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THE FRENCH REVOLUTION AND CODIFICATION

COMMENT ON THE ENLIGHTENMENT, THE FRENCH REVOLUTION, AND THE NAPOLEONIC CODES

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In the third of the Edward A. Seegers Lectures, "The Enlightenment, the French Revolution, and the Napoleonic Codes," Professor Berman gives a general picture of the social, political and economic conditions that prevailed in France on the eve of the Revolution. He then describes the principal events following the meeting of the Estates General at Versailles in May 1789, and subsequently examines the "belief system" which was embodied in the Revolution, namely, in his own words, "the structure of ideas and attitudes reflected in the policies of the new regime."[1]

This belief system, Professor Berman points out, had originated in the Enlightenment of the eighteenth century in Europe. Among the French participants in this movement, he mentions Montesquieu, Voltaire, Diderot, and Rousseau. He also notes that this belief system was the first one in Europe that had been developed outside of the organized churches by men who were not Christians in the conventional sense, and that it was built in part on the secular writings of Locke and Newton.

Professor Berman observes that Deism was an essential part of the belief system of the Enlightenment, that it had clear political, economic, and social implications, and that its individualism and rationalism inevitably led to emphasize reform of existing conditions for the benefit of the majority of people living in society. He states, however, that the intellectual leaders of the eighteenth century did not prophesy nor preach a revolution, nor propose the overthrow of the monarchy. The Revolution, according to him, added other explicit elements to the Enlightenment: public opinion and nationalism.

Referring more specifically to changes in the legal system, Professor Berman states: "As in the case of the German and English Revolutions, the most apparent and most comprehensive legal changes

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1. H.J. Berman, *Revolution and law*, 18 VAL. U.L. REV. 569, 616 (1984).

connected with the French Revolution were in the field of constitutional law."[2]

It should be recalled, however, that more than two years before the first Constitution, enacted September 3, 1791, and even before the Declaration of the Rights of Man and Citizen, enacted August 26, 1789, the National Convention had approved a most drastic legal change of a very comprehensive scope, namely, the decree abolishing feudalism. This historic decree was passed during the night of August 4, 1789, and it had a most powerful impact on the private rights, both personal and economic, of all citizens. By this decree the National Assembly destroyed the feudal regime in its entirety. It abolished, without indemnity, the rights and obligations, both feudal and those relating to ground rents, those derived from mortmain, real or personal, and personal servitude, and those which represented them, and declared all other rights redeemable, the price and manner of redemption to be set by the National Assembly. (Art. 1). The decree also abolished, without indemnity, seignorial justices and tithes, and it provided that all perpetual rents, whether in kind or in cash, whatever their origin and irrespective of the persons or corporations to whom owed, would be redeemable. (Art. 6). Moreover, privileges of a pecuniary or other substantial nature in regard to subsidies were forever abolished. (Art. 9).[3]

Professor Berman notes the particular importance of the unification of French law when considering the differences in legal traditions between the south and the north of the country. Referring to the Civil code, he rightly recalls the fact that Napoleon had played a part in its drafting. This acknowledgement, no doubt, particularly in France, will be much better received than his characterization of Napoleon, a few pages earlier, as "the Stalin of the French Revolution."[4] In due justice, Napoleon did a good deal more than play a part in the drafting of the Civil code: he really saved it from inevitable defeat at the Tribunate where the *Projet* of the year VIII (1800) had met with a systematic and partisan opposition. By reorganiz-

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2. Berman, *supra* note 1, at 621-22. Professor Berman states: "A written constitution was adopted for the first time in French history. A republican form of government was instituted, with supreme power given to a legislative assembly elected by popular vote and responsive to public opinion." *Id.* There is a confusion in the foregoing statement between the first Constitution of September 3, 1791, which was monarchical and representative, and the second Constitution of June 24, 1793, which entrusted the executive power to an Executive council.

3. Decree of August 4, 6, 7, 8 and 11, 1789, found in 1 J. DUVERGIER, COLLECTION COMPLÈTE DES LOIS, DÉCRETS, RÉGLEMENS, AVIS DU CONSEIL D'ÉTAT 33 (2nd ed. 1836).

4. Berman, *supra* note 1, at 615.

ing the Tribunate and by devising the so-called "officious communications," he secured a smooth and practical discussion and approval of each of the thirty six separate laws comprised in the final version of the code.[5]

Professor Berman refers to Portalis as "a principal author of the 1804 *Code civil*."[6] In this regard, he simply restates the general view on this matter. This view, however, is quite inaccurate. Portalis was not one of the authors of the Civil code of 1804 but of the Government *Projet* of the year VIII, which is not the same. While the code was based on the *projet* and about three-fourths of its contents came from it, there were many substantial differences between the two as a consequence of the suppressions, additions and other changes made to the *projet* in the course of the complicated process of its revision. Numerous critical observations were made to it by the twenty eight Courts of Appeal, and by various individuals who took part in the discussions at the Council of State (*Conseil d'Etat*), and there was the final criticism by the special committee of the Tribunate. This process of revision took over three years.[7]

Among the most important changes made to the *projet* the following may be mentioned: the nearly complete elimination of the Preliminary Book dealing with general definitions, division, publication, effects, application, interpretation, and abrogation of laws, which had originally comprised thirty nine provisions. It was replaced in the Civil code by a brief Preliminary Title consisting of only six provisions. Matters which had not appeared in the *projet* were added to the code, such as adoption, dowry, and compromise. The mortgage system of the *projet*, which had been strongly criticized by the Court of Cassation and by several Courts of Appeal as inadequate, was rejected in favor of the system devised in the law of 11 brumaire year VII. As a result of the many suppressions and despite numerous additions, the original 2510 provisions in the *projet* were reduced to 2281 in the code.

Professor Berman quotes Portalis for the purpose of describing the predicament faced by the drafters of the Civil code in bringing a uniform system into the chaotic situation then prevailing in France, and states: "Under these circumstances the draftsmen of the civil code

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5. *See* 1 P. FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL LXXVII-LXXIX, LXXXVII-XCI (1827).

6. Berman, *supra* note 1, at 625-26.

7. Printing of the *Projet* of the year VIII was finished on January 21, 1801; the last of the thirty six laws comprised in the Civil code was enacted on March 15, 1804.

seized upon the *few* available treatises. Of these, the most important one was that of Pothier. . . ."[8] This assertion is clearly at variance with another statement by Professor Berman, a page earlier, to the effect that "Prior to the Revolution, legal science in France was highly developed in the Roman Catholic Church . . . and in the universities, where it was also applied chiefly to canon law and Roman law."[9]

The fact of the matter is that, rather than only a few available treatises, the abundance as well as the quality of legal writing in France before the Revolution had achieved a remarkable degree of development, probably unequaled anywhere. The number of works used by the draftsmen was quite impressive. Pothier, it should be recalled, was the author not of just one treatise, but of more than thirty separate treatises on a wide variety of subjects: obligations in the first place, and various specific contracts regarding sale, lease, deposit, agency, loan, partnership, insurance, etc. Other of his treatises dealt with persons, marriage, community property, possession, ownership, prescription, donations, successions, pledge, mortgage, and the Custom of Orleans. Besides Pothier, there were many other writers whose works were used by the draftsmen on various subjects, among them: Domat, Bourjon, Dargentré, Lamoignon, Renusson, Duplessis, Ricard, Lebrun, Despeisses, Argou, Pocquet de Livonnière, Charondas, de Ferrière, Loisel, Prevôt de la Jannés, Dunod, de Malleran, Cujas, Bacquet, Dumoulin, Furgole, Desgodets, Basnage, Jousse, Valin, Loiseau, Mornac, etc.[10] Many of the works used were *in quarto* editions, often consisting of more than one volume. In addition, the draftsmen also resorted to several legal multi-volumed encyclopedias such as those by Denisart and Guyot.

There is a more serious objection to the description given by Professor Berman of the manner in which the Civil code was drafted, although, in all fairness, it must be recognized that here again he limits himself to restating the generally accepted opinion. There is a significant fact which, with one exception,[11] has been entirely overlooked,

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8. Berman, *supra* note 1, at 626.

9. Berman, *supra* note 1, at 625.

10. All of these names are mentioned in a work in four volumes published two years after enactment of the Civil code. *See* J.M. DUFOUR, CODE CIVIL DES FRANÇAIS AVES LES SOURCES OU TOUTES SES DISPOSITIONS ON ÉTÉ PUISÉES (1806) where the author claimed to have identified the sources of each of the provisions contained in the Civil code. While there are a number of inacuracies in that work, this writer is satisfied that Dufour's claim supports a general conclusion to the effect that, on the whole, the works of the authors enumerated were used by the Government commissioners.

11. The exception was represented by the Court of Appeals at Riom, which saw the situation very clearly. *See* 5 FENET, *supra* note 5, at 409.

namely, that the Government commissioners: Tronchet, Bigot-Préameneu, Portalis, and Maleville, were not actually instructed to draft a civil code, but "to hold conferences on the drafting of the civil code," which is not quite the same. They were also instructed to compare the order followed in the redaction of the four *projets* already published, and to discuss, in accordance with the sequence of divisions to be set, "*the principal bases of legislation on civil matters.*"[12] It is clear, therefore, that the commissioners had only received a mandate to examine the three Cambacérès *Projets* of 1793, 1794, and 1796, respectively, and the *Projet* Jacqueminot of 1799. But even while going beyond their authority, the commissioners did not start from scratch. They had at their disposal those *projets,* particularly the third *Projet* Cambacérès, containing 1104 provisions, and the *Projet* Jacqueminot which, although an unfinished draft, comprised 759 provisions, totalling over 1800 provisions. That is why the commissioners were able to meet the all too brief and pressing deadline of four months given by the Government.[13]

However, the process of codification of the civil law had started some years earlier with the *Projet* d'Olivier, which its author had sent to the King and the National Assembly in 1789.[14] The only way to properly understand how the completion of the Civil code was achieved is to proceed backwards, since the code represented the last stage in a process of gradual development that lasted over ten years. From the code, then, one goes back to the *Projet* of 1800, and from this to the third *Projet* Cambacérès and to the Projet Jacqueminot; from these two *projets* one proceeds to the second and first Cambacérès *Projets*, and from these to the Plan Durand-Maillane of July, 1793 (one month earlier than the first *Projet* Cambacérès). The Plan Durand-Maillane was preceded by the *Projet* d'Olivier of 1789.[15] The foregoing *projets* had been generally influenced by the writings of Domat and Pothier, and some by the decrees of the Revolution, save for the *Projet* d'Olivier which had come earlier than those decrees.[16]

Professor Berman remarks that the Civil code "was intended to express the spirit of the Revolution."[17] However, as observed by

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12. Emphasis added. *See* the resolution by the consuls of 24 thermidor year VIII (August 12, 1800), 1 FENET, *supra* note 5, at lxii-lxiii.

13. The text of the three Cambacérès *Projets* and the Jacqueminot *Projet* are found in 1 FENET, *supra* note 5, at 17-98, 110-39, 178-326, 333-462.

14. *See* R. Batiza, *Origins of Modern Codification of the Civil Law: The French Experience and its Implications for Louisiana Law,* 56 TUL. L. REV. 477, 502-03 (1982).

15. Batiza, *supra* note 14, at 482, 491.

16. Batiza, *supra* note 14, at 508, 509, 512, 518.

17. Berman, *supra* note 1, at 622.

French writers, the fact is that the revolutionary period experienced two different general trends, one following the other, from 1789 to 1804. The first, from 1789 to 1795, was characterized by equality and liberty; the second, from 1795 to 1804, was dominated by the principle of authority. Therefore, it is necessary to distinguish a period of progress and a period of reaction.[18] While France, in the early 1800's, had become a relatively egalitarian and nonfeudal society very different from that of the *Ancien Régime*, nevertheless, the Civil code itself was far from being radical. Referring to its "spirit of moderation," Planiol and Ripert pointed out that the code had the good fortune of having been drafted (it should have been said completed) at the right time; if it had been drafted too soon, during the Revolution, it would have yielded to revolutionary passions and political temptations, and if drafted too late it would have been affected by the severity of the military regime and by the reactionary attitude which had already developed and was increasing. According to Planiol and Ripert, the code represented a compromise and was neither reactionary nor revolutionary, its dominant quality being its spirit of moderation and wisdom.[19]

While recognizing that French secular law, namely, royal law, customary law, and the law of the cities and provinces, had become a university subject in 1697, Professor Berman comments, nevertheless, that, prior to the Revolution, "it remained a step-child in the curriculum."[20] Even if this were so, the mere fact that French secular law had become a university subject, is in itself remarkable. A Danish scholar who, therefore, cannot be suspect of chauvinistic bias, made the following observation: "Though *it was in France*, not in Italy or Germany or Scandinavia that teaching of national law began at the universities. . . ."[21] It can be added that even if Bourjon could not be compared to Domat as a legal scholar,[22] and that French customary law was quite inferior in scientific quality to the French civil law of Roman origin, yet customary law had an interesting background traceable at least to the thirteenth century as shown by the *Grand*

18. *See* P. SAGNAC, LA LÉGISLATION DE LA REVOLUTION FRANÇAISE (1789-1804) 55 (1898).

19. *See* M. PLANIOL & G. RIPERT, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL 36 (12th ed. 1940).

20. Berman, *supra* note 1, at 625.

21. *See* E. ANDERSEN, THE RENAISSANCE OF LEGAL SCIENCE AFTER THE MIDDLE AGES 130 (1974).

22. *See* P. VIOLLET, HISTOIRE DU DROIT CIVIL FRANÇAIS 231 (2nd ed. 1893).

23. *See* F. OLIVIER-MARTIN, PRÉCIS D'HISTOIRE DU DROIT FRANÇAIS 88-90 (5th ed. 1953).

Coutumier de Normandie (c. 1250), the *Olim* registries of the Parliament of Paris due to Jean de Montluçon (c. 1260), and the *Coutumes de Beauvaisies* by Philippe de Beaumanoir (c. 1280).[23]

Both the *Projet* of the year VIII and the Civil code represented a conscious effort to reach a compromise between the customary law of the North, particularly the Custom of Paris, and the Roman law inspired system of the South.[24] This compromise had been proposed for the first time by d'Olivier.[25]

Professor Berman wrote only one page describing the Civil code while devoting more than four times that space to criminal law and procedure and to the Penal Code of 1810. It is true that the appalling conditions that existed in France and most other countries in that area make this topic of considerable importance, nonetheless, of all the Napoleonic *Cinq Codes*,[26] only the Civil code achieved true world significance and influence. Commenting on this, Planiol and Ripert stated: "These four codes are quite inferior (*bien inférieurs*) to the Civil code."[27]

There is one final comment before concluding this response. In discussing Deism as an essential part of the belief system of the Enlightenment, Professor Berman stated: "They [the *philosophes*] believed in what Jefferson, in the Declaration of Independence, called 'the laws of Nature and of Nature's God.' It was, in fact, their belief in the laws of Nature's God that led the *philosophes* to proclaim universal human happiness as the highest goal, and universal liberty, equality, and fraternity as the highest means of achieving that goal."[28]

There is no reference in the foregoing paragraph, or in Professor Berman's lecture, to the decisive role played by Natural law in the codification of the civil law in France. The *Projet* d'Olivier of 1789 was an enlarged and improved version of an earlier *projet* of 1786, which bore the significant title "Civil Code for All Peoples, or Laws emanating from Nature and Reason."[29] The *Projet* of the year VIII

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24. *See* the Discours préliminaire of the *Projet* of the year VIII in Projet de Code civil, présenté par la Commission nommée par le Gouvernement le 24 Thermidor an VIII (Ventôse an IX).

25. Batiza, *supra* note 14, at 502, 509.

26. Namely (in addition to the Civil code), the Code of Civil Procedure, the Code of Commerce, the Penal Code, and the Code of Criminal Procedure.

27. *See* PLANIOL & RIPERT, *supra* note 19, at 39.

28. Berman, *supra* note 1, at 618.

29. Code civil de tous les peuples, ou Loix dictées par la nature et par la raison. *See* Batiza, *supra* note 14, at 502, n. 110.

continued that same trend and adopted a Natural law philosophy in the following provisions:

> There is a universal and immutable law, a source of all positive laws; that law is nothing more than natural reason in so far as it governs all men.[30] In civil matters, the judge, in the absence of precise law, is a minister of equity. Equity is a return to natural law or to received usage in the silence of positive law.[31]

The preceding provisions were not retained in the final version of the Civil code.[32] Nevertheless, Natural law had succeeded in inspiring the process of codification that culminated in that code.

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30. Liv. prél., tit. I, art. I.

31. *Id.* at tit. V, art, XI.

32. Several Courts of Appeal raised the objection that the provisions in the Preliminary Book, for the most part, belonged more properly in a law treatise rather than a civil code. *See,* the observations made by the Court of Appeals at Paris, 5 FENET, *supra* note 5, at 94.