

BOOK REVIEWS

THE CODE NAPOLEON AND THE COMMON LAW WORLD.

Bernard Schwartz, Editor. New York: New York University Press, 1956. Pp. x, 438, Index. \$12.25.

On March 24, 1804, the Code Napoleon was voted into law. The one hundred and fiftieth anniversary, an event of importance not only for the Civil Law but also for the Common-Law World, was celebrated by eighteen sesquicentennial lectures delivered at the Law Center of New York University on December 13-15, 1954. These eighteen papers constitute the commemorative volume under review. They are followed by a selective bibliography of publications in English (pp. 401-21), compiled by Julius J. Marke, Law Librarian of New York University.

As the title indicates, all papers deal with the Code Napoleon and the Common-Law World. But within this general subject, different groups may be distinguished. Some papers deal with the Code Napoleon itself. Carl J. Friedrich (pp. 1-18) discusses its ideological and philosophical background. Here, three types of codification are enumerated: (1) The digest type (Justinian's *Corpus Juris*); (2) The natural law type (Austrian Civil Code 1811); (3) The revolutionary type. Whereas the Code Napoleon was inspired by revolutionary thinking, it was actually shaped into the second type. Here, already, the moderation of the drafters is praised as one reason for the excellence of the Code.

André Tunc (pp. 19-45) of the University of Grenoble, who recently published his excellent works on American law, gives the grand outlines of the Code. He shows that the wish for codification was old in France, but that only the strong will of the First Consul assured the success of the great undertaking. The principal reason for the codification was the wish for a written law, clearly stated. Let us remember that this wish brought about the first codification of the ancient Roman law, the history of which starts and ends with a codification: the *lex duodecim tabularum* and the *Corpus Juris*. In France not only was the influence of Roman law strong, but the French spirit and language had inherited from Rome the love for precision, clarity and logic. The French concept of codification stresses, therefore: (1) completeness; (2) statement of the law in broad general rules, whereby, as Portalis underlined in his *Discours préliminaire*, it is left to the judge to direct the application of the "maximes générales du droit." There is in France, consequently, also a vast field of judge-made law. But Tunc brings out the essential difference between French judge-made law, which always is within the Code and the statutes and is definitely a secondary, subordinate law, and the Anglo-American "case law." The French judge relies on logic, concision, clarity. Tunc, finally, stresses that the Code is based on the conciliation between tradition and revolution. René Cassin (pp. 46-54) deals with the other motive of

codification: The necessity of the national unity, out of the coutumes of the North and the Roman law, prevailing in the South.

It is the moderation, the brevity, the logical and systematical arrangement, the elegance of formulation which have made the Code both a legal and a literary masterpiece. That explains also the wide territorial expansion of the Code in Europe, Latin America and the Middle East, although after 1900 the more modern Codes of Germany (1900) and of Switzerland (1911) have gained wide influence. This territorial expansion of the Code is the topic of the paper (pp. 92-109) of the Belgian, Jean Limpens, who also loudly praises Napoleon as a legislator who himself knew that the Code was to remain his principal achievement.

Another group of papers deals with the comparative analysis between the Code and common law in certain legal fields. John H. Tucker, Jr. (pp. 346-77) gives a bit of the legal history of Louisiana and shows that, while Louisiana has adopted much of the common law in fields not covered by the Code, it is still civilian and the rule of *stare decisis* really has no place in Louisiana. Max Rheinstein (pp. 139-61) studies the family law of the Code and its development. A. von Mehren (pp. 110-38) makes a comparative analysis in the field of contracts and finds that the French approach to the problems of formation and form of contracts is superior to that of the common law, developed concretely and pragmatically, not systematically and speculatively. Claude Lévy (pp. 162-76) compares the law of the Code with common law in the field of property. He shows that the French concept of "propriété" is very different from the concept of "ownership" because the idea of limitation in time is completely repugnant to the French concept of "*propriété*."

There are vast bodies of French judge-made law which created new law. That has happened for two reasons. The first is that this French judge-made law *did* develop from the Code, but only out of two articles of the Code, announcing a general principle of tort law. Walker J. Derenberg (pp. 177-223) shows how early, as a result of French judge-made law, a vast and far-reaching French law of *concurrence déloyale* developed, and compares the late, slow and cautious development of the law of unfair competition in the United States. The other reason for a vast body of French judge-made law, creating new law, is that it deals with a field outside of the Code. That is the case of French administrative law, a field studied by Bernard Schwartz (pp. 247-66). He compares it with the slow emergence of a particular administrative law in the United States. One reason for this slow emergence here is the subordinate position of public law, the primacy of private law in the common-law world. This writer would add another field, not treated in this volume, a field known in the United States as "conflict of laws" and in France as *droit international privé*. In the absence of norms dealing with this field in the Code, the French conflicts of law is wholly judge-made.

In spite of all that, there are vast and basic differences between the techniques and between judge-made law in the realm of civil law and

Anglo-American "case law," as André Tunc brings out in his paper. Sheldon D. Elliot (pp. 80-91) studies the techniques of statutory interpretation; Angelo P. Sereni (pp. 55-79) shows the basic differences between the Code Napoleon and common-law statutes, even if they are called codes. The Code is based on the principle of completeness and self-sufficiency. The law is laid down in broad general rules, not going into details; the law is logically and systematically arranged. Common-law statutes are not complete, not superseding unwritten law, not formulated in general principles, but giving many details, exceptions, distinctions, qualifications; hence the principle of strict construction. In consequence, the "legal rule" of common law is not identical with the *règle juridique* of civil law; in the latter the predominant place is not held by the judge, but by the legislator and the scholar (*la doctrine*). The fact that in common law every case is law, has the consequence that there is much more law in Anglo-American than in civil law; hence the difficulty of finding the law, the technique of "distinguishing" cases; hence the fact that legal advice in Anglo-American countries is much more expensive, that there is a greater difference, as far as legal advice is concerned, between the rich and the poor. The French lawyer has all his private law in one volume. Hence, methods of interpretation and relations between legal rules and judicial functions differ. While decisions of the highest courts and, particularly, the *jurisprudence constante* have also their place in civil law, the distinction between the value of precedent in Anglo-American and in civil law is still a substantial one. This writer could add that this difference between the two laws has a deeper reason, namely the different philosophical approach in continental and Anglo-American countries: continental thinking is deductive, going from the general to the particular, is logical and systematic—hence the Code; Anglo-American thinking is inductive, going from the particular to the general, is pragmatic and casuistic—hence the "case law." This philosophical difference is also stressed in the paper of the former Chief Justice of Canada, who corroborates it with a quotation from André Maurois.

Another group of papers studies the problem of codification in new states or states of a basically different ideology; these papers make us acquainted with specific laws and problems of which we know little. N. Stjepanovic (pp. 224-46) gives an expose of the problems in Yugoslavia; B. Akzin (pp. 298-340) studies in a detailed way the problem as it presents itself in Israel.

Dean Roscoe Pound (pp. 267-97) with his enormous knowledge surveys the problem of codification in Anglo-American law; he investigates the conditions leading to codification, the two classes of states adopting a code, the three types of codification, the objections against and the advantages of codification. He concludes that the conditions leading to codification exist, perhaps, in this country, but he doubts that the Anglo-American law is ripe for a complete code, because "no one today can formulate with assurance the idea of the end of law which will prevail in

the twenty-first century." (p. 292). J. B. Tate (pp. 341-45) gives a brief glance at the problem of codification in international law.

The concluding two papers by the former Chief Justice of Canada, Thibaudeau Rinfret (pp. 378-88), and by the Chief Justice of the Supreme Court of New Jersey, Arthur T. Vanderbilt (pp. 389-400), give a general view of the relations between civil law and common law.

It is sometimes said that a volume constituting a symposium by many, very different men is, so to speak, necessarily threatened by a lack of unity and an unevenness in quality. That is certainly not the case here. All the papers are closely related to the central theme, indicated in the title; all the papers, however varied the approaches of the different authors may be, are on the same high scientific level. This commemorative volume is excellent and holds a high place in the growing literature on comparative law. Both the Law Center of New York University and the editor, Professor Bernard Schwartz, are to be highly congratulated.

Josef L. Kunz †

STRATEGIC INTELLIGENCE AND NATIONAL DECISIONS.

By Roger Hilsman. Glencoe, Illinois: The Free Press, 1956. Pp. 187. \$4.00.

This volume undertakes to survey the United States agencies concerned with strategic intelligence and to analyze their operating policies. It contains a brief history of past and present American intelligence activities, with emphasis upon "current doctrines" in the Central Intelligence Agency, the State Department and so forth.

Any serious contribution to our literature on national intelligence is welcome, in an age of guided missiles and atomic warheads when the first enemy attack could be decisive. All can agree that it is imperative that the United States be well informed as to the plans and capabilities of foreign powers. However, the practical value of this work is questionable. While it contains a cursory description of United States intelligence facilities, its analysis of their functions is hampered by academicism and a prolix style. Accordingly, its contribution to thought upon its vital theme must be evaluated as slight when compared with the works of William J. Donovan, Allen Dulles, Sherman Kent and others.

Characteristic of the approach and style of the author are his final conclusions that our policy makers "do not seem to understand the disciplined procedures of a more or less 'scientific' analysis or the role of theory and conceptual tools in thinking," and "the intelligence men, for their part, must orient themselves frankly and consciously toward policy and action—creating a frame of mind that is manipulative, instrumental, action-conscious, policy-oriented; recasting their thought to the context of action and adapting their tools expressly to the needs of policy." (pp. 181, 182). While stating commendable objectives, it is difficult to conceive how

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such doctrinaire advice could be of practical benefit to the brothers Dulles in their daily affairs.

Security, of course, renders such a task difficult for any writer. The probability is that the best analyses of our strategic intelligence problems will never become public, but even now are available to the National Security Council. This undoubtedly is for the best, despite our heritage of aversion to secrecy. Like war plans, the acquisition and utilization of strategic intelligence must remain outside public forums if they are to serve their essential purposes of national security.

James B. Donovan †

CONGRESSIONAL POLITICS IN THE SECOND WORLD WAR. By Roland Young. New York: Columbia University Press, 1956. Pp. 281. \$4.50.

For the past few years the number of new books on Congress has exceeded those on the Presidency. The Presidency is reasonably well understood, Congress baffles. Consequently when a distinguished student of legislative institutions like Roland Young brings out another book on Congress, we may expect further illumination therefrom. The reader is not disappointed.

The story of Congress during the war years is absorbing and on the whole reassuring. It would be too much to expect, nor would it be a healthy sign for Congress to give up its partisanship and local politics completely even during a war. One does have a right to expect, and on the whole this was the fact, that Congress shall accept certain overall objectives in war time, and shall make its main decisions accordingly.

Dr. Young has identified seven main fields of congressional concern and has devoted a chapter to each. Conversion to the war effort, the mobilization of man power, price control, financing and profiteering, grand strategy, foreign policy and the basis for reconversion to peace are the themes which comprise the body of the work. A conclusion, which is largely a summary, and an appendix analyzing the influence of party in detail make up the remainder of the book.

Implicitly rather than explicitly, the author sees the two main interwoven strands of congressional behavior in Congress' roles as resolver of conflicts and as attainer of objectives. He speaks of "the usual political method of striking a compromise between competing economic and regional claimants." (p. 144). It has been fashionable for many years for most writers to interpret virtually all of congressional behavior in this frame of reference. Those of us who live close to Congress know better. We would not underrate for one minute the importance of these factors in the legislative process. We do, however, insist that most congressmen are themselves far more aware of the pressures of local and special interests

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than an outsider could possibly be, but with this awareness has come also a very real appreciation of the overriding importance in many instances of other values. Congressmen seek the appearance of furthering the demands of their clientele, but in executive sessions and in numerous other ways they often see to it that these same demands are subjected to the test of the national interest. We note something of this in the account of congressional behavior in the field of price control as pictured in chapter four. If we were to judge Congress by what it said, one would assume that Congress wanted price controls riddled at a drop of a hat. On the other hand, at the critical times of decision, in some way understandable only to those who observe Congress at close range, the end result legislatively speaking was not too far from the declared national objective. On the other hand, the very great influence wielded by agriculture appears again and again, perhaps most notably in draft deferment of farm labor. However, with the need felt for food, it is difficult to give a wholly negative verdict even on this point.

The book throws very considerable light on relationships between the President and Congress. "The President emerged as the over-all planner of political and economic action, and the role of Congress was that of altering, amending, objecting, and substituting." (p. 5). At times the President was cavalier in his methods, as in his threat to impose price control, whether or not Congress consented. Consumer subsidies for a long time had a doubtful legislative base. On the other hand, practices of liaison, leadership and congressional participation in conferences were developed which have had a carryover in the years since the war. From the war years apparently date the frequency of meetings between the President and congressional leadership, often without reference to party. From these years also date what is now a fairly settled part of the usages of our Constitution, namely the utilization of members of Congress as delegates in international conferences. The fairly frequent practice whereby congressional committees invite their opposite numbers in the executive branch for off-the-record briefings and conferences seems to have jelled during this period. Moreover, Congress sharpened its critiques as instruments of control at the same time that it delegated extensive powers. This also is now customary. To summarize, Dr. Young has illuminated greatly a number of the informal devices of legislative-executive liaison which seem now to have become reasonably established practice. Thus the war left our living Constitution permanently changed.

In this centennial year of Woodrow Wilson, it is interesting to note Dr. Young's comment on the committee system which was subject to such severe stricture in Wilson's *Congressional Government*.

"The strength of the committee system lies in the fact that a known group in Congress is responsible for developing policy in specific areas. Committees develop considerable corporate unity and are able to command the sedulous attention of their members on difficult problems for prolonged periods of time. A well-functioning committee which shows

concrete results from its efforts can give its members a feeling of satisfaction to reward them for their service. Moreover, the relations established with the government agencies provides the committees with some awareness of and insight into administrative problems and programs." (p. 229).

Two appendices deal in detail with the effect of partisanship. Each member is given a rating according to the percentage of time he agreed with the majority of his own party on party votes. A party vote is defined as a roll call on which a majority of one party is opposed by the majority of the other party. It is clear from this classification that there were and still are a considerable number of liberal and conservative members in both parties. It is also clear that during these years the dominant group in the Republican Party was conservative and that of the Democratic Party, liberal. While this has often been observed and maintained, an objective, quantitative demonstration of the fact is evident in these appendices.

Dr. Young has naturally high-lighted certain weaknesses of Congress as then constituted. Most serious of these was the difficulty of integrating policies in different areas. The dispersive nature of congressional committees, for example, was the obstacle which the special reconversion committees found seriously handicapping. The making of fiscal policy was so spread among the committees that taxing, spending, borrowing and price control were each separately considered.

Leaks from the single executive session of the Senate revealed the difficulty of sharing classified information with the legislative body. On the other hand, those in Congress who were aware of the Manhattan project not only respected its confidentiality but were of the calibre to gain acceptance by their colleagues of the expenditure of large sums of money without criticism and without disclosure. Perhaps such a selection of a few members for confidential disclosure is a device which the executive might repeat in connection with other problems.

The peevishness of individual congressmen were duly noted. On the other hand, Congress in actuality pays much less attention to these members than the amount of publicity which the latter obtain in the newspapers would seem to indicate.

The period was prior to the growth of a permanent professional staff. Except in the fields of taxation and appropriations, no committee had any research staffs of a professional and permanent nature. Such professional staffs were from time to time assembled for investigations and then almost as quickly dispersed. The reviewer feels, and he believes that Dr. Young will agree, that the acquisition of such permanent staffs has brought about a considerable measure of correction of many of the weaknesses and inadequacies set forth in this account of the war period.

The book is strongly commended to those interested in the legislative process. While its author almost necessarily has confined himself largely to the printed record, and consequently may well have missed certain of the influences operating upon congressional decisions, his own contact with

Congress and his subsequent study have been such as to make the book a most useful account of our legislative establishment at one of the periods of its greatest testing.

Ernest S. Griffith †

THE PITIFUL AND THE PROUD. By Carl T. Rowan. New York: Random House, 1956. Pp. xii, 432. \$5.00.

Carl T. Rowan, a staff writer of the *Minneapolis Star and Tribune*, was invited by the United States Department of State in 1954 to spend three months in India giving lectures on "The Role of the Newspaper in Social Change" under the International Educational Exchange Program. After his mission in India, he briefly visited various countries in Southeast Asia. This book is a report of his trip. More than half of it is devoted to India; of its twenty-five chapters, fourteen are given to India, two to Pakistan, and then one short chapter to each of the countries he visited in Southeast Asia.

His observations in India are summarized in the title of the book. He actually saw two Indias—the *pitiful* masses of common people gripped by extreme poverty, the magnitude of which could not be fully appreciated without actually seeing and "smelling" the "stench, dirt and rags" (p. 10) that were observable everywhere; and the *proud* intelligentsia, who prefer to talk of India's "moral and spiritual superiority" and whose passion is to declare to the world that India is strong and independent, and would brook no interference or domination from any foreign power, especially those powers identified with the colonial regimes of the recent past.

His task of interpreting his country to India was not easy. Many times he found himself before suspicious, if not hostile, audiences. He found the Indian intelligentsia in an "anti-American mood" (p. 75), he was disturbed by the anti-American campaign of the Indian press (p. 189), he was grieved to hear his own country criticized again and again for supporting colonialism, practising racial discrimination and pre-occupation with warlike activities. As an American Negro, he was fully aware of the evil of racism, but at the same time he was also proud of his country in many ways. He found it difficult to tell the story of free and democratic America. He was heckled in meetings, harassed by "loaded questions" that cast reflections on American policy at home and abroad and questioned his personal qualifications to speak for the oppressed Negroes of his land, and worn out by "emotion-charged incidents" (p. 24) which left him with "frightened concern about the fate" of India (p. 105).

His concern was heightened by the realization that the communists were fully exploiting the prevalent distrust of the West. He found student organizations dominated by communist agitators and "professional students" planted in the colleges to incite discontent, suspicion and bitterness. The major themes with which they appealed to student emotions were colonialism, racial discrimination and the war-mongering activities of the capitalist

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nations. The red menace, he reported, was "greater and more frightening" than he had imagined prior to his India visit. (p. 417).

Despite his disappointment, Rowan did not lose faith in India or in the value of cultural exchange. He remained firm in his belief that "India held the key to the survival of democracy in Asia." (p. 231). Though personally rebuffed by Nehru, who angrily walked out of a brief interview after an emotional denunciation of the Southeast Asia Treaty Organization (p. 168), he retained his respect for the undisputed leader and "demigod" of India's millions. Despite rude criticisms of American motive in giving aid to other countries, he was unshaken in his conviction that aid to India was essential to the cause of freedom (p. 420).

The chapters on Southeast Asia consist of general observations based on his brief visit. In Pakistan, he found a dictatorial government exercising power in the name of "controlled democracy." Corruption and intrigue were rife and the intelligentsia were "sad, disheartened and almost desperate." (p. 258). In Burma, he was relieved to be greeted by a friendly atmosphere, in which he heard no boastful talk of spiritual superiority as he had so often in India. He "found in Burma a serious concern about social justice and equality awing her people" (p. 285), and Premier U Nu to be "plain and unpretentious" and much more approachable than Nehru.

Thailand impressed him as a beautiful country with tranquil people free from the bitterness and indignation so prominent in the other lands he had visited (p. 301). Nevertheless he found here "deep and political turmoil," an attempt to stamp out corruption and a fervor that is of great significance to the free world.

In Malaya, British colonials have to contend with not only the growing nationalism of Asia but the terrorism and subversion of the communists. The fight against the terrorists in the jungles is a war that never ends, but in some ways communist subversive activities in schools are even harder to combat.

In Indonesia, the dominant features of the scene were again poverty, government intrigue and corruption, and a belligerent nationalism very suspicious and bitter toward Western colonialism. Perhaps the best chapter in the second half of the book is that on the Bandung Conference of Asian-African nations in April 1955. He brought a valuable eye-witness report of the spirit of the conference and personal characteristics of some of the important persons who attended it.

Mr. Rowan has given us a good journalistic report of the lands he visited and the people he talked with. At a time when Americans are becoming increasingly aware of the importance of South and Southeast Asia to the free world, the author's realistic report of the mood of Asians, their aspirations and sensitivities and suspicions, should help toward an intelligent realization of what obstacles lie in the way of the free world and what has to be done to dispel current misunderstandings to develop goodwill and mutual trust.

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