

# Two Hundred Years of a Famous Code: What Should We Be Celebrating?\*

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## 1. Introduction

In WALPOLE'S *Anecdotes of Painting* we are told the terms set by Oliver Cromwell for the painting of his portrait.<sup>1</sup> He thus told Peter Lely to "remark all these roughnesses, pimples, warts, and everything as you see me, otherwise I never will pay a farthing for it."<sup>2</sup> Since neither the portraitist nor the subject were in any way diminished by the degree of frankness thus imposed (and achieved), the lesson for anyone celebrating the 200th anniversary of the French Code (CC) is clear. One must strike a balance between a panegyric, which some may feel an auspicious event such this calls for, and an accurate and thoughtful assessment of an historic enactment. To achieve this it seems to me one must try and pinpoint the Code's legacies for, indeed, there may be more than one.

Two hundred years of existence is a long time. The British who rightly lay great store on tradition will respect this. Yet, let us start by enquiring how many of the original provisions of the text we are celebrating are still in force?

On the last count, 1,115 original provisions survive out of the original 2,281.<sup>3</sup> That is just less than half. The last time such a count was attempted was in 1965.<sup>4</sup> At that time, 1,716 articles remained intact. It would seem, with the passage of time, the death of the cells accelerated. Indeed, remaining with our human metaphor, we are now celebrating the birthday of a person who has had a heart, lungs, and liver transplant. Depending how one looks at the patient, one could argue that even more of his features have gone during his long life! In many respects he is a different person; yet he is still alive. That is no mean achievement.

But what does our birthday man look like? The Code has for long been recognised by its good looks. By this I mean its lapidary style—a style which reputedly led Stendhal, when writing his *Chartreuse de Parme*, to claim that he read its text at least once a day in order to enjoy good French.<sup>5</sup> No doubt this was true of many of its famous provisions.

Consider Article 312: *L'enfant conçu pendant le mariage a pour père le mari.* (The child conceived in marriage takes the husband as its father). Or recall Article 2279: "*en fait des meubles possession vaut titre.*" (In the case of movables, possession means title). As ZWEIGERT and KÖTZ rightly state: "This provision can hardly be bettered for dramatic tautness";<sup>6</sup> and it was not the only one, all of which

<sup>1</sup> Horace WALPOLE (1876), *Anecdotes of Painting in England*, Vol. 2, reprinted in 1969, Arno Press, New York, p. 94.

<sup>2</sup> Id.

<sup>3</sup> Gérard CORNU (1965), "La Lettre du Code à l'Épreuve du Temps", in *Mélanges Offerts à René Savatier*, Dalloz, Paris, pp. 157 ff., p. 181.

<sup>4</sup> See generally id.

<sup>5</sup> See Jacques GHESTIN & Gilles GOUBEAUX (1983), *Traité de Droit Civil : Introduction Générale*, 2<sup>nd</sup> ed., Librairie générale de droit et de jurisprudence, Paris, p. 94 (citing a letter to Balzac).

<sup>6</sup> Konrad ZWEIGERT & Hein KÖTZ (1977), *Einführung in die Rechtsvergleichung: auf dem Gebiete des Privatrechts*, Mohr, Tübingen; translated by Tony WEIR (1998), *Introduction to comparative law*, 3<sup>rd</sup> ed., Clarendon Press, Oxford, p. 92.

may accounted for the fact that the Code proved so exportable as a legal model of regulating the bulk of private law.

Yet our German friends do not pay compliments easily; and in the case of Article 2279 for instance—and many other examples have been given by them—they observed “that it gives only the shadowiest indication of the underlying thought.”<sup>7</sup> Windscheid, that great German Romanist who was to have such a direct impact on the drafting and content of the newer (1896) and much more dour German Civil Code (BGB), thus thought that the French Code lacked the “true inner precision which comes from complete clarity of thought.”<sup>8</sup> So, still looking at Article 2279 CC, what does possession mean? Is good faith necessary? What amounts to good faith? And when must it exist?

These criticisms of the Code civil must not be dismissed lightly. The German Pandectists of the nineteenth century spent much time and effort discussing these issues. Paragraph 932 BGB was their answer. Whereas Article 2279 CC amounts to seven words, its German counterpart runs to nine lines. Like most German legal writing, judicial or legislative, the wording of Section 932 leaves little to the imagination. The nineteenth century German debates over the precise meaning of possession, detention and the like did not impress everyone. Among their American admirers, Holmes was among the most sceptical.<sup>9</sup> The entire literature on this subject has now receded into the background. Its intellectual depth deprived of much of its original allure. This brief assessment of the German approach shows its strengths but also suggests some weaknesses. Among the latter, one counts the fact that it makes the exportation of a legal culture—important when export of ideas can, especially these days, be as important as the export of goods—much more difficult. On this point therefore I would be inclined to call the French/German competition a draw though, representing as I do a culture which also adopts a cumbersome legislative drafting style, I should, perhaps, disqualify myself from any attempt to formulate a final judgment.

Yet I am not over with Article 2279 CC. For, when all is said and done, what the Germans put in their code, the French judges worked out themselves, in most cases in very similar ways. In that sense, it brings French law closer to our law—(unlike us) in theory attached to principle but (like us) in practice moving from case to case and leaving it to the judge to work out the rules in response to real facts. Having said this I must again contradict myself and remind the reader of the (unfortunate) contemporary tendency of the English courts to put up their hands and seek the help of the legislature. Thus, let us not forget three major examples from my own area of prime interest: the law of torts: Lord Goff’s abandon of the law of strict liability to what strikes me as a very Germanic

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<sup>7</sup> Id.

<sup>8</sup> Id. (quoting B. WINDSCHEID (1847), “Zur Lehre des Code Napoleon von der Ungültigkeit der Rechtsgeschäfte”, in V).

<sup>9</sup> See G. Edward WHITE (1993), *Justice Oliver Wendell Holmes: Law and the Inner Self*, Oxford University Press, New York, pp.134–35 (discussing Holmes’ view that the theories of German jurists on possession were not consistent with or faithful to common law decisions, and thus had an overall negative impact).

legislative approach;<sup>10</sup> Lord Steyn's cry for help on the issue of psychiatric damage which he thought had passed the point of judicial redemption;<sup>11</sup> and, most recently, Lord Hoffman's (illusionary, in my view) appeal to Parliament to do what needs to be done in the law of privacy.<sup>12</sup>

This is no place to compare the (real or apparent) attachment to principle rather than pragmatism or to compare drafting techniques, be it of legislation or of judgments. Yet a marker must be put down for the discussion that will follow in section three, below since PORTALIS' views still deserve to be taken seriously. In particular, we must guard ourselves against the danger of equating detailed legislative drafting with mature thought. For the French judicial technique was not accidentally opaque but (often) deliberately broad to accommodate expansion since PORTALIS repeatedly stressed that "the foresight of the legislator is limited."<sup>13</sup> In this sense the brevity of the texts was not just a generator of problems but also a source of beneficial development. For the supple wording of the texts made the growth and modernisation of French law depend very largely on the constant co-operation of the three agents of law: judges, practitioners, and academics. I personally find this co-operation attractive; and even believe that a form of it is now beginning to emerge in England as it already exists in the United States.

We can illustrate this point briefly by looking at two important articles of the Code: 1121<sup>14</sup> and 1384. Both are models of the epigrammatic, manifesto-like style of the period when the Code was drafted. They were formulated when the subjects they addressed—respectively, contracts in favour of third parties and strict liability in tort—were legal topics which were either non-existent or in their infancy. By the end of the nineteenth century this was no longer so. Both of these provisions were thus called upon to resolve problems which had become associated with new pressing social issues which could not find their answers in the text of the Code as originally drafted. These issues were the morality and validity of life insurance contracts (and, eventually, third party insurance generally: Article 1121 CC) and the growing number of industrial and, later on, road accidents (Article 1384 CC).

The broad wording of these provisions, so mistrusted by German colleagues, provided the salvation. For the French courts, in a casuistic manner that would be recognised and even admired by Common lawyers, gradually crafted them to produce solutions which had not been conceived by the legislator.

<sup>10</sup> See *Cambridge Water Co. v. E. Counties Leather Plc.*, [1994] 2 A.C. 264, 305 (1993) (Eng.) (arguing that "as a general rule, it is more appropriate for strict liability . . . to be imposed by Parliament, than by the courts")

<sup>11</sup> See *White v. Chief Constable of South Yorkshire Police*, [1999] 2 A.C. 455, 500 (1998) (Eng.) (stating that "the law on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify . . . . It must be left to Parliament to undertake the task of . . . law reform").

<sup>12</sup> See *Wainwright v. Home Office*, [2003] U.K.H.L. 53, para. 34 (2003) (Eng.) (rejecting the invitation to declare a general common law tort of invasion of privacy), available at <http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldjudgmt/jd031016/wain-1.htm> (last visited Apr. 19, 2004).

<sup>13</sup> J.E.M. PORTALIS (1827), "Présentation au Corps Législatif, Exposé des Motifs", in P.A. FENET (1968), *Recueil Complet des Travaux Préparatoires du Code Civil*, Vol. 6, Sëller, Osnabrück, p. 360.

<sup>14</sup> In the case of Article 1121 CC, not only the text is brief but it is also opaque, in part reflecting an original intention to give it a narrow scope.

Thus, the barely intelligible Article 1121 CC was, effectively, altered in content, though it is still part of the surviving fabric. In terms of substantive law, however, one could argue that the end result was ahead of the English. Thus, contracts in favour of third parties were recognised in France<sup>15</sup> just over one hundred years before the English Contracts (Rights of Third Parties) Act 1999 addressed comprehensively the problems that existed because of the absence of this institution. And the introduction of strict liability for traffic accidents has still to become law in my country, the status quo depriving many road victims the chances of getting some compensation quickly and without recourse to the courts.

These solutions to major problem areas of substantive law are not easy to describe, let alone appraise comparatively, in a few sentences. Up to the very end, one could find Common lawyers who thought that the Common law muddled on quite well, even without the legislative sanctioning of contracts in favour of third parties by having recourse to other devices—judicial and legislative. The particular developments could be seen as controversial. Maybe they are incapable of attracting a unanimous reaction from lawyers, be they French or English, though one must note that towards the end of the last century the Law Commission in England thought reform had become essential. But that is not why I mentioned these examples. I cited them instead in order to show the reader one of the French Code's greatest legacies: the need to develop its bare bones through a constant and close collaboration between the judicial and academic worlds. So French judges deliver their Delphic pronouncements; the *arrêtistes*<sup>16</sup> explain them and embroider them; the judges then take into account these writings, and the process moves on. In France, the academic has never been the dominus he has been in Germany but nor has he been the junior partner of the law making process he has been in England. There is something attractive in the ideas of equilibrium and co-operation.

Continuing in this manner would produce a paper suitable for a Faculty seminar destined for a few and not a general essay celebrating an important anniversary in the life of Europe's oldest code aiming for a broader audience. Suffice it thus to say that such an examination of the French system, in close and focused juxtaposition with the English and the German, can show how the same problems have occupied us all on both sides of the channel; how our methodology has often been different and how, despite the preceding observation, our final results have, invariably, been analogous. All of which may be interesting and, even, educationally instructive. Yet it is still not the main lesson we ought to draw from the Code. For if that is all the Code can teach us, it is not enough for the Code to occupy a permanent place in either our minds or our curriculum. A more enduring, more universal, legacy is what we need; and to find this I think we must move to legal sociology and politics since legislation is essentially a political act. Once we reset our target in this way, I think we can move closer to discovering the enduring legacy of the enactment of the French Code; and this, as hinted, may be different for the French people on the one hand and the rest of us on the other.

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<sup>15</sup> Cass. civ., Jan. 16, 1888, S. Jur. I 1888, 609 (Fr.). The immediate problem which prompted the French law development was, in England, addressed by the Matrimonial Act of 1882; but its wording was restrictive and other devices had to be found to solve the wider problems.

## 2. *The Durable Legacies*

The enactment of a code—this Code in particular—can teach different things to different people; certainly, when I have discussed this issue with French colleagues we have not always picked out the same things to admire. What follows then gives the views of an outside observer. On most occasions this is what comparatists are; and this is the source of their greatest strength as well as weakness!

### 2.1. **The Importance of the Charismatic Personalities**

This heading, no doubt, leads us to the Code's main creator—Napoleon. I am not here talking about his personal role as (occasional) chairman of the Drafting Committee<sup>17</sup> but as the “facilitator” who made the long dream of a Code finally come about a good three hundred years after it was first canvassed as a desirable institution of the gradually emerging unity of the French state. In expressing a view on such a man, one cannot escape the fact that Napoleon, the subject of an estimated 250,000 books and articles, has been as controversial as he has been fascinating. The fact also remains that the views politicians and historians have had about him have varied with their times, as Napoleon and his work lent itself to differing interpretations which could be used to support his biographers' contemporary pre-occupations or agendas. If this switch of emphasis moves us—temporarily—away from purely legal issues, it is well and good. For, as stated, behind the Code we find first and foremost a political will. And it is this will, which the contemporary Europeans, as well, now have to discover, to a greater or lesser extent, as they are called upon to decide the possibility of European legislation. Will and timing thus become the true determinants of what happens; and let us not forget that both are essential to an enduring outcome.

As stated, the literature is vast and, understandably, very uneven. In it, Napoleon the military leader is not often distinguished from Napoleon the administrator and reformer. The years of the Empire (1804–1815) and the earlier period of the Consulate (1799–1804) are also not kept clearly apart.

This early Napoleonic period contains the most durable part of the great man's legacy. For it is during these few years that one finds the creation of the Bank of France (1800), the Prefectures<sup>18</sup> (1801), the reconciliation with the Pope (1801), the creation of the lycées<sup>19</sup> (1802), the Légion d'honneur (1802), and the stabilisation of the currency (1803), not to mention the creation of the modern form of state administration, with its pioneering and extensive use of statistics which, in its

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<sup>16</sup> I.e., the learned professors and other commentators of court decisions.

<sup>17</sup> Various figures are given as to how many meetings Napoleon chaired. About half of over one hundred is probably close to the truth. The remainder were chaired by Cambecérés who, at the time, was the Second Consul.

<sup>18</sup> The administrative divisions of France which began in the early years of the Revolution.

<sup>19</sup> These are the secondary state schools which still function and which replaced the older schools almost exclusively run by the Catholic Church. Many of them rival the reputation of some of our best grammar schools.

essentials, was then exported to most of Europe.<sup>20</sup> Needless to add, this is also the period that saw the enactment of the Civil Code (1804). In Saint Helena, Napoleon told Count Emmanuel-Joseph LAS CASES, an old aristocrat and latter-day friend who accompanied him there and then recorded the Emperor's last thoughts,<sup>21</sup> that his "memory will be made up of facts which words alone will not be able to destroy."<sup>22</sup> The points made in this paragraph are facts. They project Napoleon in a favourable light and one which is very different from the military image of the more confident, indeed authoritarian, character of the later years of the Empire when over confidence turned to arrogance which then led to his two greatest mistakes: the over-estimation of his power and his luck. More importantly for us, however, these years also pose one question: how did these achievements come about—especially the enactment of the Code? Understanding these better may be useful as Europe is rapidly increasing the harmonisation of its laws and may even stand poised to enact a European code.

As already stated above, because the kind of nuanced approach advocated above is not always scrupulously adopted Napoleon can be represented as authoritarian; a man who like Bismarck, three quarters of a century later, liked to impose his will on others without caring about their own. Geoffrey ELLIS, for instance, tells us that he was "utterly convinced that he was always right . . . [and] authoritarian."<sup>23</sup> Authoritarian, as we noted, he increasingly became; and his lust for power led, even during his lifetime, to unfavourable comparisons with Washington. But Napoleon was also perceptive; and at the beginning of his power he read the mood of the French people correctly. This ability to accept what was viable from the past and not tear it down (as the revolutionary period had on several occasions tried to do) was a sign of Napoleon's ability to be in tune with his times, and also be ahead of them. And in 1799, the times that made it propitious for him to assume the reigns of power after the coup de état of 18/19 Brumaire, cried out for a compromise, stability, and calm. The product of the drafting debates thus had to avoid some of the excesses of the *droit intermédiaire* which, in its pursuit of some of its cherished dogmas had shaken marriage, family relationships, and paternal power.<sup>24</sup> But the final settlement contained in the Code also had to accept some of the boldest moves from the early revolutionary years among which one must surely include the expropriation of the lands of the church and the aristocratic émigrés who fled France in waves leaving them to the middle classes to purchase at bargain prices.<sup>25</sup> Indeed, many a study has shown how the middle classes, especially the landed middle classes, were the economic beneficiaries of the

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<sup>20</sup> With or without adaptations and a varying degree of resistance. See Stuart J. WOOLF (1991), *Napoleon's Integration of Europe*, Routledge, London, ch. 3.

<sup>21</sup> See Emmanuel de LAS CASES (1823), *Le mémorial de Sainte-Hélène*, 1956 ed., Librairie Gallimard, Paris.

<sup>22</sup> Id., entry of 21 October 1816.

<sup>23</sup> Geoffrey ELLIS (1997), *Napoleon*, Longman, London & New York, p. 6 (emphasis added). To be fair to M. ELLIS, however, one must note that the point here stressed does emerge later in his book. See id. at pp. 197–214.

<sup>24</sup> These points are elaborated with great lucidity in Xavier MARTIN (2003), *Mythologie du Code Napoléon: Aux Soubassements de la France Moderne*, éditions Dominique Martin Morin, Bouere, pp. 403–52.

<sup>25</sup> Which became known as the biens nationaux.

revolution; and the code safeguarded their gains<sup>26</sup> and gave full effect to their aspirations, something which the (self) exiled nobles of the ancien régime never came to accept.

But there were other matters that troubled the codifiers. On contract the legal inheritance was clear: Roman law was the main source (as presented and explained by the great seventeenth century lawyer Domat, and his eighteenth century counterpart, Pothier). But on matters of matrimonial property, inheritance, legitimacy of children, and divorce the views were as different as were the solutions that prevailed in the many areas of customary law. The differences were not just differences in local customs; they were also differences about what we would now call general issues of legal theory (compounded by a heavy dose of political arguments) such as retroactivity of laws, which the revolutionary purists wished to apply at least as far back as 1789.

In other matters, wider political issues were entangled: the relationship with the Catholic Church was one; and we must not forget how much the Church suffered after the revolution and yet how it continued to command strong support, especially in some areas of the South and West of France.<sup>27</sup> It is here that we begin to see Napoleon's ability to compromise and take into account public opinion.

Both these qualities can be seen in his signing of the Concordat of 1802 which achieved a settlement with the Pope on the political front.<sup>28</sup> The need for a compromise with the Pope was evident once the infamous law of 3 ventôse (21 February) of 1795, permitting freedom of conscience but seriously restricting freedom of religious expression, was increasingly shown to be unenforceable. The need for a compromise, in the light of the open refusal of the countryside to abandon the "refractory" priests, was, in retrospect, quite obvious. And yet, at the time, the disorganised Directorate did not see what became obvious to Napoleon soon after the assumption of power after the coup of 18/19 Brumaire.

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<sup>26</sup> Among them one includes particularly the state sale of lands belonging to members of the nobility which fled France in waves during the early years of the revolution. Their restoration to the rightful/original owners was famously championed by the Count of Provence (future King Louis XVIII), in his declaration of Verona of 1795 and, again, after the restoration of the monarchy in 1815. But on this issue the clock could not be turned back and the interests of the mainly middle class people who had acquired them could not be ignored. Napoleon's Code acknowledged this, unequivocally showing, once again, how much closer his ear was to the ground than that of his opponents.

<sup>27</sup> On October 28, 1789, the Constituent Assembly reorganised the Church by what became known as the Civil Constitution of the Clergy. The nationalisation of Church property was as serious a blow to the Church's autonomy (and wealth) as was the decision to entrust the election of all curés and bishops to the so-called "active" citizens (i.e., citizens with a certain amount of annual income) of the country. The constituents also imposed an oath of loyalty to the entire constitution which, at the time, was taken by some sixty percent of the cures but only a tiny fraction of bishops (including the subsequently famous writer, Foreign Minister, and brilliant but opportunist politician, Talleyrand (then Bishop of Auban)) known as the "constitutionals." The remainder (who did not take the oath and who with the passage of time grew in numbers) were not allowed to officiate mass. They became known as "refractories."

<sup>28</sup> The complex (and long drawn-out) settlement with the Pope reached a compromise over the election of Bishops (the right to nominate passed to the State, and the old bishops never returned) but did not go back on the confiscation of ecclesiastic properties or the abolition of the special church taxes. In exchange, however, an obligation was imposed on the state to pay the salaries of the clergy.

The same compromise was transposed on the legal front. For divorce was recognised, though denied some of the excesses of the revolutionary period which had rid it of all formalities and made it freely available. Thus, the very man who had the courage to reach a settlement with the Church was the same man who deprived it of the great grip—spiritual and financial—which it had on both officiating marriages and denying the validity of divorce. Indeed, Napoleon who, eventually, decided to divorce his first wife—Josephine—for reasons of state (she could not give him an heir), did so on the basis of mutual consent. In this, he may have been giving effect not only to the feelings of deep affection towards her. For, to his favouring of divorce as an institution, we must add his belief in the danger (which he had stressed at the Code meetings) that marital disputes attract a lasting degree gossip and cause harm that endures. Indeed, even in the final separation act from his wife, ceremoniously announced in the Tuilleries Place in 1809, he retained a degree of grace which is not found even in our days of reputed greater civility; for he allowed Josephine the right to carry her Imperial title even after her divorce!

## 2.2. More About Compromise and Taking Advice

Important though I think the above-mentioned points may be, they are still not the main point I wish to make. My essential point is different and refers to compromise and synthesis being part of that elusive quality: leadership and legislating.

Leadership involves the ability to see what is coming and not just to cling to the past. Leadership also means knowing how far to go and when to stop or take into account the views of others. Thus, while on the military field Napoleon might have sought complete victory (and very nearly got it), in the internal policies of his early years he strikes me—an outsider amateur—as being more conscious of the need for compromise and even consensus. His favourite expression was “national reconciliation.”

Studying Napoleon as an administrator, as an organiser of a state, as man who brought France out of the financial bankruptcy of the revolutionary years, even as the man who started rebuilding Paris,<sup>29</sup> we see three features which I for one find admirable and, I feel, are not widely stressed in the Anglo-American world.

First is the desire to use old talent as well as to discover new. This is not a revolutionary but a synthesizer who knows to throw out what is bad of the old but keeps what is good and then combines it with the new. Secondly, I see a politician who is surrounding himself by talent, indifferent to its past loyalties; indeed, in attracting able people around him Napoleon often brought near him people—soldiers, diplomats, even his own chief surgeon—who later betrayed him when

they sensed that power was slipping from his hands! And thirdly, I see a leader who, in the pursuit of his aims, he combines force, persuasion, and guile in his willingness to caress human weaknesses.<sup>30</sup>

### 2.3. A Workable Team

All of the above points become clear when one sees who drafted the Code and how they were selected.<sup>31</sup> Leadership requires the leader to have the political talent to utilise all the forces which are at work to one's advantage; and Napoleon did this not because they gravitated to him once he had prevailed but because he took the trouble to seek them out. The first forty appointments on the Council of State, an important body of the Consulate entrusted with the preparation of bills (and the precursor of the most respected court of modern France), "were chosen less for their political background than for their expertise."<sup>32</sup> His ability to attract people who were useful to him extended even to those with whom he had crossed swords in the past.<sup>33</sup>

Napoleon's eclectic utilitarianism is, again, evident, in the selection of the four-man committee entrusted with the task of drafting the text of the Code—Tronchet, Bigot-Préameneu, Portalis and Malleville. For they represented legal practice, but at least two of them had an open mind and a strong predilection towards legal theory.<sup>34</sup> Their legal expertise also covered the interests of the Teutonic North (Tronchet and Bigot) and the Romanesque South (Portalis and Malville). Indeed more than that, for these draftsmen, who were supposedly articulating the voice of the new regime, also had a foot in the old one. Tronchet, for instance, who had defended Louis XVI when prosecuted (and eventually executed) in the 1790's, could thus even be seen as a "turn coat" at worst, a supreme realist at best.<sup>35</sup> PORTALIS, as well, was (intellectually) more in tune with the past than with the revolutionary "present" when he argued repeatedly that a transnational and transtemporal legal scholarship could be used to complete the Code.<sup>36</sup> As one of the most perceptive contemporary historians of the French Revolution has put it: "In this way the homeopathic synthesis which was one

<sup>29</sup> Georges POISSON writes how Napoleon often hesitated when important architectural decisions had to be taken as well as how he deferred to the judgment of experts whose views he would seek and then weigh against competing opinions. See generally Georges POISSON (2002), *Napoléon Ier et Paris*, Tallandier, Paris.

<sup>30</sup> The award of honours, and in later years, titles of nobility was often used to caress human vanity and win people to his side. A few failed to succumb, among them La Fayette, perhaps because his stay in the United States had imbued a suspicion for civic honours.

<sup>31</sup> See generally Laurence CHATEL DE BRANCION (2001), *Cambacérés: Maître d'Oeuvre de Napoléon*, Perrin, Paris, p. 287, for an interesting background discussion.

<sup>32</sup> Donald M.G. SUTHERLAND (1986), *France 1789-1815: Revolution and Counterrevolution*, Oxford University Press, New York, p. 347.

<sup>33</sup> We see this, for instance, in his relations with Benjamin Constant, a lawyer, politician, and author of some repute. This relationship, which frequently touched upon forms of government, merits at least an article of its own

<sup>34</sup> Malville, for instance, had practiced at Bordeaux before becoming a judge. Tronchet had followed the same career pattern.

<sup>35</sup> In fact, he was the only lawyer whom the King personally chose to defend him.

<sup>36</sup> See J.E.M. PORTALIS, "Expose des motifs : De la Publication, des Effects et de l'Application des Lois en General", *Ecrits et Discours Juridique et Politiques*, 1988 ed., pages 65-78.

of the First Consul's secrets took effect: moderating the French Revolution with a pinch of ancien régime."<sup>37</sup>

Napoleon's search for talent is thus earnest, constant, not episodic. To be convinced about this one only has to look at areas other than law and there, again, one finds the same pattern of behaviour. It is precisely because my research has shown this in many, diverse areas of administration that it strikes me as so important and, again, so little noted in Anglo-Saxon circles. For this predilection shows both his willingness to open up all posts to merit—indeed, this was one of the most enduring achievements of the Revolution—but also his own self-confidence to promote diversity of opinion as part of his wider scheme for national reconciliation and not to feel compelled to be surrounded by “yes-men.”<sup>38</sup> Many illustrations could be given but the following may be appropriate from an academic commentator who has had quite some experience in “university elections.”

The election of Chateaubriand to the Académie Française was something Napoleon favoured, having greatly admired the former's *Génie du Cristianisme*, a religious work which attacked much of the anticlerical writings of the Enlightenment, especially by Voltaire, and which was published timeously and conveniently just before the signing of the Concordat with the Pope in 1801. But Lemercier—another Academician—who disliked the same book, strongly opposed Chateaubriand's candidature. In the end, death, as so often is the case, produced new opportunities. Chenier, another Academician, died in 1811; and Napoleon, with whom Chateaubriand had fallen out since 1804,<sup>39</sup> nonetheless allowed the election to take place. Chateaubriand, as is customary in that august body, was then called upon to write his “acceptance speech,” which by long tradition requires the incoming “immortal” to praise his predecessor. But the predecessor was a “regicide”; and Chateaubriand, a royalist. His pen was as sharp as his mind was discerning; and in the draft speech he made his own royalist contempt for his predecessor obvious. Napoleon applied the blue pen and insisted that the offending parts be removed in the spirit of national reconciliation. Chateaubriand, a taciturn, aristocratic Breton, refused and as a result never took up the chair. In his *Mémoires d'Outre Tomb*, which first appeared in Brussels in 1850 after his death—hence the title—he proved a sever critique of Napoleon but also an admirer of his abilities.<sup>40</sup>

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<sup>37</sup> François FURET (1988), *Revolutionary France 1770-1880*, translated by Antonia NEVILL (1992), Blackwell, Oxford, p. 232.

<sup>38</sup> Cambacérés stressed this point when he recommended each member of the drafting committee to Napoleon.

<sup>39</sup> The quarrel came when Napoleon executed the royal Duke of Enghien, wrongly suspecting him to be behind an unsuccessful assassination attempt which took place against him earlier that year. The young Duke, who was residing at the time in (neutral) Baden in Germany, was kidnapped by Napoleon's men, summarily tried and executed, all in one day. Joseph Fouché, Napoleon's famous Interior Minister and one of the most opportunistic politicians of all times, famously described the incident (with which he was personally not implicated) as “not just a crime but as a grave error.” Indeed, it became one of the most serious flaws in Napoleon's claims of legitimacy. Fouché's complex personality has been partially re-habilitated in recent works. See generally Jean TULARD (1998), *Joseph Fouché*, Fayard, Paris.

<sup>40</sup> Chateaubriand devoted books XIX to XXIV of his classic *Mémoires d'Outre Tombe* (1841) to Napoleon; and what he says there contrasts with the more politically motivated (and often intemperate) earlier pamphlet entitled *De Buonaparte et des Bourbons* (1814), published a day after Paris capitulated in 1814 to the forces which forced Napoleon into his (temporary) exile to the Mediterranean island of Elba.

But let us return to the drafting of a code and leave the penultimate word to a writer who was not, on the whole, sympathetic to Napoleon. Writing in the first edition of the Cambridge Modern History, the late H.A.L. FISHER said: “[H]is contributions to the discussion were a series of splendid surprises, occasionally appropriate and decisive, occasionally involved in the gleaming tissues of a dream, but always stamped with the mark of genius and glowing with the impulses of a fresh and impetuous temperament.”<sup>41</sup>

Admiring though this statement is, it cannot be left at that. For it ignores the fact that the Napoleonic “interventions” were often “amenagé” by his good friend and number two—Cambacérés. Though this does not affect the substance of Fisher’s point, it also shows how Napoleon knew how to select his lieutenants and how to defer to their superior expertise in matters which they knew better than he. For the way he chose his two co-Consuls (and later high officials of his Empire)—Cambacérés and Lebrun<sup>42</sup>—shows this. The choice not only revealed Napoleon’s constant search for political equilibrium; he also showed political astuteness. For as Professor FURET has put it in his classic work on the Revolution: “Both had the sceptical maturity born of experience, but both preferred honours to power.”<sup>43</sup> This suited Napoleon; and they were to prove immensely helpful to him without ever posing any threat to him personally.

#### 2.4. The Importance of Timing

Ignoring the earlier attempts to enact a code (less known to non-French) can make people underestimate the importance of another factor: right timing. The French, of course, require no reminding of earlier attempts at codification. Brison in the sixteenth century, Colbert and Lamoignon in the seventeenth, and D’Aguesseau in the eighteenth, all produced limited codifications. On the legislative front we can, in fact go back to at least 1560 when the States General voted for a code. I stress “limited” for attempts to enact all-embracing codes was perceptively avoided, I think, largely due to the fact that the time was not yet ripe. French lawyers also know that such unifying legislation as was enacted prior to the Revolution—and there was a fair amount in the seventeenth and eighteenth centuries—remained restricted to particular topics though some (like commercial law) were, undoubtedly, of considerable amplitude.

History does not repeat itself. But there is a lesson in what I have just described for what is nowadays being attempted in Europe. But it is not the only one. For the Napoleonic Code shows that such projects succeed only whenever a charismatic leader appeared on the scene to promote them. Colbert was one, D’Aguiseau another, though no where on the scale of Napoleon! Both were also political animals, both were able, both proceeded incrementally, both were offering what the society

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<sup>41</sup> H.A.L. FISHER (1906), “The Codes”, in A.W. WARD *et al.* (eds.), *The Cambridge Modern History*, vol. 9, The University Press, Cambridge, pp. 148 ff., p. 151.

<sup>42</sup> The first was a man of the Revolution, the second of the ancien régime.

<sup>43</sup> FURET (1988), *supra* note 37, at p. 217

of the time was able to absorb; and that was law reform in small doses. But it was not always going to remain like that.

The time ripened in the early 1800s.<sup>44</sup> When the coup d'état of 18/9 Brumaire broke out Napoleon, uncharacteristically, hesitated for a moment. But he quickly sensed the significance of the timing. He sensed that the French people were tired of the convulsions of a revolution that were still going on eleven years after it had broken out. He sensed that they wanted to have the gains they made out of it safeguarded from the risk posed by the opposing Jacobins and royalists. To achieve all this, the bulk of the French were even willing to entrust their fate in the hands of a strong man for, it could be argued, what mattered most to the French of the day was égalité than liberté! So, as Professor Furet – that great coiner of memorable phrases – put it: “In 1789, the French had created a Republic, under the name of a monarchy. Ten years later, they created a monarchy, under the name of a Republic.”<sup>45</sup> Napoleon seized his chance by reading the times correctly.

Napoleon also realised that the time was now ripe for the all-embracing Code that would facilitate the above and bring legal unity to a country that had finally become politically united. It was Napoleon's correct assessment of the French mood as well as his political will to end, through compromise, the legal inability to enact a Code which the National Assembly of 17 June 1789 had asked for. The Code brought the geographical fragmentation and the class fragmentation of old France as depicted in the laws of the ancien régime to an end. At the time when the Code was enacted, this might well have been its greatest achievement. Nowadays, as we shall stress further down, the Code's true legacy and value may have to be sought elsewhere.

## 2.5. The Style of Drafting

I have alluded to this at the beginning of this chapter so, for present purposes, two further points should suffice.

The first is that the original lapidary style of the Code. As noted at the beginning of this article, this did not escape criticism, especially in Germany. But it also had its plus side in so far as it significantly contributed in making the Code an acceptable export model.

The lapidary style is, secondly, not in itself inextricably linked to loose thinking. The modernisation of the family law section of the Code, carried out by the late Doyen Carbonnier shows that it can be successfully imitated without losing intellectual rigour or an innovative spirit. By all accounts,

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<sup>44</sup> The coup d'état of Brumaire was in the making for a long time as more and more people despaired with the disorganization that took root during the period of the Directorate. But it provides yet another example of Napoleon's sense of timing as well as an illustration of mastery of what we call nowadays the art of political spin! For more details of this turning point in French history, as well as information about the way Napoleon “handled” his colleagues, see Jean TULARD (1999), *Le 18 Brumaire: Comment Terminer une Révolution*, Perrin, Paris.

<sup>45</sup> FURET (1988), *supra* note 37, at p. 215.

Carbonnier achieved both these aims. To his efforts one could add that the law incorporating the European Directive dealing with defective products for it, too, adapted the codal style to a detailed regulation which manifestly had a European Directive at as its origins.<sup>46</sup> These observations are important for they show that whilst one can break with the tradition of formulating an entire area of the law – e.g. the law of torts – in very few and laconically-phrased provisions, the style of drafting need not acquire the involved, excessively inter-linked, dry, and even opaque style one often finds in some German legislation.<sup>47</sup> The above, however, should not be taken to suggest that the French have always hit the correct note when drafting other provisions, subsequently added to their Code. Indeed, in one case the constitutional court was even called upon to pronounce on the meaning of a particular article!<sup>48</sup>

### *3. The future of the French Code in the context of the contemporary moves to draft a European Code*

Contemporary French lawyers are (rightly) conscious of the ageing of their Code. They are also aware of the challenges posed by a stream of European Directives imposing changes on internal French private law. The most recent problem stems from the incorporation of the European Directive on Consumer Sales<sup>49</sup> which played no small part in the Germans deciding to over-haul their law of obligations and not just try to fit the contents of this Directive into the ageing fabric of their old law. Could the French go down the same path which the Germans followed? In theory, the answer is that they could. However, for reasons which are best developed in another paper, this author believes that this is unlikely to happen in the immediate future. So could the French opt for one of the wider plans to produce a European Code? At least one distinguished French comparative lawyer sees some merit in taking such a direction.<sup>50</sup> The so-called von Bar project seems the most ambitious of those currently circulating;<sup>51</sup> and it would be consistent with the aim and content of this paper to test the

<sup>46</sup> CODE CIVIL [C. CIV.] art. 1386 (Fr.). The 21 articles of the law are inserted as art. 1386 of the CC.

<sup>47</sup> The German Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen – the equivalent of our Unfair Contract Terms Act – recently incorporated in the BGB, offers an excellent example of what an outside observer would regard as indigestible legislation. See BÜRGERLICHES GESETZBUCH [BGB] § 305 (F.R.G.).

<sup>48</sup> See generally C. CIV. art. 15 (allowing persons of the same or opposite sex to regulate their common life); Nicolas MOLFESSIS (2000), “La Réécriture de la Loi Relative au PACS par le Conseil Constitutionnel”, *La Semaine Juridique*, num. 10, 8.3.2000, Paris, pp. 399-407.

<sup>49</sup> See Geneviève VINEY (2002), “Quel Domaine Assigner à la Loi de Transposition de la Directive Européenne sur la Vente?”, *La Semaine Juridique*, num. 36, 4.9.2002, Paris, Doctrine, I 158, pp. 1497-1501.; Gilles PAISANT & Laurent LEVENEUR (2002), “Quelle Transposition pour la Directive du 25 Mai 1999 sur les Garanties dans la Vente de Biens de Consommation?”, *La Semaine Juridique*, num. 21, 22.5.2002, Paris, pp. 76-135.

<sup>50</sup> Denis TALLON (2003), “Grandeur et Décadence du Code Civil Français”, In Bernard DUBUISSON *et. al.*, *Mélanges Offerts à Marcel Fontaine*, De Boeck & Larcier, Bruselas, p. 279.

<sup>51</sup> The so-called “Trento Project” is another, though its aims are somewhat different. Other groups of academics have been organising workshops aiming to discover the common principles of European law. The mobilisation of European scholars to discuss these issues is quite unprecedented and gives the lie to those who have argued that comparative law is in an academic ghetto. My own views on the wider issue of the state of comparative law at the turn of the century can be found in Basil MARKESINIS (2003), *Comparative Law in the Courtroom and Classroom: The Story of the Last Thirty-Five Years*, Hart Publishing, Oxford.

way this project is taking shape against the kind of durable legacies of the French Code-making process which we sketched in the preceding pages. We can then ask ourselves whether the new project passes the enduring tests set by the old one.

### 3.1. Do Our Times Tolerate Charismatic Figures?

The importance of the charismatic leader in the final enactment of the Code has already been stressed. But who has such charisma and power these days? And—a wider question—do our times welcome such “heroic” figures?

Personally, I doubt that a positive answer can be given to the above. Our times favour government (or administration) by committee. Strong leadership generates mistrust which leads to fear. It is tolerated only if it is accompanied by diplomatic skills that have mastered the modern art of “spin” and give the illusion of consensus-seeking. A further question then arises: where—namely, in which section of society or in which of its professions—should one be looking for such “enabling” leadership when one is thinking in terms of an intra-state project? It is difficult enough to think of academics in such a role in a national context; I would have thought it impossible if one were thinking of supra-national projects. Academics simply do not have the legitimacy for such a role.

In the context of the European Union, the Commission in Brussels is the main initiator of legislation; and to a large extent it is the main moving force behind the current projects. Moreover, one gets the impression that the Council of Ministers does not, at present, see the “code project” as a “political” one but as “technocratic” one. If this is a correct assessment it means that, for the time being at least, officials will be left to do the running. The question however is can such a group of anonymous officials steer through a project of this kind and magnitude? Moreover, what exists at present is a product of purely academic thinking—the von Bar project—which has been mainly financed by German funds and generated more discussion than support. It is also beginning to attract criticism which, worse still for the promoters of the project, is becoming “personalised.” In the world of international politics, these are not good portents. And the question whether the von Bar drafts can serve as a catalyst for subsequent “official” action depends on many imponderables. Before we attempt to answer this wider question we should, however, ask one preliminary question: is there a need for such a code?

### 3.2. How Much Does Europe Need a Code?

The feasibility of a wider, potentially all-embracing, code must be tested against the desirability of having one. Both seem to have waned since the idea was first endorsed by the European Parliament

in 1989, even though the Commission is pressing ahead.<sup>52</sup> But the need to facilitate European business and trade is, it is argued, crying out for a lesser contract code. The narrowing of the focus is already an indirect vindication of this author's thesis. But, even with a redefined objective, this author has some difficulties with this idea. Here are five:

First, is it realistic to think that such a binding document could be agreed by all the members of the European Union in its present phase? Secondly, why do we need such an instrument to take the form of a binding statute, especially in an area of the law which is dominated by rules which are *ius dispositivum*? Thirdly, why do we need a new contract document and not use instead the Lando Principles of European Contract Law, already published in three volumes? Fourthly, when we speak of the law of contract, which contract law are we thinking about: the law that applies between businesses entities of more or less equal bargaining power? The law suitable to consumer transactions? Labour law contracts? Small, everyday contracts?<sup>53</sup> Can we harmonise one of these and leave the others to national laws? Fifthly, contract rules reflect economic, market, and political ideas. Whereas all countries of the European Union can now be said to belong to what one could call free-market economies, important variants still exist between those countries that opt for the "harsh" type of American capitalism and the more socially conscious European variants. Are the proposed rules suitable to all these variants? Have these issues been discussed? Could they be explored without the whole project exploding in the face of the self-appointed codifiers? Does a *culpa in contrahendo* rule sit well in a setting which wishes to preserve the freedom not to be bound contractually until the contract is actually agreed? Can the German idea of good faith ever come into our contract law (and has the famous German Section 242 BGB really solved problems or encouraged litigation?)

Have the unifiers or harmonisers worked all these questions out in a way that could form an acceptable code for twenty-five countries? Or have they instead focused on the reduction of a text that represents the minimum common denominator of its academic draftsmen? And would such a document, if ever it became officially accepted, have the same or even approximately the same interpretation when interpreted daily by different courts? And have the "codifiers" worked out the proper borderline of contract and tort or are they including much of tort (that is inappropriate) to the alleged pressing commercial needs of Europe simply because some of them specialize in the subject? Finally, are the drafts which emerge from their meetings unanimously approved or passed by majority voting? And if the latter is the case, are the names of the dissenters recorded and available

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<sup>52</sup> "On 15 November 2001, the European Parliament adopted a Resolution on the Communication [on European Contract Law], setting forth an action plan and a timetable up to the year 2010 when a body of rules of contract law should be adopted in the European Union." Wulf-Henning ROTH (2003), "Case C-168/00, Simone Leitner v. TUI Deutschland GMBH & Co. KG, Judgment of 12 March 2002 (Sixth Chamber), ECR 2002, I-2631", *Common Market Law Review*, vol. 40, num. 4, pp- 937-951.

to outsiders? One is left with the impression that a significant number of English and French lawyers – to limit one’s hunches to those countries one knows best – remain to be convinced on some or all of these issues.<sup>54</sup> Certainly the doubts expressed in France have been very pronounced.<sup>55</sup> In the opinion of this author, the starting position of the von Bar project thus seems weak. The wider demand has yet to be proved; and the absence of a charismatic political leader to bring these changes about is obvious and – for those who wish to achieve these aims – probably fatal.

### 3.3. The von Bar Team?

The von Bar team, though not the only one busy on such ideas, seems to be the largest and, for the time being, the best endowed. The German largesse which has maintained it on the road must be welcome, especially to all those who form part of it. But the Germanic influence on the drafting techniques and style is not likely to endear it to many French, or English, lawyers. For code drafting in Germany has a long tradition of entrusting the task largely to professors whereas the French model (like that followed by the American Law Institute) has been to use practitioners with academic interests or a combination of academics and practitioners. Having representatives of all sides of the legal profession, including civil servants and insurers, would seem even more appropriate given the nature of the proposed reforms and the way the impact on a free and common market which lies at the root of modern European thinking. Professor von Bar’s defence of his fiefdom is that this is still a purely academic project so that he can control its membership.

In the eyes of this commentator this is an unconvincing reply. The academic nature of the advisory committee does not mean that the subjects discussed can be discussed in a legal vacuum deprived of the insights of others who, though not lawyers, may also play a part in the workings of a legal system. The magnitude of the task requires many other talents. Some twenty years earlier, the late Professor Tunc, when he embarked on the equally onerous task of transforming the French law of traffic accidents, made sure that he was surrounded by insurers. He made sure he presented and modified his ideas to take into account the views of practitioners and judges. Many joint sessions were held to seek the views of these wide interest groups. And in the end, the change came by the Courts, which then prompted a tidying up operation by the legislature. In the case of a European Code, there is, of course, the further dimension of European politics.

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<sup>53</sup> The point has been made forcefully and repeatedly by Professor Mauro BUSSANI. See, e.g., Mauro BUSSANI (2002), “The Contract Law Codification Process in Europe: Policies, Targets and Time Dimensions”, in Stefan GRUNDMANN & Jules STUYCK (eds.), *An Academic Green Paper on European Contract Law*, Kluwer Law International, Hague, pp. 159-180 (stressing that European contract law systems are composed of various sub-systems, including consumer contracts, employment contracts, business contracts, and civil or “ordinary contracts” that should be taken into account in the contract law codification process in Europe).

<sup>54</sup> See, e.g., Roy GOODE (2003), “Contract and Commercial Law: The Logic and Limits of Harmonisation”, *Electronical Journal of Comparative Law*, nov. 2003, vol. 7.4, 2, available in <<http://www.ejcl.org/74/art74-1.html>> (last visited Apr. 8, 2004).

<sup>55</sup> For the fierce criticisms of Professor Y. LEQUETTE, see Yves LEQUETTE (2002), “Quelques Remarques à Propos du Project de Code Civil Européen de M. von Bar”, in *Recueil Le Dalloz*, Paris, pp. 2202 ff., pp. 2210-2214 and LEQUETTE (2003), “Vers un Code Civil Européen ?”, *Pouvoirs*, Paris, pp. 97-126.

Professor von Bar's group is not only one of academics; it is also large in size. In many respects this is a "plus"; an indication of broad support; a desire to consult widely. Yet size also raises questions. First, how were the members chosen? Secondly, are the talents of all participating members put to the best possible use? I am not the first to ask these questions; nor the first to hear rumbling noises from within these groups. How can the question of restitution be considered without having made sure that such international experts such as Professors Canaris or Lorenz or Birks have been invited to attend the deliberations of the group or consulted on its drafts. Indeed, how come the Restitution sections are drafted by Professor von Bar—a tort lawyer—and not by Professor SCHLECHTRIEM, one of Europe's leading comparative restitution lawyers?<sup>56</sup> And how involved have the tort lawyers mentioned in the advisory Council and the co-coordinating group been in the drafting of the text? Anyone involved in a drafting exercise knows that the draftsman begins with an advantage which those who are asked to comment on it can never neutralise. Moreover, how many of those listed as advisors have actually advised? We note, for instance, that Professor Viney's name appears on the list of advisors even though she resigned her post a long time ago.<sup>57</sup> Who is in that case leading the French tort delegation? And, as already stated, when the plenum meets to take decisions are dissenting views recorded? Can we, will we, ever find out how many and who opposed particular solutions? (For one can think of quite a few recent and controversial decisions about which little has become known in public.) To all these questions, no doubt answers can be given; perhaps have already been given. But the fact that the questions keep being asked suggests that many jurists are in the dark. Compare this with the fact that the proceedings of the codifying committee of the French Code exist in fifteen volumes and this even though they took place at a time when everything had to be recorded by hand and was not facilitated by electronic means.

It is in this context of wider doubts that one must take special note of a resolution of the legal section of the French Academy—the equivalent one might argue of the American Academy of Arts and Sciences and thus the country's prime centre of learning—expressing serious concerns about the project.<sup>58</sup> Indeed, there have even been questions on the table in the French Parliament<sup>59</sup> forcing the French Minister of Justice to admit that his Ministry is keeping a close eye ("une attention vigilante") on these "private" initiatives.

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<sup>56</sup> Peter SCHLECHTRIEM'S *Restitution und Bereicherungsausgleich in Europa* is a masterpiece of Germanic scholarship, and is the most detailed and deep-probing comparative work on the subject ever written. See generally Peter SCHLECHTRIEM (2000), *Restitution und Bereicherungsausgleich in Europa*, Vol. 1, Mohr Siebeck, Tübingen and SCHLECHTRIEM (2001), *Restitution und Bereicherungsausgleich in Europa*, Vol. 2, Mohr Siebeck, Tübingen. One can thus only assume that he was offered the post of chairman of this group and declined it.

<sup>57</sup> See *The Study Group on a European Civil Code, The Coordinating Group, Team Leaders and Advisors to the Working Teams* (Oct. 25, 2001) (listing Geneviève Viney as a participant "in the work of the Study Group"), at [http://www.sgecc.net/media/download/the\\_coordinating\\_group.pdf](http://www.sgecc.net/media/download/the_coordinating_group.pdf) (last visited Apr. 28, 2004).

<sup>58</sup> Dated July 1, 2002.

<sup>59</sup> Asked by M. Richard Dell'Agnola, M.P. of Val-de-Marne, on February 12, 2002.

Such a suspicious reaction is neither usual nor welcome to a project that describes itself as private, academic, and unifying! In my view this is because the French side (as the English before it) is waking up to this theoretical juggernaut and will soon exact from its driver greater rights to control its direction than it has thus far enjoyed. In the end, all this may be for the best. But it is not how consensus emerged in the drafting of the French Code. To put it differently, in the case of the older code, consensus emerged naturally, slowly, pragmatically and the text was not octroyés from the top.

### 3.4. Timing and the Right Sequence

The Napoleonic Code was, as we noted, greatly assisted by many preceding attempts to achieve the same aim. More importantly, it was brought about after the country had reached a constitutional settlement. In the view of Professor HALPÉRIN this is why the Second Draft (of 1794) of Cambacérés was abandoned; and to some extent the same political indecisiveness killed his third and last project of 1796. PORTALIS was, himself, later to say in the Discours Préliminaire that a good civil code cannot be born during a political crisis; one needs institutional stability before one can elaborate durable ordinary legislation.<sup>60</sup> Indeed, how else can one explain the fact that PORTALIS himself, only seven years earlier, was denouncing from the floor of the Conseil des Anciens (of the Directorate) the “dangerous ambition of enacting a new civil code.”<sup>61</sup> In France, the time was ripe in 1804 – but it did not ripen at once. If one starts counting from the first declaration of the need for a code by the Constitutional Assembly, it took twelve years; if one also takes into account the earlier incrementally achieved codification of partial subjects, one is talking in terms of over two centuries.

The experience of the new Dutch Civil Code, much closer to our times, also shows that it took our Dutch friends some forty years to change the Napoleonic Code; while the recently modernised German Civil Code also took about fifteen if one starts counting from the moment when the first consultation attempts begun in the mid 1980’s. And all these involved the codification of one national system; not a code for twenty-five countries, divided by language barriers and, let us repeat it, not entirely united in their understanding of the economic substructure.

The harmonisation of European private law for the sake of European business also seems to have been over-stated. For let us face it, even Europhile writers such as the present one cannot help but stress the degree of European disunity which is manifested at each governmental conference where national – dare one even put it even lower – party-political interests dictate the fudged compromises that are reached as well as the posturing that follows in the ensuing press conferences and local reporting of the meetings. This writer, who follows this reporting in the press of four countries on a regular basis, often wonders whether the government spokesmen, extolling the virtues of the fudged resolutions, attended the same meetings!

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<sup>60</sup> See also Jean-Louis HALPÉRIN (2003), *Le Code Civil*, Dalloz, Paris, p. 263.

<sup>61</sup> MARTIN (2003), *supra* note 24, at p. 165.

### 3.5. Drafting and the Problem of Languages

The tort papers of the von Bar project—circulated last May and looked at by this author—also reveal the dangers of a text drafted by a German, translated into English, and then submitted for comment by all others. The text is distinctly less user friendly than the earlier Lando project; and the dangers of such way of drafting must be obvious and ought to be pointed out in no uncertain terms. For there it one thing to try to explain away in a classroom the differences between legal systems by urging on students a “functional” instead of a “conceptual” approach to law and quite another to have to cope with such problems in the courtroom interpreting the wording of a statute. The chances of (subsequent) uniform interpretation by national courts of this intended “uniform” code thus strike this writer to be near to non-existent. But there is more that worries one who reads the Sixth Draft and notes the inclusion of topics which a torts professor may find attractive but which are hardly necessary for the facilitation of business trade in Europe. The contents and the declared aim of the project do not really dovetail.

Professor von Bar’s text is not only conceived by a (learned) German but also expressed in a manner which is totally alien to traditions such as the French or the English. If we look at the Sixth Draft, dated 15 May 2003, we note that almost three pages of text (essentially) set out to replace the famous Article 1382 of the French Code. To be sure, Article 1382 CC was too brief from the outset; though, as stated, French lawyers have come to know pretty well its real contours thanks to the rich case law which now surrounds this famous provision. The proposed new text, with its elaborate textual cross-referencing, and a wording which, though in English, is clearly not conceived by an English (or French) mind, would presumably then be translated into French and Italian and so on and then applied by the courts. Reading the proposed draft, one ventures the thought that this would, at best, require years of assimilation and, arguably, cause more disruption than harmonisation. In addition, the draft makes a very unattractive read as the extracts re-produced in the following note suggest.<sup>62</sup>

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<sup>62</sup> Article 1:101 described as the “basic rule,” reads:

- (1) A person who suffers legally relevant damage has a right to reparation from a person who caused the damage intentionally or negligently or is otherwise accountable for the causation of the damage.
- (2) Particular rules may provide that damage is legally relevant only if caused intentionally.
- (3) Where a person has not caused legally relevant damage intentionally or negligently that person is accountable for the causation of legally relevant damage only if Chapter 3 so provides.

Study Group on a European Civil Code, Tort Law: Paper No. II, Sixth Draft, art. 1:101 (May 15, 2003), available at <http://www.sgecc.net/media/download/tort.pdf> (last visited Apr. 29, 2004).

Article 2:101 then defines the meaning of legally relevant damage (in between two more articles defining the scope of application of this provision, etc.). It states:

- (1) Loss, whether economic or non-economic, or injury is legally relevant damage if:
  - (a) one of the following rules of this Chapter so provides;
  - (b) the loss or injury results from a violation of a right otherwise conferred by the law; or
  - (c) the loss or injury results from a violation of an interest worthy of legal protection.
- (2) In any case covered only by sub-paragraphs (b) or (c) of paragraph (1) loss or injury constitutes legally relevant damage only if it would be fair and reasonable for there to be a right to reparation or prevention, as the case may be, under articles 1:101 or 1:102.

One might have thought that such projects are in no way in the interests of the European Commission, a body (sometimes unfairly) severely criticised by the citizens of the Member States of the Union for its interventionist tendencies.

#### 4. Conclusion

In this essay I tried to ask which is the enduring legacy of the French Code. If some synthesis is to be attempted of the ideas presented above, I think it should proceed on the basis of a distinction: the Code's importance to the French and the Code's significance for the rest of the world.

The first question is complex; and, as an outsider, I can only hazard an opinion. To most of the French, the weaknesses of the ageing Code are known. So are the dangers and difficulties presented by the half-baked European alternatives or the constant refinements and adaptations made by their own Supreme Court. In light of this, will the Code continue as the starting point of their judicial reasoning process, modified here and there by European directives and supplemented by Supreme Court decisions? Will it/can it be revised as the German BGB recently was? Or will it be submerged by the European tide and replaced by an internationally created document? This outsider's hunch is that, for the time being, we shall get more of the same.

The same outsider, however, must also add that he understands, indeed, sympathises with his French colleagues, in the emotional attachment they feel for the Code as a symbol representing the continuity which their many constitutions have not given to their nation.<sup>63</sup> The late Professor Carbonnier expressed this idea perfectly; and since his words if translated into English might give the impression of a text more flowery than the English taste can accept, here they are in the original. He thus described the Code as

[l]a véritable constitution [de la France], . . . véritable non pas au sens formel, mais au sens matériel, pour emprunter aux publicistes une distinction usuelle . . . . [M]atériellement, sociologiquement si l'on préfère, il a bien le sens d'une constitution, car en lui sont récapitulées les idées autour desquelles la société française s'est constituée au sortir de la Révolution et continue de se constituer

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(3) In considering whether it would be fair and reasonable for there to be a right to reparation or prevention regard is to be had to the ground of accountability, to the nature and proximity of the damage or impending damage, to the reasonable expectations of the person who suffers or would suffer the damage, and to considerations of public policy.

(4) In this Book

(a) economic loss includes loss of income or profit, burdens incurred and a reduction in the value of property.

(b) non-economic loss includes pain and suffering and impairment of the quality of life.

Id. art. 2:101.

<sup>63</sup> See also George P. FLETCHER (2001), "Three Nearly Sacred Books in Western Law", *Arkansas Law Review*, num. 54, pp. 1-18. p.14 ("[I]n the Continental European context . . . [t]he code provides the thread that runs through history and ties the country together . . .").

de nos jours encore, développant ces idées, les transformant peut-être, sans avoir jamais dit les renier.<sup>64</sup>

The daily nit-picking of the Code and its text has thus not, in the view of this author, yet reached the stage of the Code being totally abandoned. But have these critiques convinced the French to move all the way towards a European project? This author doubts this, too. And the reasons why this is so, also give us the clues for what the wider legacy of the Code is.

For, he believes, the Code of 1804 was drafted at the right time, after due reflection, hesitation, even procrastination; that it was the product of many minds who did not think in terms of theories but in terms of what worked; that its drafters knew that presenting it in attractive style would help promote its durability and its exportability. They were also conscious of the fact that reform lasts longer if it achieves the right mixture of the old and the new. Its drafters, in short, embodied its cardinal virtues; and these were just as much political as they were legal. Moreover, when this Code was exported, with the backing of Napoleon's bayonets, it had, more often than not, to be adapted and modified before it was taken over by the "importing" states.<sup>65</sup>

None of the virtues found in the way the Napoleonic Code was drafted can be found in any of the contemporary European projects, especially the one which has been looked at in this essay in modest detail. This is because these projects, at any rate in the current amplitude, are doctrinal in their conception, excessive in their amplitude, and premature in their timing. An additional reason is they do not seem to embody a consensus built from the bottom up but an academic attempt, with some help from Euro-bureaucrats, to produce a technical synthesis at the top and then impose it downwards on a Europe that is not, alas, yet ready to think European.

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<sup>64</sup> Jean CARBONNIER (1986), "Le Code Civil", in Pierre NORA (dir.), *Les Lieux de Mémoire*, vol. 2, Gallimard, Paris, pp. 292-315, p.309.

<sup>65</sup> See also HALPÉRIN (2003), *supra* note 60.

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