

very important for the Code, but there is more to it than that. For all the impetus of revolution, the Code carefully absorbs the results of a long historical development, and most of it is a felicitous blend of traditional legal institutions from the *droit écrit* of the South, influenced by Roman law, and the *droit coutumier* of the North, influenced by the Germanic-Frankish customary law. Though in many respects the Code civil makes a revolutionary take-off, it bears throughout the marks of its heritage of the pre-revolutionary law, the *ancien droit*. Accordingly we shall first trace the development of French law up to the Revolution, so far as this is necessary in order to understand the achievement of those who drafted the Code civil. Then we shall deal briefly with the *droit intermédiaire* of the revolutionary period and with the legislative history of the Code, before turning to the Code itself.

II

The Romans established their law in Gaul as they did in all the provinces they conquered, but when the Western Roman Empire collapsed in 476, Roman law did not lose its validity in the Germanic states which succeeded it; it survived, especially in the kingdoms of the Visigoths and the Burgundians, as the law for the subject peoples of non-German origin. In 506 Alaric II, King of the Visigoths, passed a statute—the *Breviarium Alaricianum* or *Lex Romana Wisigothorum*—containing a résumé of and commentary on the *Codex Theodosianus* and some other Roman sources; this contributed to the survival of some knowledge of Roman law in the southern part of France despite the great migrations of the fifth and sixth centuries. In the North of France, on the other hand, the incursion of the Franks and the founding of the Frankish state did largely oust Roman law, since the Franks brought with them their own developed customary laws of Germanic origin, and later crystallized them in several statutes of which the most important is the *Lex Salica*. The renaissance of Roman law studies in North Italy in the eleventh and twelfth centuries was immediately taken up in the South of France; the study of the *Corpus Iuris* was well established in the Universities of Montpellier and Toulouse in the twelfth century. Acquaintance with Roman law gradually filtered northwards, without of course displacing the traditional customary laws of the Franks. Thus the territory of France became divided for legal purposes into the area of *droit écrit* in the South influenced by Roman law, and the area of *droit coutumier* in the North, based on Germanic customs (*coutumes*). The dividing line ran parallel with the Loire from the mouth of the Gironde to the Lake of Geneva, so that the northern three-fifths of France as it is today were controlled by the *droit coutumier*, the southern two-fifths by the *droit écrit*.

One must not overestimate the sharpness of the division between the *droit écrit* and the *droit coutumier*. In the South, for example in the urban regions

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- ARMINJON/NOLDE/WOLFF, *Traité de droit comparé I* (1950) 120 ff.
 BRISSAUD, *Manuel d'histoire du droit privé* (1935).
 DAWSON, 'The Codification of the French Customs', 38 *Mich. L. Rev.* 765 (1940).
 —, *The Oracles of the Law* (1968).
 A. ESMEIN, *Précis élémentaire de l'histoire du droit français de 1789 à 1814* (1908).
 —, *Cours élémentaire d'histoire du droit français* (15th edn., 1925).
 FENET, *Recueil complet de travaux préparatoires du Code civil* (1836).
 HEINSHEIMER, *Die Zivilgesetze der Gegenwart I* (1932): *Frankreich, Code civil*, Introduction V ff.
 HEYMANN, 'Romanische Rechtsordnungen', in: *Handwörterbuch der Rechtswissenschaft* V (1928) 151.
 KOSCHAKER, *Europa und das römische Recht* (2nd edn., 1953).
 LE CODE CIVIL, *LIVRE DU CENTENAIRE*, 2 vols. (1904), with essays by SOREL, ESMEIN, VIGIÉ, SALEILLES and others.
 MITTEIS, 'Die germanischen Grundlagen des französischen Rechtes', *SavZ/Germ.* 63 (1943) 137.
 OLIVIER MARTIN, *La Coutume de Paris—Traité d'union entre le droit romain et les législations modernes* (1925).
 RABEL, 'Private Laws of Western Civilization—The French Civil Code', 10 *La. L. Rev.* 107 (1950).
 SAVATIER, *L'art de faire les lois—Bonaparte et le Code civil* (1927).
 WILHELM, 'Gesetzgebung und Kodifikation in Frankreich im 17. und 18. Jahrhundert', *Ius commune* 1 (1967) 241.
 —, 'Portalis und Savigny', in: *Aspekte europäischer Rechtsgeschichte, Festschrift für Coing* (1982) 445.

I

THE Code civil of 1804 is not only the heart of private law in France but also the great model for the codes of private law of the whole Romanistic legal family. The Code was generated by the spirit of the French Revolution which sought to eradicate the feudal institutions of the past and to implant in their place the natural law values of property, freedom of contract, family, and family inheritance. The revolutionary events of the years after 1789 were

of Bordeaux and Toulouse, there were written *coutumes* influenced by Roman law but containing strong Germanic elements. Nor was Roman law entirely rejected by the *droit coutumier* in the North. Some parts of the law, for example contract law, were inadequately regulated by the *coutumes* and therefore lawyers readily had recourse to the better developed and more refined Roman law; and the view was accepted in the North that Roman law as *ratio scripta* could be called upon to supplement and explain the *coutumes* when they gave no answer to particular questions. But it must be noticed that, unlike the later situation in Germany when Roman law was received, Roman law was not regarded as authoritative or valuable on the ground that it was the law of the Roman Empire. On the contrary, the French Kings were especially interested in protecting their sovereignty against the Empire and the Emperor, and the royalist lawyers emphasized that if Roman law was accepted in France, this was not because it had been laid down by Rome, but on the ground that it had been accepted by custom or by reason of its inherent quality: *non ratione imperii sed imperio rationis*. Thus in France, unlike Germany later, there was never any serious discussion of a complete reception of Roman law into France; it was effective only in so far as this was the local custom, as in the South, or, as in the North, on the grounds of its inherent merit.

In the tenth and eleventh centuries, as the Carolingians gave way to the Capetians, Frankish law broke up into many different systems, according to the territories, some extremely small, won by princes and prelates (compare MIRREIS, above p. 74, at pp. 152 ff.). A number of law-books were written in the thirteenth century, mainly by famous practitioners, recording the custom of a particular region. Among the most important are the *Livre de Justice et de Plet* which portrayed the *Coutume* of Orleans, strongly impressed by Roman and canon law, the *Coutumes de Beauvaisis* by PHILIPPE DE BEAUMANOIR, and the great collection of Norman customary law (*Grand Coutumier de la Normandie*) which to this day provides the basis for the private law of the Channel Islands. It remained true, however, that the customary laws of Northern France depended principally on oral tradition; the judge who did not know the appropriate rule of the relevant *coutume* had to discover it by means of an 'enquête par turbe', in which a number of local inhabitants had to say what they remembered the substance of the *coutume* to be. The proliferation of *coutumes* and the difficulty of discovering their content naturally gave rise to great legal uncertainty. This called the French King on to the scene in the fifteenth century. By the Ordinance of Montils-les-Tours of 1454, Charles VII ordained that the customs of the various territories should be written down and that those which were already recorded should be drafted anew, with the co-operation of a royal commission of experts. The task of recording the *coutumes* took longer than expected. Charles VII's instruction had to be repeated several times by his successors, and they also had to overcome the opposition of some of the territories,

especially Normandy (see the detailed description in DAWSON, above p. 74). But the intervention of the King greatly strengthened the power of the traditional customary laws to withstand Roman law. As the French historian of law OLIVIER MARTIN wrote, 'That France was saved from the massive reception of Roman law which took place in Germany is clearly attributable to the King's success in having the customs recorded in the sixteenth century' (above p. 74, p. 13). It is also clear that the recording of the *coutumes* was necessary for the gradual development of a common customary law of France (*droit coutumier commun*), and finally for the amalgamation of *droit coutumier* and *droit écrit*, without which the Code civil of 1804 could never have unified the law in France.

By the end of the eighteenth century all the important customs of more than purely local significance had been recorded in accordance with the royal mandate. Yet on the eve of the French Revolution, on one estimate, there were no fewer than 60 customary laws of extensive significance (*coutumes générales*), some of which were interrelated, and as many as 300 *coutumes* of limited territorial application (*coutumes locales*).

The juxtaposition of different *coutumes* led to legal problems whenever a case had connections with more than one region, as where a Breton drew up his will in Paris, where the *coutume* laid down different rules regarding testamentary capacity or form. Thus in the sixteenth century French lawyers were especially active in the area of law which today we call private international law; the names of DUMOULIN (1500-66) and, even more, D'ARGENTRÉ (1519-90) stand out; see the fundamental work of GAMILLSCHEG, *Der Einfluss Dumoullins auf die Entwicklung des Kollisionsrechts* (1955).

While the writing down of the more important *coutumes* could reduce the uncertainty of the law, it could not diminish the substantial differences between them, much less the great legal division between the *pays du droit écrit* and the *pays du droit coutumier*. As the French Kings consolidated their power, the multiplicity of legal systems became more and more unsatisfactory, and the creation of a unitary private law common to the whole of France was increasingly felt to be necessary.

The assimilation of the particular customary laws was considerably promoted by the *Coutume de Paris*. It became increasingly important after its publication in 1510. This was mainly attributable to the influential decisions of the Parlement de Paris, whose very wide jurisdiction included almost the whole of the area of *droit coutumier* with the exception of Brittany and Normandy. Its judges therefore had to apply a very broad range of different *coutumes*, and, as one would expect, when they had to solve disputed questions or fill gaps in the law, they tended to develop unitary rules. Consistently enough, the new and extended edition of the *Coutume de Paris* in 1580 contained a digest (abrégé) of the decisions of the Parlement on *questions générales*. Gradually it came to be accepted that the *Coutume de Paris*

could be applied everywhere, even in preference to Roman law, so as to supplement any gaps in the regional laws.

A series of important jurists played a most conspicuous role in the gradual development of a common private law for the whole of France. They were not professors, but practitioners, attorneys, legal advisers, royal administrators, and judges. Of these, DUMOULIN is pre-eminent. He was the first to state the view that there was such a thing as a common law of France; it consisted of the totality of the ideas of law which found expression in the different *coutumes*. His works, especially his famous and influential commentary on the First Book of the *Coutume de Paris*, were mainly directed to discovering these general legal principles; to this end he constantly made critical comparisons of the different *coutumes*, and applied the principle that 'deficiente consuetudine . . . non est recurrendum ad ius Romanum, sed ad vicinas et generales et promiscuas consuetudines Galliae' (see GAMILLSCHG (above p. 74) at 88 ff.). COQUILLE (1523-1603) wrote a commentary on the *Coutume* of the County of Nevers, and an *Institution au droit français*, both of which expressly used the methods of comparative law in the interest of harmonizing and assimilating the various customs—the very task which comparative law still has to perform today, with the difference that it is no longer the customs of localities but the legal systems of nations which have to be assimilated and harmonized.

DUMOULIN, COQUILLE, and other like-minded authors of the sixteenth century could not by themselves have had such a determinative effect on the development of a common customary law had there not been, especially in Paris, a well-regarded and powerful body of professional lawyers pledged to achieve the same goals. As KOSCHAKER has emphasized, the careful and moderate acceptance of Roman law in France, like its rejection in England, of which we shall shortly be speaking, is attributable to the fact that in both countries there developed early a well-organized and therefore powerful group of practising lawyers, allied with the King, interested in the centralization of justice in the royal courts, and devoted to the national law.

By the fourteenth century professional judges, trained in the law and of bourgeois background, had replaced the clergymen, barons, and noble courtiers in the Court of Paris; before long they were appointed by the King, not just for particular cases or particular sessions, but for an indeterminate period ('à tant qu'il nous plaira') and were normally chosen from the group of practising lawyers and legal advisers on the proposal of the Parlement. We may find it very shocking today that in the fifteenth and sixteenth centuries the King allowed judicial positions to be sold and inherited, but it contributed to the consolidation of the legal profession in France.

'The fact that he could sell his office made the judge in practice irremovable, and the fact that the office could be inherited led to the development of a large number of

families with a strong juristic tradition. . . . In consequence there arose a sort of hereditary nobility of lawyers, une noblesse de robe, of families proud of their status, with education and style of living to match, which prevented the bureaucratization of the judiciary which occurred in Germany. . . . It was men like these, in practice as lawyers with the Parlement of Paris, whether as judges or as attorneys or as legal authors, who created the common private law of France. This law was largely the old law of France, partly because the *coutume* de Paris, though not strictly speaking common law, was much more important than the other customs, but it did not lose its connection with Roman law, from which it took some mature concepts and also some substantive rules of law. Just as in England it was the jurists who rejected the reception of Roman law, so here it was the jurists who, if they did not reject the reception, at least tempered its influence and so were able to maintain a large part of the national law' (KOSCHAKER (above p. 74) 169, 223).

In the seventeenth and eighteenth centuries we find the first jurists whose works provided the draftsmen of the Code with material and model. First there is BOURJON, a Parisian lawyer expert in the Custom of his native city; his influential work had the significant title *Le Droit commun de la France et la coutume de Paris réduit en principes* (1720). DOMAT (1625-96) was less a practitioner than a philosopher like his influential friend PASCAL; he was a great systematizer and his work *Les Loix civiles dans leur ordre naturel* (1689), in which he put into an order suggested by the new ideas of natural law the rules of Roman law adapted to the needs of the time, greatly contributed to the scientific basis of the Code civil. The jurist with the greatest influence on the draftsmen of the Code civil was POTHIER (1699-1772). He was not a great organizer of a vast mass of material nor a very original thinker; indeed, according to the historian A. DUMAS, 'he sometimes did no more than repeat in good French what DUMOULIN had already said in bad Latin'. Yet POTHIER knew both Roman and customary law inside out, though he took from them both rather eclectically, and his numerous small writings on the law of obligations, sale, hire, gift, and so on are characterized by great elegance of style, extreme lucidity, and conceptual accuracy.

Royal ordinances also had a certain effect on the eventual unification of French law. Until the sixteenth century these ordinances dealt with questions of feudalism, procedural law, and court organization. Only later did they regulate areas of substantive private law as well. The Ordonnance de Moulins (1566) dealt with a subject close to procedure. It laid down that oral testimony should be inadmissible in lawsuits worth more than 100 pounds. This formalistic rule is preserved in the Code civil (art. 1341; see below pp. 366 ff.) though of course the monetary limit has been altered. From the seventeenth century we have the Ordonnance du Commerce (1673) and the Code de la Marine (1681) which contained special rules for commercial law and maritime law, and thereby laid the basis for that division between private law in the narrow sense and commercial law which the Romanistic and Germanic legal families (except Switzerland and Italy) still recognize by having different codes, much to the surprise of Anglo-American lawyers. Louis XIV's Chancellor DAGUESSEAU was responsible

for three ordinances of particular importance; one concerned the law of gift (1731), the second the law of wills (1735), with the remarkable feature of laying down different rules for the *pays du droit écrit* and the *pays du droit coutumier*, and the third the law of *fideicommissa* (1747). The Civil Code incorporated significant parts of the first two ordinances, but there was not much scope for the third since the *fideicommissum* was regarded by the Code civil as an institution of a feudal system which had been rendered obsolete. On the whole matter see WILHELM, 'Gesetzgebung und Kodifikation' (above p. 74).

Despite all these efforts France on the eve of the Revolution was still very far indeed from having a unified private law. The chasm between *droit écrit* and *droit coutumier* was as wide as ever. It is true that all the important *coutumes* of more than local significance had been codified, but this only made it easier to see the differences between them. VOLTAIRE's mockery was justified:

'Is it not an absurd and terrible thing that what is true in one village is false in another? What kind of barbarism is it that citizens must live under different laws? . . . When you travel in this kingdom you change legal systems as often as you change horses' (*Oeuvres de Voltaire* VII (1838) Dialogues p. 5).

The idea of a 'droit coutumier commun' or, as people were coming to say more often, a 'droit français' had been clearly formulated for a century and a half. It had become the leading theme of French jurisprudence and this had laid the intellectual basis for the great work of unification of law in theory and practice. But before this idea of a unified French private law could become reality, two things were needed: first the powerful political impetus of the French Revolution, secondly the authority and decisiveness of NAPOLEON.

III

The 'droit intermédiaire', the law of the revolutionary period between the first session of the Assemblée Constituante of 1789 and the coming to power of NAPOLEON BONAPARTE in 1799, altered the traditional social order with almost unparalleled speed and thoroughness. All the institutions of the *ancien régime* were rooted out in very short order—the absolute monarchy, the interlocking powers of King, nobility, clergy, and judiciary (*noblesse de robe*), the old territorial division of the country into provinces, the feudal regime of land, the courts system, and the tax system. In its place was put the vision of the Enlightened Society, as sketched by DIDEROT, VOLTAIRE, and ROUSSEAU: according to this, man is a rational and responsible creature who acquires at birth an inalienable right to freedom of conscience, belief, and economic activity. No longer does man have to deal with the intermediary status groups of the *ancien régime*, but only with the state itself, which is bound through its legislation to free its citizens from the traditional author-

ity of feudal, church, family, guild, and status groups, and to equip all its citizens with equal rights.

In pursuit of these aims the hectic legislation of the early years of the Revolution was sometimes too radically individualistic in the area of private law, and many of the extreme positions it adopted had to be abandoned by the more composed draftsmen of the Code civil. In 1791, decrees of the Assemblée Constituante abolished without compensation all feudal servitudes and cancelled all the privileges of primogeniture along with all the other differences based on age and sex which existed in the laws of succession. Estates both moveable and immoveable were to be divided completely and equally between the descendants or other heirs in intestacy: 'All heirs of equal degree succeed in equal parts to the property which vests in them by law.' This still left the possibility that the decedent might by will seek to prefer some persons over others, or to attempt to bind the inheritance for a long period of time. This possibility the Revolution also did away with; fideicommissary substitutions, which performed the same function as the *Nachherbfolge* of German law, were forbidden, and they even went so far, in the interests of dividing up landed property, as to abolish freedom of testation and donation. The National Convention in 1793 decreed that 'the power of disposing of one's goods whether on death, or inter vivos, or by contractual donation in direct line, is abolished: in consequence all descendants will have an equal part of the property of ascendants'. The testator with children could dispose by will of only one-tenth of his estate, the testator with collaterals of only one-sixth, and this only in favour of third parties unrelated to him, for otherwise the 'sainte égalité' of relatives entitled to succeed would have been infringed.

The changes in family law were equally far-reaching. *Patria potestas*, which in the *pays du droit écrit* had allowed the father to exercise some paternal power even over adults, was abolished as being inconsistent with the rights of man. Restraints on marriage laid down by canon law were severely curtailed, and the requirements of marriage, particularly the requirement of parental consent, reduced to a minimum. Marriage itself was regarded as a civil contract (*contrat civil*), with the consequence, amazing for its time, that either spouse could announce a wish to terminate the contract and then obtain a divorce; it was sufficient to assert that there was 'incompatibility of temperament or character' between the spouses. The justification for this principle was made clear: 'individual freedom entails the freedom to divorce, since it would be lost if the engagement of marriage were irrevocable'. Only civil marriages were lawful, and the central register of civil status was introduced. Illegitimate children recognized by their parents were equated with legitimate children, save that 'adulterine' children, that is, children at the time of whose conception either parent was married to a third party, could not have more than one-third of the inheritance of a legitimate child.

One of the most important aims of the Revolution from the very beginning was to unify the private law. The Assemblée Constituante itself had decreed: 'A code of civil law common to the whole kingdom will be drawn up.' In 1793 CAMBACÈRES tendered a first draft which was immediately rejected on the ground of being too comprehensive and complicated, although it had only 697 articles; what was wanted were 'simpler and more philosophical conceptions' (see FENET (above p. 74) I, p. XLVIII). The next year CAMBACÈRES offered a second draft with only 297 articles, but this time the National Convention found it too sparse and terse. The indefatigable CAMBACÈRES produced a third draft in 1796 and laid it before the Council of Five Hundred, the Directorate's legislative organ, but its protracted consideration of the draft was rudely interrupted by NAPOLEON's taking power at the end of 1799.

Things now began to move more briskly. Under the constitution introduced by NAPOLEON the executive power and the power of initiating legislation was vested in three Consuls; NAPOLEON was the First Consul, and the two others had only advisory roles. Draft legislation was to be prepared by the Conseil d'État on the proposal of the Consuls, and was then to be referred by the Consuls to the Tribunal, who could adopt or reject the draft, but not alter it. Then the draft had to be laid before the Corps Législatif, which was just a caricature of a Parliament, since it also had no power to discuss the draft, but only to hear the views of the representatives of the government and the Tribunal and then to adopt it as a law or to reject it. After this constitution was adopted, NAPOLEON devoted himself with energy and circumspection to the creation of a Code civil. He appointed a Commission of only four persons to draft it; these were no revolutionary hotspurs, but experienced practitioners. The representatives of the *droit coutumier* were TRONCHET, President of the Court of Cassation, and BIGOT DE PRÉAMENEU; both had previously been advocates at the Parliament of Paris; the representatives of the *droit écrit* were PORTALIS, a high administrative official and a brilliant speaker and writer, and MALEVILLE, judge of the Court of Cassation. In the astonishingly short period of four months this Commission produced a draft. It was shown to the Court of Cassation and the Courts of Appeal and then, along with their views on it, laid before the Conseil d'État for discussion under the chairmanship of a Consul, normally NAPOLEON himself. There the decision was taken to divide the Code into large sections and to submit these sections separately to the legislative process. But the very first section met with opposition in the Tribunal. Some of its members were very suspicious of the abolition of the Directorate and the rise to power of the young General NAPOLEON. One of these was BENJAMIN CONSTANT, who expressed strong opposition to the First Consul in the salon of his close friend MADAME DE STAËL, and was later to gain fame for the polemics he wrote in exile. Suspicion and envy rather than reasons of substance led the

Tribunat to reject the first portions of the Code, and the Corps Législatif to follow suit. NAPOLEON's reaction must have surprised them. He withdrew the whole legislative project, saying that the calmness and unanimity required for so important a project had not yet been achieved. He then purged the Tribunat of all the members hostile to him, including CONSTANT, and procured that in future the Tribunat should be asked unofficially what position it would take before the draft law was laid before it and the Corps Législatif. After the lapse of only a year, NAPOLEON set the legislative process in motion again, and in 1803 and 1804 thirty-six separate statutes were passed without opposition; they were finally consolidated by the law of 31 March 1804 and brought into force under the title of 'Code civil des Français'.

What part did NAPOLEON himself take in the creation of the Code civil? As we have seen, his energy and determination were needed to force the Code through the legislative process, but we are now interested in his influence on its form and substance. NAPOLEON, as chairman, took a very lively part in no less than 57 of the 102 meetings at which the Conseil d'État considered the text of the drafting committee. Of course, NAPOLEON had no legal training; he was a soldier, and indeed was heavily preoccupied at the time in question by military adventures against the English. He was absent when some important matters, such as, for example, the law of obligations and the law of matrimonial property, were being discussed by the Conseil d'État, and he took very little part in purely legal debates. Yet his contribution to the formation of the Code civil was quite substantial. Then a man of 34 and head of state, NAPOLEON had, according to all contemporary evidence, a most powerful and fascinating personality. At the meetings of the Conseil d'État he constantly focused attention on the realities of life rather than the technicalities of law; he immediately saw the practical relevance of abstract rules; he put an abrupt end to any hair-splitting discussions, and by clear and simple questions kept bringing the discussion back to the practical and concrete; above all, he insisted on a style of drafting which was transparently clear and comprehensible to a non-lawyer like himself. It has been said that the Code civil owes the clarity and comprehensibility of its language to the fact that its draftsman had constantly to ask himself whether the words he had chosen would withstand the criticisms of a highly intelligent layman like NAPOLEON, unfamiliar with the jargon of the law. THIBEAudeau, who took part in the discussions as a member of the Conseil d'État, is probably not exaggerating in the following passage from his memoirs where he describes NAPOLEON's participation:

'He started, maintained and guided [the discussion], and when it flagged he revived it. . . . He spoke quite simply and naturally, without affectation, but with the freedom and tone one finds in a conversation whose natural flow depends on the subject-matter, the diversity of opinions and the stage of the discussion. At this no member of the Council was better than he; in his capacity to go straight to the heart of a

question, in the appropriateness of his ideas and the strength of his arguments he was as good as any: in originality of expression and apt turn of phrase he was often the best.' (Quoted in SOREL, *Livre du Centenaire* I, pp. XXV f.)

NAPOLEON left many marks on the actual substance of the Code, too. His support for the idea of a strong patriarchally organized family was constant and eloquent; here his central idea was, in SAVATIER's words (above p. 74, at p. 25), 'A strong family in an omnipotent state with a Napoleon at the top'. His strong support for divorce by mutual consent and for adoption may be explained on personal grounds. At the time NAPOLEON planned to found a dynasty, having obtained by referendum in 1802 the consulship for life as well as the right to nominate his successor, and since he knew that his marriage to JOSEPHINE BEAUHARNAIS would remain childless, remarriage and adoption seemed to be ways to procure a family and thus a successor. NAPOLEON himself was very proud of his part in creating the Code civil, as is shown by his famous observation, made years later in exile on St. Helena: 'It is not in winning 40 battles that my real glory lies, for all those victories will be eclipsed by Waterloo. But my Code civil will not be forgotten, it will live forever.'

The Spirit and Essential Features of the Code Civil

In addition to the literature cited above p. 74:

- AUDIT, 'Recent Revisions of the French Civil Code', 38 *La. L. Rev.* 747 (1978).
 BOEHMER, 'Der Einfluß des Code Civil auf die Rechtsentwicklung in Deutschland', *AcP* 151 (1950/1951) 289.
 —, 'Grundlagen des französischen Privatrechts im 20. Jahrhundert, *RebelsZ* 18 (1953) 480.
 BÜRGE, *Das französische Privatrecht im 19. Jahrhundert zwischen Tradition und Pandektenwissenschaft, Liberalismus und Etatismus* (1991).
 DAVID, *English Law and French Law* (1980).
 —, *French Law, Its Structure, Sources and Methodology* (1972).
 FERID/SONNENBERGER, *Das Französische Zivilrecht* Chs. 1 and 2.
 FIKENTSCHER, *Methoden des Rechts in vergleichender Darstellung*, vol. I (1975) Ch. 6.
 FRIEDRICH, 'The Ideological and Philosophical Background', in: *The Code Napoleon and the Common Law World* (ed. B. Schwartz, 1956) 1.
 GÉNY, *Méthode d'interprétation et sources en droit privé positif*, 2 vols. (2nd edn., 1954).
 GORDLEY, 'Myths of the French Civil Code', 42 *Am. J. Comp. L.* 459 (1994).
 KAHN-FREUND/LÉVY/RUDDEN, *A Source-Book on French Law* (3rd edn. 1991).
 LAWSON, 'The Approach to French Law', 34 *Ind. LJ* 531 (1959).
 —, 'Réflexions d'un juriste anglais sur le cent-cinquantième du Code civil', *Rev. int. dr. comp.* 6 (1954) 665.
 MURDOCK, 'Le Code civil vu par un Américain', *Rev. int. dr. comp.* 6 (1954) 678.
 PORTALIS, *Discours, rapports et travaux inédits sur le Code civil* (ed. F. Portalis, 1844).
 RIPERT, *Le Régime démocratique et le droit civil moderne* (2nd edn., 1948).
 SAVATIER, *Les Métamorphoses économiques et sociales du droit privé d'aujourd'hui*, 3 vols. (3rd edn., 1959–64).
 —, 'Destin du Code civil français', *Rev. int. dr. comp.* 6 (1954) 637.
 THIEME, *Das Naturrecht und die europäische Privatrechtsgeschichte* (1947).
 TUNC, 'The Grand Outlines of the Code', in: *The Code Napoleon and the Common Law World* (ed. B. Schwartz, 1956) 19.
 —, 'Methodology of the Civil Law in France', 50 *Tul. L. Rev.* 459 (1976).
 WIEACKER, *Das Sozialmodell der klassischen Privatrechtsgesetzbücher* (1953).
 —, *A History of Private Law in Europe* (trans. Weir, 1995) 257 ff.

OTHER great codes came into force in Central and Western Europe at the end of the eighteenth and the beginning of the nineteenth centuries, but

beyond doubt the French Code civil is intellectually the most significant and historically the most fertile. Like the General Land Law for the Prussian States (1794) and the General Civil Code of Austria (1811), the Code civil is founded on the creed of the Enlightenment and the law of reason that social life can be put into a rational order if only the rules of law are restructured according to a comprehensive plan. The means by which these codes sought to achieve this goal and the historical situations in which they tried to do so were very different. Despite the recurrent influence of the spirit of the Enlightenment, the Prussian Land Law remains essentially rooted in the class structure of Frederick's state: its paternalistic authoritarianism did not leave the subject much room for play, and judges and scholars were inhibited from creative development by its rigid specificity of detail. The Austrian General Civil Code, in contrast, is much more strongly pervaded with the idealism and rationalism of the Enlightenment, and differs from the Prussian Land Law in being brief, general, lucid, and easily comprehended: but it was in advance of social reality, for in the early nineteenth century Austria under METTERNICH was the great champion, at home and abroad, of the restoration of absolute monarchy, and those were not propitious conditions for a powerful development of the liberal ideas of the Code. In France the situation was different; the Prussian and Austrian codes were decreed by an enlightened despot; in France it was the *bourgeoisie* which by revolutionary means had brought down the socially obsolete institutions of the *ancien régime*, had founded the new state on the principle of the equality of citizens, and had then, out of this very situation, created a code which vindicated the demands of the Revolution for liberty and equality. Only in France was the Code the product of a revolutionary movement, only in France was there complete congruence between social reality and the idea of society on which the Code was based.

Of course one must distinguish ideology and reality. Contemporaries saw the Code civil as a product of revolution, but closer investigation shows that it rests also on a large number of traditional legal institutions tenaciously conserved. Several provisions of the Code civil can certainly be read as declarations of faith in the freedom of ownership and contract.

Thus art. 544 states that 'ownership is the right to enjoy and dispose of property in the most absolute manner, provided that one does not use it in a manner prohibited by law or regulation', and according to art. 1134(1) 'Contracts formed in the statutory manner have the force of law for the parties who made them.'

But it is not clear that in adopting these provisions the fathers of the Code civil really meant to ring in a new era of individualism and liberalism. Recent research has shown that the formulae of arts. 544 and 1134 had been common coin in European legal circles for centuries, that they were almost unconsciously taken over by the draftsmen of the Code civil (see GORDLEY (above p. 85)) and that it was only later, in the mid-nineteenth century, that

they were converted into liberal manifestos (see in particular BÜRGE (above p. 85)). It is true, however, that the Code civil held fast to the important achievements of the Revolution—the principle of equal division of estates, the complete secularization of marriage, the total abolition of feudal servitudes, and the prohibition of fideicommissary substitutions, to take a few examples. But the Code did abandon or qualify many rules of the *droit intermédiaire* which seemed to have gone too far. Thus divorce is retained, but the ground of mutual consent is severely restricted by many complex rules of procedure. The freedom to dispose of one's property on death or in life had been largely abolished in the aim of parcelling out landed estates; it was reintroduced by the Code, though only up to the 'quotité disponible', that is, to a much lesser degree than in the German or Anglo-American legal systems.

To the *droit intermédiaire*, it was inconsistent with the rights of man that an adult's freedom to marry be dependent on his parents' consent. The conflict between the individual's interest in free self-determination and the social interest in maintaining patriarchally organized family groups was resolved by the Code in favour of the latter: a man under the age of 25 and a woman under the age of 21 could not marry at all without the permission of their parents or, if the parents were dead, their grandparents. At 25, a man could marry without his parents' consent but only if he had sought their consent three times by issuing at monthly intervals a 'respectful request' (*sommatation respectueuse*) served by a *huissier*. For a man of 30, a single sommation was sufficient. A similar step, which some would see as retrogressive, was taken in matrimonial law in relation to the equality of husband and wife. To begin with, the revolutionary principle of the equality of citizens had been quite simply applied between spouses; thus CAMBACÉRÈS in his First Draft had proposed that 'the rights of spouses in the administration of their property are equal. Every legal act which sells, binds, burdens or pledges the property of either spouse requires the consent of both.' (FENET (above p. 74) I. 20.) But in his Third Draft CAMBACÉRÈS abandoned this position and, as the Code civil was later to do, gave the right to administer the property to the husband alone: it was true that all social relationships should be controlled by the principle of equality, but in the matrimonial sphere the precedence of the husband was part of the 'natural order' and to deny it would lead to 'quarrels which would destroy the pleasures of domestic life'. (FENET (above p. 74) I. 156.) It was much the same in the law of divorce. The Code civil did not hesitate to lay down that the husband could demand a divorce simply by proving his wife's adultery, whereas the wife could seek divorce on the ground of the husband's adultery only 'when he has kept his mistress in the matrimonial home'. PORTALIS seemed to regard this rule as self-evident: 'The infidelity of a wife bespeaks greater vice and has more dangerous consequences than that of a husband.'

In the difficult problem of making an accommodation between the *droit coutumier* and the *droit écrit*, the draftsmen of the Code civil showed a sure and skilful touch. Their main aim here was to produce a reasonable and balanced compromise. In his *Discours Préliminaire* PORTALIS wrote:

'We have made a compromise, if such an expression may be used, between the *droit écrit* and the customs, whenever we have been able to reconcile their provisions or to

modify each in the light of the other, without infringing the unity of the system or causing widespread dissatisfaction.' (FENET (above p. 74) I. 481.)

The *droit écrit*, which was nearly pure Roman Law, provided almost the whole of contract law, the draftsmen having relied extensively on the classical treatment by POTHIER, as well as the law of neighbours, the law of wills, and the system of dowry as a contractual property regime. The *coutumes*, especially the Custom of Paris, won through principally in family law and in the law of inheritance, with their strong emphasis on the unity of the family and on the domestic power of husband and parents, in the forced heirship of relatives, in the statutory property regime of community of moveables, and in the administration of wills. Acquisitive prescription in good faith (see art. 2279 Code civil) is also in line with Germanic legal thinking; but the principle of publicity in German land law is found in the Code civil only in the shadow form of a system of transcription and inscription. By and large one must accept the paradoxical conclusion that the French Code civil, the leading code of the Romanistic family, contains more Germanic legal ideas than the German Civil Code a century later which, owing to the influence of the Historical School of Law and the pandectists, belongs much more to the Roman tradition.

It is often asked how much the Code civil was influenced by *natural law* thinking. As a matter of intellectual history it is clear that the Code as a whole would never have existed but for the idea of codification which comes from natural law. Furthermore the Code civil is based on the tenet of natural law that there are autonomous principles of nature, quite independent of religious belief, from which one can infer a system of legal rules which, if given intelligible form according to a plan, can act as the basis for an orderly, reasonable, and moral life in society. The early versions of the Code civil, more strongly and directly influenced by the Revolution, are largely dominated by this idea; but its hold diminished as work on the Code progressed.

On this matter see THIEME (above p. 85) 25 ff., 38 ff.; HEINSHEIMER (above p. 74) at 7; WIEACKER, *History of Private Law* (1995) 269 f.—The Draft of the Commission originally contained an introductory section, clearly taken from DOMAT's introduction to his *Loix civiles*. Art. 1 was as follows: 'There is a universal and unchanging law which is the source of all positive laws: it is none other than natural reason, which governs all mankind.' Elsewhere the judge who finds the applicable statute unclear is instructed to decide as a 'ministre d'équité'; by 'équité' is understood 'the return to natural law, or to practices accepted in the absence of positive law' (FENET (above p. 74, II. 3, 7). The Conseil d'État deleted almost the whole of this introductory section on the practitioners' argument that *omnis definitio in iure periculosa*: 'Laws are acts of will. Definition, teaching and scholarship are the matter of science. The matter of legislation is command and disposition properly so-called' (PORTALIS (above p. 85) at p. 100).—The weakening of the influence of natural law thinking can also be seen in the changing attitude to the value of traditional legal

institutions: CAMBACÉRÈS believed that nothing but obstacles to thorough legal reform could be found 'in our institutions, our customs and our habits' (FENET (above p. 74) I. 140).—This antihistorical attitude, quite typical of the reformist zeal of natural lawyers, was not shared at all by the Drafting Committee: 'It is useful to maintain everything which it is not necessary to destroy: laws should respect social practices unless they are vicious. We too often act as if at every moment the human race came to a complete stop and made a fresh start, without any kind of communication between one generation and the next. . . . We have recently been too fond of change and reform; where institutions and laws are concerned, if centuries of ignorance have made for abuse, centuries of enlightened philosophy have too often made for excess.' (FENET (above p. 74) I. 481 f.)

Thus although the idea and conception of the Code civil are the product of the natural law of the eighteenth-century Enlightenment, the value of historical continuity was increasingly recognized as it took practical shape. The Code seemed to many contemporaries to be a 'reaction against the Revolution', but succeeding generations who have seen its extraordinary influence have acclaimed it on the ground of its 'spirit of moderation and wisdom'.

II

The draftsmen of all the natural law codes were much exercised by the question of the proper position of the judge in relation to statute. Doctrinaire adherents of the principle of separation of powers often held the exaggerated view that the judge should have no power at all to develop the law and that statutes should be so detailed that the judge could apply them quite mechanically.

Thus in the decree which introduced the Land Law of Prussia, FRIEDRICH WILHELM II expressly forbade the judges 'to indulge in any arbitrary deviation, however slight, from the clear and express terms of the laws, whether on the ground of some allegedly logical reasoning or under the pretext of an interpretation based on the supposed aim and purpose of the statute'; otherwise 'Our very great displeasure and severe sanctions will be incurred'; in cases of doubt the judges were to submit the problem to the statutory commission. The Land Law with its 17,000-odd paragraphs often amuses us today by the detail into which it descends, but its intention was to give the judge a precise answer to every question and thus to render interpretation, so far as possible, wholly unnecessary.

Here also the draftsmen of the Code civil adopted a more sensible course. It is true that during the period of the *droit intermédiaire* the principle of division of powers was still taken very seriously; thus in 1790 a statute ordained that the courts 'must apply to the Corps législatif whenever they believe it necessary either to interpret a law or to make a new one'. The Tribunal de Cassation—later the Cour de Cassation—was set up about the same time to quash judicial decisions which by these standards had misconstrued the

written law. The new system, based on the teaching of MONTESQUIEU, had no place for the sort of judicial development of law which had occurred in the Parlements under the *ancien régime*. Of course the principle that the courts must submit questions of interpretation to the Corps Législatif for a decision was never really taken seriously. The drafting committee were emphatic in their opposition to any such proceeding: the function of the legislator was to set up *general* rules; interference with the resolution of questions of interpretation affecting the affairs of private individuals would be time-consuming and undignified, the quality of legislation would suffer and lawsuits would be prolonged. Consequently art. 4 Code civil provides without any qualification that if a judge refuses to make a decision 'on the ground that the law is silent or obscure or inadequate' he may be held responsible.

The Code civil also avoids the danger of being too detailed. The draftsmen clearly realized that even the most ingenious legislator could not foresee and determine all the possible problems which might arise and that therefore room must be left for judicial decisions to make the law applicable to unforeseen individual cases and suited to the changing circumstances of society. PORTALIS's observations on this matter are among the most impressive in his *Discours Préliminaire*: they show clearly that the dichotomy between statute-law of the Continental variety and the case-law of the Common Law is by no means so fundamental as theorists of the sources of law keep trying to tell us:

'The task of legislation is to determine the general maxims of law, taking a large view of the matter. It must establish principles rich in implications rather than descend into the details of every question which might possibly arise. The application of the law belongs to the magistrate and the lawyer, steeped in the general spirit of the legislation. . . . There is a legislative skill as well as a judicial skill, and the two are quite distinct. The skill of the legislator is to discover the principles in each area which most conduce to the common weal; the skill of the judge is to put these principles into action, and to extend them to particular circumstances by wise and reasoned application. . . . To the courts may be left those unusual and extraordinary cases which no reasonable legislation could deal with, the varied and contested trivia with which the legislator had no time to deal, and all those matters which it would be futile to try to foresee, and which could not be safely defined even if one did cursorily foresee them. We shall leave some gaps, and they will be filled in due course by experience. National codes are created in time; indeed, people do not really create them at all.' (FENET (above p. 74) I. 470, 475 f.)

The best-known example of the compressed legislative style of the Code civil is found in arts. 1382-6. These five laconic paragraphs cover the entire French law of delict, a subject-matter to which the General Civil Code of Austria, otherwise so terse, having only half as many paragraphs as the Code civil, devotes about 40, and the German Civil Code 31. These rules of the

Code civil, now 190 years old, are still in force, almost unaltered despite all the economic and technological changes which have taken place, and it is therefore no surprise to find that today they are barely recognizable under a heavy gloss of case-law to which new layers are added every year. Perhaps the draftsmen of the Code civil went too far in compression here (see Ch. 40 IV); yet in 1804, when the Industrial Revolution had hardly started, the social problem of compensating the victims of accidents had nothing like the importance it has today.

The way the Code civil is drafted gives the courts room for interpretation, for its terms are often inexact, incomplete, or ambiguous, far from having the terminological exactitude which the German Civil Code inherited from the pandectists. Thus according to art. 778 of the Code civil, an inheritance may be accepted either 'dans un acte authentique ou privé' or by means of an 'acte qui suppose nécessairement son intention d'accepter': here in the same sentence the word 'acte' is used in the sense of 'deed' and in the sense of 'action', a lapse of which the fathers of the German Code would certainly not have been guilty. In arts. 544 ff. Code civil, the notion of 'propriété' is used in the sense of ownership of things (moveable or immoveable), while in the Title of the Third Book ('des différentes manières dont on acquiert la propriété') it is used in the sense of wealth of all types. According to art. 1147 Code civil, a person has to pay damages for breach of contract, unless he proves that a 'cause étrangère qui ne peut lui être imputée' was the reason for non-performance; according to art. 1148 the duty to make compensation ceases in the event of 'force majeure' or 'cas fortuit'. The relationship between 'cause étrangère', 'force majeure', and 'cas fortuit' is never made clear. The list of technical inaccuracies of this kind could easily be prolonged.

On the other hand, the Code civil is a masterpiece from the point of view of style and language. It has often been praised for its clear and memorable phrases, and for the absence of cross-references and jargon, all of which has significantly contributed to the popularity of the Code in France. STENDHAL is said to have read part of the Code every day in order to refine his feeling for the language ('pour prendre le ton'), and PAUL VALÉRY described the Code civil as 'the greatest book of French literature' (cited by THIEME (above p. 85) at 38 f.). The dry and dogmatic language of the *German* Code is very unattractive in comparison. For example, compare art. 212 Code civil with §1353 BGB. The French provision is concrete: 'Spouses owe each other the duty of fidelity, succour and companionship'. The German text offers the rather pale technical term of 'matrimonial community'. Art. 312 Code civil is almost an epigram: 'The child conceived in marriage takes the husband for its father'; in §1591 BGB the legislator goes straight into the technical details of the requirements for legitimacy. The idea *pacta sunt servanda* is given in art. 1134 Code civil a striking and almost moving formula: 'Agreements made according to law have the force of law for the parties to them'. §241 BGB on the other hand instructs us, somewhat didactically, that 'by reason of the creditor-debtor relationship . . . the creditor is

entitled to demand performance from the debtor'—a textbook formulation which admittedly makes it perfectly clear, to the lawyer at any rate, what meanings are going to be attributed in the succeeding paragraphs to the ideas of 'creditor-debtor relationship' and 'performance'. Yet the elegant sheen of the wording in the Code civil is often paid for by a lack of substance, as closer investigation shows. WINDSCHEID made the criticism 'that the famed precision of its expressions is quite often only superficial, not that true inner precision which comes from complete clarity of thought' (*Zur Lehre des Code Napoleon von der Ungültigkeit der Rechtsgeschäfte* (1847) V). An example can immediately be given: the famous formula 'en fait de meubles la possession vaut titre' (art. 2279). This provision could hardly be bettered for dramatic tautness, but one must realize that it gives only the shadowiest indication of the underlying thought: it was left to the courts of France to resolve the following questions: Under what conditions is possession a ground of defence to a *revendication*? What is meant by 'possession'? Is good faith required? If so, what constitutes good faith, and at what moment of time must it be established? §932 BGB may lack the urbanity of art. 2279 of the Code civil, but it certainly contains more precise information.

The subject-matter of the Code civil is set out as follows. A brief introductory title contains only six articles, all that remains of the much fuller *Livre préliminaire* originally planned. The *First Book* is entitled 'Des Personnes' (arts. 7–515). It opens with provisions concerning the enjoyment of civil rights; these rights, according to art. 8, attach to every Frenchman. Rules about the acquisition and loss of French nationality followed, well demonstrating the national character of the Code, but in 1927 these rules were greatly expanded and promulgated in the form of a special statute. The following few articles about the legal status of foreigners have formed the basis on which the French courts have created an impressive structure of private international law and procedure, and of law relating to foreigners. The next section contains an extensive treatment of the register of civil status; this is a matter which a German lawyer could hardly imagine as forming part of his Civil Code but it seemed especially important to the draftsmen of the Code for whom the secularization of family relationships was one of the achievements of the Revolution. The following sections deal with domicile, disappearance, marriage, divorce, children born inside and outside marriage, adoption, parental power, and guardianship. *Book Two* ('Des biens et des différentes modifications de la propriété'; arts. 516–710) starts with general provisions about things, distinguishing moveables and immoveables and dealing with components and accessories. The ownership of things, their fruits and profits, is then covered, followed by rules about usufruct and the rights of use and habitation, as well as servitudes. The acquisition of ownership by means of contract is not dealt with here, because French law adheres to the principle that a contractual act automatically operates as a conveyance of ownership (gift, sale, exchange: see arts. 938, 1138, 1583); thus there is no separate conveyance contract or delivery, actual or constructive, to be regulated by the law of property (contrast §§873, 925, 929 ff. BGB).

All the rest of the Code civil—twice as many articles as in the first two books together—falls in *Book Three*, under the title 'Des différentes manières dont on acquiert la propriété' (arts. 711–2281). First there are the rules of succession, which is seen as a special form of the *acquisition of ownership*, like gift, with which it is closely associated. There follows a section on the general law of contract, with articles concerning capacity, construction, joint debtors, contractual penalties, set-off, formal requirements, and rules of evidence; next there is a section on 'obligations formed without agreement', consisting of eleven provisions on the law of unjustified enrichment ('quasi-contracts'; see Ch. 38 III); and then the five articles on the law of delict. Next comes matrimonial property law, and then the special contracts—sale, exchange, lease, the contract of services and of service (employment being treated, on the Roman model, as a 'contrat de louage'), then partnership, loan, deposit, agency, suretyship, and compromise. Book Three ends with security rights (pledge, hypothec, and lien) and prescription.

The structure of the Code civil is plainly unsatisfactory. Matrimonial property law would be much better placed next to the law of husband and wife in the First Book, and the law of succession, instead of being placed with the property law in Book Three, might have been better grouped with family law or put in a separate book of its own. To say that a claim for compensation based on tort is a special 'mode of acquiring ownership' seems to miss the point. PLANIOL is justified in saying that Book Three is a rag-bag of heterogeneous matters:

'It is not very logical to put all these various topics in a single book' (*Traité élémentaire de droit civil* I (5th edn., 1950) 33). It is true that PLANIOL does not regard the absence of scientific order in the Code civil as very serious: 'A scientific order, although very suitable in a lecture-course or a textbook, is neither necessary nor even useful in a code. Teaching requires a special method because it is a kind of initiation. Codes are made for people who have completed their studies, practitioners who are familiar with the law. In consequence, it is enough that the topics be set out in a clear and convenient manner' (id., 36).

III

The original Code civil was the law-book of the third estate, the bourgeoisie which in the French Revolution had worsted the feudal groups dominant in the *ancien régime* and subsequently, in the Restoration after the fall of NAPOLEON, had consolidated its position with growing self-confidence and political influence. The ideal man in the mind of the draftsmen is therefore not the little man, the artisan or the day-labourer, but the man of property, the responsible man of judgment and reason, knowledgeable about affairs and familiar with the law, and it is this ideal which gives the Code its particular flavour. In this view, the existence of the bourgeoisie depended

on guaranteed personal freedom, especially the freedom to engage in economic activities, and on property, especially landed property. Freedom of contract is therefore the principle which dominates the law of obligations in the Code civil, restricted as little as possible by mandatory rules of law, called in France 'lois d'ordre public' (see art. 6). Consonant with this view of the citizen's responsibility is the conclusion evinced by the general formula of art. 1382 Code civil, that if a person causes harm by behaviour which is reprehensibly careless ('faute') he must pay for it; this accommodated both the freedom of activity and the individual's desire for responsibility which *stricter* forms of liability might have narrowed and constrained. The great problem of how to regulate the position of the dependent worker was not recognized by the legislator, but unlike the draftsmen of the German Civil Code of 1896, he is not really to be blamed for this, since in 1804 industrial mass production had hardly started. The rules of family law in the Code civil reflect the patriarchal family typical of the successful bourgeoisie of the early nineteenth century; the husband and father is head of the family, and it is he alone who has paternal power over the children, including the power, by refusing his permission, to prevent the marriage of his son until 25 and his daughter until 21. As for the relationship of the spouses, the original art. 213 Code civil speaks for itself: 'The husband must protect the wife, the wife obey her husband.' The wife was supposed to be running the household and educating the children, and to be unexperienced in business affairs; without her husband's permission therefore she could neither enter contracts nor conclude dispositions, even when the spouses had chosen by antenuptial contract to retain their separate property. Interference by the state in the closed family circle was regarded as intolerable; the supervision of guardians and juveniles now performed by officials was given to a 'conseil de famille', including more distant relatives such as uncles, aunts, cousins, and in-laws, who were then part of the family in a way which is not usual today. The great protection afforded to the family circle is a leading characteristic of French family law, and its concern to preserve the family property has had an effect on the law of succession as well. There are severe restrictions on the freedom to dispose on one's assets by gift or will as one chooses: even today in France a person can dispose only of a *part* of his property—the so-called 'quotité disponible'; as to the rest, called the 'réserve', members of the family have more than just a right to monetary payment of their statutory part, they are actually forced heirs.

When one considers what economic and social changes have occurred since the time of NAPOLEON, and how differently the family is now regarded, one may well ask how the Code civil can have remained in force in France until this day. How can a Code which came into force nearly 200 years ago have withstood the tremendous political, economic, and social storms which have raged over France in the nineteenth and twentieth centuries?

In many areas, especially in family and inheritance law, it is the *legislator* who has kept the Code in line with changing social reality by altering its text. *Patria potestas* has been gradually eroded, the business capacity of the married woman admitted, her position on the death of her husband improved, and the right of illegitimate children to be maintained or recognized by the father accepted. In the law of contract also, wherever it was clear that the free play of contractual autonomy led to consequences which seemed unacceptable to new social value-judgments, the legislator has expanded or modified the rules of the Code civil, mainly by special statutes. Thus in the contracts of lease, carriage, employment, and insurance so many mandatory provisions are imposed by law that almost nothing is left of the unrestricted freedom to conclude and determine the content of contracts which so appealed to the draftsmen of the Code civil.

But the *courts* (*jurisprudence*) as well as the legislator have played a leading part in adjusting the rules of the Code civil to modern requirements; they have continually been construing these rules so as to develop, extend, or limit them and have brought new legal ideas into play as well as developing old ones. The task of the courts in this has been made easier because, as we have already seen, the principles of the Code civil are often unclear and deliberately designed to require completion, the concepts used are frequently indefinite and ambiguous, many individual rules are incomplete, and the systematic interplay of different provisions is often faulty. It is easy to give examples of the creative legal activity of the French courts. For instance, out of the rule of art. 1384 of the Code civil they have developed a law of *accident compensation* which is much better adapted to the special dangers of the modern world with its advanced technology than the system of compensation which the draftsmen of the Code had in mind (see Ch. 42 III). In labour law the courts, strongly supported by the legislature, have developed rules for the social protection of workmen and employees which go far beyond the inadequate provisions of arts. 1780 f., and indeed this whole important area of law now really falls outside the Code civil and, as in Germany, is widely regarded as being an independent area of law. The courts developed the doctrine of abuse of rights which has proved useful in limiting the right of the owner of property to deal with it exactly as he chooses (see art. 544 Code civil), the right to dismiss an employee, the right to strike, the right to take steps in legal procedure and other rights, for if the exercise of a right seems to a court to constitute an abuse of right (*abus d'un droit*), an injunction may be issued or liability in damages imposed (see Ch. 40 IV). Art. 1121 Code civil permits some contracts for the benefit of third parties and invalidates others, all in rather obscure language; here the courts developed rules relating to the *insurance contract*, which the legislature took over into the statute of 1930. The courts also developed a general claim based on *unjustified enrichment*, which had received an extremely patchy treatment

in arts. 1376 ff. Code civil in relation to the payment of a thing not due (see Ch. 38 III). There was no statutory regulation at all of the 'astreinte', a legal device for enforcing judicial orders for performance, and this the courts themselves developed. The practice of the courts has also played a significant part in family and inheritance law. Thus, to give a few examples, the courts have so qualified the strict prohibition of successive heirship in art. 896 Code civil than one can now create successive entitlements to an inheritance simply by having one's will skilfully drafted. Many years before the enactment of the basic reform statutes, the courts had accepted claims for maintenance by an illegitimate child, although this was hard to reconcile with the original meaning of art. 340 Code civil, according to which *any* 'recherche de la paternité' was excluded.

'Thus quite large areas of French private law have ceased to be *droit écrit* and have become common law, almost without our noticing it. The famous and striking opposition between the sources of law recognized by Anglo-Saxon and French law respectively has been very materially reduced.' (RIPERT (above p. 85) II, 15, no. 9.) There have frequently been lively disputes in France on the question whether or not judicial decisions are strictly speaking a source of law. The dominant view is still that they are not; but great scholars like PLANIOL, JOSSERAND, LAMBERT, and HÉBRAUD have accepted that they are. Fortunately people are becoming tired of this question, for it is now clear that one's answer depends entirely on one's definition of 'source of law'. If the test of a rule is its validity in social reality and its viability in fact, then there can really be no doubt at all that the rules which have been created by the courts and confirmed by repeated decision have all the qualities of rules of law.

As the Code aged, *legal writing (doctrine)* became increasingly significant in the development of French private law. In the years immediately following the enactment of the Code legal writing went through an unfruitful and positivistic stage, merely expounding the text of the Code, grammatically and logically, and ignoring judicial decision entirely (*école de l'exégèse*). The picture changed, however, towards the end of the nineteenth century. Under the influence of GÉNY and SALEILLES, scholars realized that the school of exegesis was not giving any help to judges in the task of applying the Code civil to changed circumstances; GÉNY's new school, called the 'école de la libre recherche scientifique', allowed the judge a greater freedom with the text of the Code and encouraged him to construe the Code not simply logically and systematically, but in the light of the requirements of society as it developed, the actual usages and practices in the relevant areas of commerce, and also the results of the researches of sociologists and comparative lawyers.

In this dispute between the schools the multi-volume treatises of French private law, of which the three most important and comprehensive are those of BAUDRY/LACANTINIERE, BEUDANT, and PLANIOL/RIPERT, took an intermediate position. These treatises all have their own refined systematic structure, often quite different

from the statutory structure of the Code civil, but, thanks to the practical and sober good sense of French jurists, never lose themselves in exalted subtleties of doctrine. They all deal carefully with judicial decisions, which are sometimes criticized quite severely, though never with that dogmatic tone of dismissal occasionally to be found in German textbooks. In language and style these treatises are often of splendid eloquence and perfect lucidity, even if one sometimes has the feeling that the text could be compressed somewhat without any loss of substance. This is less true of the more recent textbooks, of which those of COLIN/CAPTANT, CARBONNIER, MARTY/RAYNAUD, and MAZEAUD call for especial mention. Often enough the development of French law has been spurred on not by textbooks or articles, but by case-notes; those by THALLER and LABBÉ, the best-known 'arrêtistes' of the nineteenth century, are especially important for the basis of modern French private and commercial law.

With the help of legislation, judicial decision, and legal writing, the Code civil has been able to adapt itself to modern developments; this can be seen from the fact that though there have frequently been demands for a thorough overhaul of the Code, all attempts have so far proved abortive. In the centenary year of the Code civil, 1904, a committee was set up to reform it, consisting of 100 persons, many of whom were not lawyers; their labours soon ground to a halt. Another committee charged with the reform of the Code civil was set up in 1945, in the first flush of post-war feeling; it had only 12 members, under the chairmanship of JULLIOT DE LA MORANDIÈRE. Professor of the Paris Faculty of Law. In 1954 this committee produced the draft of an Introductory Book and of Book One, on the law of persons and the family, and in 1961 it produced a draft of Book Two, on the law of inheritance and gift, but neither of these drafts led to actual legislation. Recently the work of the committee of reform has come to a complete stop, and instead the French legislator has undertaken partial reforms of the Code civil, of which the most important concern matrimonial property law, the law of adoption, the legal position of illegitimate children, and the rules of incapacity.

Although the proposals for total reform led to nothing, the discussion and documents of the committee of reform (Travaux de la commission de réforme du Code civil (1974 ff.)) are full of interest to those concerned with questions of comparative law and unification of law. On this, see JULLIOT DE LA MORANDIÈRE, 'The Reform of the French Civil Code', 97 *U. Pa. L. Rev.* 1 (1948); HOUIN, 'Les travaux de la commission de réforme du Code civil', *Rev. trim. dr. civ.* 49 (1951) 34; PASCAL, 'A Report on the French Civil Code Revision Project', 25 *Tul. L. Rev.* 205 (1951); ANCEL, 'The Revision of the French Civil Code', 25 *Tul. L. Rev.* 435 (1951).