels, 1979).

or repealed by legislation or case law. The *Code civil* was also introduced in 1810–11 in the Netherlands, which were annexed to France later than Belgium. But it was replaced by a new code in 1838 which, although a Dutch adaptation, is still very close to the 1804 *Code*.

THE *CODE CIVIL* IN EUROPE

2 Our main concern is with the history of law in France and in the Belgian and Dutch provinces, but the rest of Europe will not be left out of account. That would in any case be impossible. The notion of national law – a single, exclusive code and a single, exclusive system of national courts for each country – is a recent and transient phenomenon. For centuries law had been local or regional (customs and charters) and also cosmopolitan and supra-national (the Roman law taught at the universities, the canon law of the church). And after the Second World War came the rise of European law, which involved the creation of a supra-national legislature and courts, to which national statutes and courts were subordinate.

Historically, the major elements of the law belong to a common European inheritance: ancient and medieval Roman law, canon law, old Germanic law, feudal law, medieval municipal law, the natural law of early modern times. All these elements had their influence in different degrees on all the countries of Europe.

COMMON LAW AND RECEPTION

3 In some regions, such as Italy and the south of France, there was a gradual, spontaneous process of change which led to the replacement of old customary law by the rediscovered Roman law. This occurred very early, from the twelfth century onwards. Elsewhere, in northern France and the southern Netherlands, customary law persisted, and was actually established and promulgated by central authorities ('homologation of customs'). Even there, however, Roman law had an important supplementary role and remained the basis of learned commentaries. In the northern Netherlands, the position was different again. Although there was an order to unify customs, it was hardly implemented at all and the resulting gap in the law led to the creation of Roman–Dutch law (*Rooms–Hollands recht*) in the seventeenth century. This was a jurisprudential synthesis of Roman and customary law, and the predominant element in it was the Roman one. The influence of Roman law was even more marked in the German empire, where it was decided towards 1500 to abandon medieval customs and 'receive' (*recipere*) Roman law as the national law: this phenomenon is known as the reception. Consequently modern German law has, paradoxically, a markedly more Roman and less Germanic character than French law.

Developments in England were entirely different. There is no doubt that England too was affected by the learned law, which then constituted the common law of Europe, both through canon law in the church courts of the Roman Catholic Church and then the Anglican Church, and also through Roman law in university teaching and in the practice of certain specialist courts. None the less the most important element of English law, the Common Law,[1] was developed from Germanic customary law and feudal law, quite independently of Roman law. As a result the common-law system differs fundamentally from the continental system. A further significant difference is that England developed a national law much earlier than other countries. A Common Law for the whole of the kingdom of England was developed by the royal courts from the twelfth century and was then expounded and commented on in legal works. A final peculiarity of English law is its continuity; there was no break in its development comparable with that caused by the great modern codifications on the continent. Not only was the law never codified, but the old law was never abrogated and replaced by a modern, let alone a revolutionary, legal system. So the system of Common Law is characterized by historical continuity; the statutes in force and the authoritative judgments may be very ancient or they may be quite recent.

[1] There are good reasons for preferring the expression 'le common law' to 'la common law', by analogy with the arguments which Criscuoli has put forward in favour of 'il common law' rather than 'la common law' in Italian. The main argument is that the masculine refers to law (*droit*) and the feminine to *loi* (statute): the common law is a *droit* and not a *loi* (G. Criscuoli, 'Valore semantico e contenuto dommatico dell'espressione "common law" nel linguaggio giuridico italiano', *Rivista trimestriale di diritto e procedura civile* (1967), 1,466–73. Yet the question is not simple, and the confusion surrounding the term 'common law' – common *droit* or common *loi* – is very old, going back in England itself to the Middle Ages. Thus, 'common law' was translated as 'lay commune' in 1297 and as 'comun dreit' in the *Miroir des Justices* of 1290; in 1377 the curious form 'commune Droit' is found; see C. H. McIlwain, *Constitutionalism and the changing world* (Cornell, 1939), 128, 132, 137.

Van C 2-3

THE COMPILATION AND PROMULGATION OF THE *CODE CIVIL* OF 1804

4 The *coup d'état* of 18 Brumaire (9 November 1799) marked the beginning of the Napoleonic regime, the re-establishment of martial law and the end of the most turbulent decade of French history. 'The Revolution is in thrall to the principles which inspired it: it is over.' One of Napoleon's concerns was to provide the nation with a collection of codes. The prevailing legal uncertainty was to be brought to an end by the use in legal practice of universally valid codes. During the Revolution, the old law had certainly been abrogated to a large extent, but this process had not been complemented by the introduction of a new legal system which was recognised as being generally applicable. Only some areas of law had been subject to new legislation;[3] and all attempts at codifying the civil law had failed. These draft codes had been conceived rather vaguely more as rules of conduct for the benefit of good citizens than as laws, and were never promulgated in the form of statutes. In any case, depending on the political inclinations of successive regimes, the draft codes were regarded at one time as excessively traditional and at another as insufficiently revolutionary. The various drafts were compiled between 1793 and 1799 by different commissions presided over by the lawyer and statesman J. J. de Cambacérès, who was a member of the National Convention in 1792. The Revolution also changed and democratized the administration of justice profoundly, while the universities and their law faculties had been abolished in 1793, and new schools of law did not open until 1804.

In order to bridge the gulf opened up by this revolutionary upheaval, Napoleon decided to introduce effective legislation in France by promulgating 'his' codes. Naturally 'his' codes does not mean that the general and first consul compiled the *Code civil* at his desk with his own hands. The codes are 'Napoleonic', because it was owing to Napoleon's political will and determination that the 1804 *Code civil* in particular was compiled in record time. In August 1800 a commission of four lawyers was instructed to carry out the task.

[3] For example, in the field of private law, the great systematic statutes of lasting importance on divorce, marriage and civil status (1792), illegitimacy (1793), inheritance (1794), privileges, hypothecs and the transfer of property (1798). This period of so-called 'intermediate law' (an interval or transitional law between the old law of the *ancien régime* and the new law of the Napoleonic codes) also saw the promulgation of a penal code in 1791 and a code of crimes and penalties in 1795.

Vem C 4-5

Barely four months later it was complete. Its authors were professional lawyers who had been educated under the *ancien régime* and had pursued careers as advocates or magistrates: Fr. Tronchet, J. Portalis, F. Bigot-Préameneu and J. de Maleville.

Tronchet, a distinguished specialist in customary law, came from the north. Portalis, the most brilliant of the four, was a Romanist from the south. He was profoundly learned in philosophy, and conceived law not merely as a skill but as an important element in the social development of his time. His views emerge particularly clearly from his well-known *Discours préliminaire*, which is the introduction to the draft code of 1801: in it he expounds the philosophy of the *Code civil* (a question to which we shall return).

The draft put forward by this commission was submitted to the Tribunal de Cassation and Tribunaux d'Appel; after revision to take account of their comments, it was laid before the Conseil d'État presided over by Cambacérès. Cambacérès was hostile to the doctrinal approach to law, and above all to general formulations and definitions. Napoleon himself took part in the debate and sometimes imposed his own views,[4] and it was in the Conseil d'Etat that the *Code* took on its final shape. The Tribunat raised political and ideological objections, but Napoleon was able to overcome the opposition and achieve his own ends. The promulgation of the *Code* by the Corps législatif met with no further obstacles: from 5 March 1803 to 21 March 1804 a series of thirty-six statutes was passed, and on 21 March 1804 consolidated into 2,281 articles constituting the *Code civil des français*. The name was changed by law in 1807 to Code Napoléon, but the new name disappeared with the fall of the emperor. In the field of private law,[5] the *Code civil* was followed by the *Code de procédure civile* of 1806 which came into force on 1 January 1807, and in 1807 by the *Code de commerce* which came into force on 1 January 1808.

[4] The first consul himself presided at thirty-five of the eighty-seven sessions. His personal views strongly influenced, among other things, the provisions on the authority of the paterfamilias for, according to him, 'just as the head of the family is subject in an absolute manner to the government, so the family is subject in absolute manner to its head'. Napoleon's views were also decisive for the subordinate position of (married) women and for the law of divorce (measures on divorce by mutual consent and adoption were introduced at his instance, no doubt for his own political reasons). On the other hand Napoleon had no interest in book II and paid only slight attention to book III.

[5] In criminal law a *Code d'instruction criminelle* and a *Code pénal* were promulgated in 1808 and 1810 respectively. These came into force on 1 January 1811.

THE *CODE CIVIL*: ANCIENT AND MODERN

5 The immediate sources used by the authors of the 1804 *Code civil* were the traditional French common law of the eighteenth century, which was an amalgam of learned and customary law, some of which was very old; and secondly the innovations made during the Revolution. This mixture of old and new suited the political climate of the nation, and after the fall of the *ancien régime* also proved itself well-suited to the middle-class society of the nineteenth century. There had often been hopes of working out a common French law to channel diverse legal currents into a single stream, and during the eighteenth century this project had already made progress through the efforts of the traditional lawyers.

The distant sources of French law (yet to be examined) were (i) the customs, in their codified and annotated form, and in particular the *Coutume de Paris*, which enjoyed great prestige throughout France. The compilers of the *Code civil* made conscious efforts to treat customs and Roman law on an even footing, and they systematically gave preference to formulations conforming to 'natural reason', but customary law was the most important source of the *Code*. (ii) Roman law as systematized by Domat (*d.* 1696),[6] and, to a lesser extent, canon law. Roman law was the basis of jurisprudence, but it was also the law practised in the south, the region of written law (*pays de droit écrit*). The influence of Roman law was particularly marked in the law of obligations. (iii) The law of the three great royal ordinances of 1731 to 1747, which were in fact partial codifications of important areas of law. These ordinances had been the work of Henri François Daguesseau (*d.* 1751), chancellor of Louis XV.[7] (iv) The case law of the *parlements*, especially the Parlement de Paris.

The compilers of the *Code civil* also consulted traditional legal writers, notably François Bourjon (*d.* 1751), author of *Le Droit*

[6] Domat was the author of *Les lois civiles dans leur ordre naturel*, an attempt to arrange the principles of Roman law (which in his view constituted universal guiding principles) in a rational order and according to a system devised by the author himself, as well as to ensure their congruence with the rules of Christian morality. Y. Noda, 'Jean Domat et le Code civil français', *Comparative Law Review*, 3.2 (1956; Japan Institute of Comparative Law).

[7] The ordinance of gifts of 1731, on wills of 1735 and on fideicommissary substitutions of 1747. The first and third were applicable throughout France, while the second envisaged different regimes for the two law regions, the north (the region of customary law) and the south (region of Roman law).

Jan C 6-7

commun de la France et la Coutume de Paris réduits en Principes;[8] Robert Joseph Pothier (*d.* 1772), a magistrate and professor, author of a commentary on customary law (*Coutumes des duché, bailliage et prévosté d'Orléans*), a work on Roman law (*Pandectae Justinianeae in novam ordinem digestae*) and above all a series of treatises on different topics in civil law. Particularly important was his *Traité des obligations*, whose influence on this subject in the *Code* was decisive. Pothier's authority can be seen even in the texts themselves, since the authors of the *Code* lifted entire passages from his work.

Although the old law was the most important element in the *Code civil*, it was not the intention of its authors to re-establish the legal order of the fallen regime and abandon the advances made in the Revolution. On the contrary, numerous principles which derived from the ideas of the Revolution and the Enlightenment, and which they considered socially beneficial, were enshrined in their legislative work. This applies above all to the actual principle of a codified civil law, unique and uniform throughout France.[9] In fact, the accomplishment of such a code responded to one of the numerous reforms demanded in the registers of grievances in 1788–9, and had already been provided for in the constitution of 1791 ('there shall be a code of civil laws common to the whole kingdom'). Besides, the *Code civil* now assured the recognition of fundamental principles: the equality of citizens before the law; religious tolerance; the disburdening of landed property, which was now freed from the charges imposed by the feudal system and the church law of tithes; freedom of contract, now much greater than under the *ancien régime*. New ideas also appear in certain specific areas, such as civil marriage, divorce, civil status, the transfer of property, and the abolition of the medieval prohibition on interest (usury).

THE SPIRIT OF THE *CODE CIVIL*

6 The general tone of the 1804 *Code* is distinctly conservative: this is indicated by its respect for the family and property rights as the basis of social order. This spirit was best expressed in the work of Portalis,

[8] R. Martinage-Baranger, *Bourjon et le Code civil* (Paris, 1971).

[9] In certain respects, this uniformity was purely formal: e.g. right up to the present, the numerous articles on dowry have hardly ever been applied in the northern regions, since dowry was an institution of Roman law, well diffused in the south but unknown in the north.

in his *Discours préliminaire*, in his *Discours . . . sur le Concordat* (1801), where he emphasizes the indispensable role that religion plays in all civilized societies; and in his posthumous *De l'usage et de l'abus de l'esprit philosophique durant le dix-huitième siècle*. Some quotations sum up his conservative convictions: 'it is useful to conserve everything which it is not necessary to destroy' or 'a bold innovation is often no more than a glaring error'. For Portalis the essential role of the state was to ensure 'preservation and peace'. He also emphasized that the *Code civil* did not represent a collection of entirely new rules, but instead the result of the 'experience of the past, the spirit of centuries'. This foreshadows his celebrated aphorism 'with time codes make themselves; strictly speaking nobody makes them'. Portalis was an admirer of Bonaparte: he saw in him the general who had re-established order and thanks to whom France, after the disorder of the Revolution, once more enjoyed the security of the law, in his words 'the palladium of property'. The absolute right of private property, and the different modes of its acquisition; its administration principally by the paterfamilias, and the means of its transmission: these are the essential concepts of books II and III of the *Code*. The second pillar of the *Code* is the family, whose main characteristic is submission to the power of husband and father (book I).

Another fundamental feature of the *Code* is its positivism, which was to mark the Exegetical School and exercise a predominant influence right through the nineteenth century. The following points allow this aspect of the *Code* to be appreciated. There is no general theoretical introduction to the *Code*, setting out basic principles, a general outline of the contents, and legal definitions. And the first six articles of the *Code* do not make up for this deficiency in any way. Yet it would not have been in the least difficult to provide such an introduction: Portalis' *Discours préliminaire* would have been eminently suitable. The absence is therefore a matter of conscious choice; and this was expressly stated at the Tribunat. Reference was made to the Prussian codification, which was thought to be excessively theoretical. The *Code* was to be conceived first and foremost as a positive legal text, and any doctrinal excess must be avoided; the terms of the statute must not become obscured by theories and lectures. This view accords with the notion of the absolute primacy of statute as a source of law. Doctrinal interpretation, case law (in which the judge is reduced to a passive role as the voice of the

Van C 8-9

statute), and custom are subordinated to the authority of the statute. While custom had been the most important source and expression of the law (a point to which we shall return), it was now relegated to a residual and marginal role. Statute, which at certain stages of legal evolution had been wholly eclipsed, was now the source of law *par excellence*.

The idealism or utopianism of the revolutionary period had disappeared. The *Code civil* bears witness to a sober and realistic reaction. After ten years of the revolutionary regime, the illusion of a new society of honest citizens, in which rules of law were replaced by moral prescriptions enjoining civic conduct, and courts and judgments by friendly conciliation, had been shattered. The aspiration to bring about instant general reforms had been expressed by Cambacérès in 1793, when he declared a desire 'to change everything at once in the schools, in the morals, the customs, the spirits, and in the statutes of a great people'. The Code Napoléon re-established the law and the courts in their full rigour, but the system was now more rational and its functioning more calculable and predictable than under the *ancien régime*.

The elimination of natural law as a source of positive law belongs in this same line of thought. In the eighteenth century the law of reason (*Vernunftsrecht*) had been a powerful instrument in the struggle against the old political regime. During the Revolution, natural law was constantly invoked to justify new rules and new systems. In Portalis' theoretical work natural law plays a very important part. The *Code civil*, on the other hand, rejects all borrowing from natural law: from now on the established order was the *Code*, and all reference to natural law, a perpetual source of inspiration for those opposing the status quo, was out of order. For adherents to the new *Code*, the role of natural law had ended.

So far as liberation and emancipation are concerned, the effect of the *Code* was limited. It is true that many inequalities and burdens (especially feudal ones) were abolished, but the 1804 *Code* introduced new ones. For instance, discrimination against women, especially married women: this can be seen particularly in the restrictions on the right of women to sit on the family council or to appear as witnesses, in a wife's subjection to the authority of her husband and her obligation to adhere to him, as well as in the reservation to the husband of the right to administer his wife's property. There was also discrimination against workers, as the

system of workers' files (*livrets d'ouvriers*) shows. The rule in article 1781 of the *Code* was particularly unfavourable: in the case of a dispute between employer and employee on a question of payment or of reciprocal obligation, the employer was believed on his word.[10]

COURTS AND PROCEDURE

7 The triumph of a single, exclusive *Code civil* was achieved by organizing a hierarchy of courts and by promulgating a code of civil procedure in 1806 which was itself common to all civil jurisdictions. Over the centuries of the *ancien régime* there had been a proliferation of jurisdictions, some dependent on the church, others on great landowners. The codification replaced this diversity with a single hierarchy of state courts. It had been customary under the *ancien régime* for worthies who were active in politics and commerce but who had no legal education to sit in the lower courts; but in the nineteenth century the administration of justice in all but the commercial courts was reserved to professional judges educated in faculties of law. The Cour de Cassation was charged with overseeing the uniform application of statutes.

Even more than the *Code civil* of 1804, the *Code de procédure civile* of 1806 owed a debt to the past. Several measures of the *Ordonnance civile sur la réformation de la justice* of 1667 (which we shall deal with later) were repeated word for word. The *Code de procédure civile* also adopted the old idea of civil procedure as a dispute between free and responsible citizens in which no initiative or intervention on the part

[10] Article 1781 of the *Code* under the rubric 'Du Louage des domestiques et ouvriers' provides that 'the master is believed on his affirmation about the amount of wages, the payment of the salary for the past year, and the advances given in the current year'. The compulsory workers' file (*livret d'ouvrier*) was introduced by the statute of 22 Germinal Year XI (12 April 1803) on factories and workshops. When the employer wrote a negative comment or retained the file, the worker was condemned to unemployment and, if he moved without his file, risked being treated as a vagabond. He had the right of recourse to the courts, but there found himself faced with article 1781. In Belgium this discriminatory situation was abolished only in 1883, when the compulsory file and article 1781 were abrogated. See J. Bekers, 'Elaboration des lois, 19e–20e siècle: La loi du 10 juillet concernant les livrets d'ouvrier', *La décision politique et judiciaire dans le passé et dans le présent* (an exhibition from 15 April to 17 May 1975 on the occasion of the colloquium 'Sources de l'histoire des institutions de la Belgique' (Brussels, 1975), 27–64; B. S. Chlepner, *Cent ans d'histoire sociale en Belgique* (Brussels, 1958); J. Neuville, *La condition ouvrière au XIXe siècle*, II: *L'ouvrier suspect*, 2nd edn (Brussels, 1980).

Van C 10-11

of the administration or the judge was required (a principle described in German as *Verhandlungsmaxime*). The *Préliminaire de conciliation*, one of the most popular procedural innovations of the Revolution, was maintained in principle in the *Code* of 1806 but in practice no longer applied. The aim of this revolutionary institution was to avoid litigation and to attempt reconciliation: parties were brought together beforehand for what was intended to be a constructive and reasonable discussion.

The legislation on civil procedure was passed in the same way as that on civil law. Like other 'feudal laws', the *Ordonnance civile* of 1667 had been criticized and was abrogated by a statute of 3 Brumaire of Year II (24 October 1793). This statute aimed (rather idealistically) to abolish all formal procedure and open the way to a system of administering justice without formal legal proceedings. In Year V a draft code of procedure was compiled but the text was never promulgated. Under the consulate a statute of 27 Ventôse of Year VIII (17 March 1800) established a new judicial system and reintroduced the *Ordonnance* of 1667. The *Code* of 1806, one of whose principal authors was E. Pigeau (*d.* 1818), took up again the broad lines of the 1667 system, although it did retain a number of revolutionary innovations. In some cases (notably the *Préliminaire de conciliation* just mentioned), the preservation of these new institutions was more apparent than real. But other achievements of the Revolution did last, such as the creation of justices of the peace; the obligation to deliver reasoned judgments; the reduction in the number of appellate courts; and the abolition of the secret examination of witnesses.

THE MERITS OF CODIFICATION

8 The revival of legislative activity from the twelfth century and the proliferation of statutes which followed soon brought about a need for systematic collections of the law in force. In the Middle Ages and in early modern times, both church and state promulgated such collections. In compiling them, the authorities attempted to organize, to prune and to adapt bodies of sometimes very disparate rules. The sixth century *Corpus iuris civilis* of Justinian was the ancient model for the new compilations, the first of which was the *Decretales* of Gregory IX of 1234 and the last the *Polnoe Sobranie Zakonov* published in forty-five volumes in Russia by Tsar

Nicholas I in 1830 and followed in 1832 by fifteen volumes of the *Svod Zakonov*.[11]

These compilations of old and new statutes did rearrange the law and bring it up to date, but they differ fundamentally from codes in the strict sense. A true codification is an original work and, in contrast to a compilation, must be intended as a general, exhaustive regulation of a particular area of law (for example, civil law or civil procedure). Furthermore, the drafting of a code involves a coherent programme and a consistent logical structure. The language of a modern code ought to be accessible to all and, as far as possible, free from archaisms and technical professional jargon. Codes of this type appeared only from the eighteenth century onwards.[12]

In theory two types of code can be imagined: a codification with the sole aim of (re)formulation and systematization of the law in force, which avoids all substantial reform and all revolutionary innovation, and which faithfully reflects the past, limiting itself to recording and ordering the existing law.[13] On the other hand, a codification can be conceived as an instrument of social reform aimed at the future. In fact all modern codifications belong, no doubt in differing degrees, to the latter category. In the eighteenth century insistent demands for codification were expressions of a desire for innovation and progress, rather than of a hope that the existing legal order would be compiled and ordered. The promulgation of codes was sometimes the work of enlightened despots, acting on their own initiative and on their own paternalistic convictions, and influenced by the ideas of the Enlightenment. There are examples in the German culture of the period. In other cases, the people or its representatives rebelled and decided to proclaim a code inspired by radical ideas. This was the case with the codifications of the years of intermediate law.

[11] The first contained 30,920 statutes and ordinances arranged in chronological order from 1649–1825; the second was a systematically ordered selection which contained elements of Roman law. In spite of efforts under Tsar Alexander I, inspired by the model of the *Code civil* of 1804, Russia had no civil code in the nineteenth century.

[12] Certain major ordinances of Louis XIV (for example that of 1667 already mentioned) can be considered codifications of particular areas of law. At the same time, however, some scholars envisaged more ambitious projects of codification (e.g. Leibniz' *Praefatio novi codicis* of 1678). Guillaume de Lamoignon (to whom we shall return) hoped to compose a code applicable throughout France and based on the different sources of French law, ordinances, case law and customs, especially the custom of Paris. His attempts did not progress beyond a first sketch under the title *Arrêtés*, completed about 1672. Daguesseau too wished to codify French law; but his work was limited to a few main ordinances in the area of civil law.

[13] One thinks for instance of the formidable 'Restatement of the Law' in the United States.

Vaw C 12-13

OPPOSITION TO CODIFICATION

9 The codification movement spread throughout Europe from the eighteenth century. Codes are now a source of law characteristic of the legal system of the various European countries, apart from England, which even now has not got beyond the stage of setting up a law commission to study the problems a codification of the Common Law would present. At first sight this anomaly is the more surprising, as one of the most eloquent exponents of the principle of codification was an Englishman, Jeremy Bentham (*d.* 1832). The difference between the English and the European approach is to be explained largely by the preponderance of case law as a source of law in England, as well as by suspicion among the English ruling classes of all codification, which tended to be associated with ideas of radical or even revolutionary reform. All the same, on the European continent too the codification movement encountered opposition: in Germany it gave rise to a celebrated controversy between A. F. Thibaut (*d.* 1840), who in 1814 published *Uber die Nothwendigkeit eines allgemeinen bürgerlichen Gesetzbuches für Deutschland*, and F. C. von Savigny (*d.* 1861) who in the same year replied with a publication criticizing the idea of codification, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft*.

All codifications have advantages and disadvantages. Among the advantages are (i) legal security: a code contains the whole of the law. Any rule which is not in the code or which contradicts it is invalid. The text of the code takes precedence over legal doctrine (which is often divided) and case law. This situation is entirely different from that which prevailed before the codifications, when there was a jumble of legal authority: a complex and sometimes incoherent body of customary rules (some of which had not even been set down in writing); diverse and contradictory learned opinions; judicial decisions, from different countries and several centuries. (ii) Clarity: the ability to ascertain the content of the law.[14] A code deals with the whole of a subject systematically, in language accessible to non-lawyers. These qualities are an important advance from an earlier stage, at which law was written in obscure technical language, often in a Latin unintelligible to any non-initiate. (iii) Unity on the scale of a state, kingdom or empire. This is to be

[14] See section 70 below.

contrasted with the inextricable entanglement of ordinances and local customs in the old law.

The main argument against codification is immobility. This criticism was already levelled by Savigny, the founder of the Historical School. A code corresponds to the state of legal development at a given moment and it aims to fix that state so that it will not be changed. The settled text can, at the very most, be the object of interpretation. Now, according to the Historical School, law is the result of the historical evolution of peoples and must adapt itself to that evolution. The fixing of the law by codification causes internal contradictions and intolerable tensions within a society. Every codification therefore poses a dilemma: if the code is not modified, it loses all touch with reality, falls out of date and impedes social development; yet if the components of the code are constantly modified to adapt to new situations, the whole loses its logical unity and increasingly exhibits divergences and even contradictions. These dangers are real, for experience shows that the compilation of a new code is a difficult enterprise which rarely meets with success.

The *Kodifikationsstreit* was also inspired by ideological differences. The adversaries of codification conceived of law as the result of a continually developing history: they, together with their leader Savigny, were the conservatives. On the other hand, the proponents of codification belonged to the progressive camp: the appeal of codification was to break with the past, further the promises of the future, and smash the ascendancy of judges and advocates. In this respect, Portalis' attitude is revealing. As a co-author of the *Code civil*, he was of course in favour of the idea of codification but at the same time conscious of the risks a code entailed. This explains why the *Code* of 1804 drew largely on the old law, and why innovations were introduced only with extreme caution; the revolutionary zeal of the preceding years was now tempered. Portalis also had a sense of the dangers of finalizing the law. To prevent petrification of the law, he formulated these principles: a code must not become too detailed, and must leave a reasonable freedom of judgment to assess the individual cases which arose in practice; to reconcile the contradictions between social development and the law settled by the code, it was proper to turn to natural reason; the task of legal scholarship and case law would be to ensure by means of interpretation that the code remained living law. It is in this sense above all that Portalis' remark 'with time codes make themselves' is to be understood.

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