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Schwartz: The Code Napoleon and the Common Law World

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RECENT BOOKS

THE CODE NAPOLEON AND THE COMMON LAW WORLD. Edited by *Bernard Schwartz.* New York: New York University Press. 1956, Pp. x, 438, $12.25.

The publication by an Institute of Comparative Law in a common law jurisdiction of a book devoted to the sesquicentennial celebration of the *Code Napoleon* is of great significance for jurists trained in either the civil law or the common law. This tribute to the universality of the French Civil Code shows that American lawyers are becoming fully aware of the advantages they may derive from comparative legal research and the lessons of legal history.

Following the Louisiana tradition,[1] Professor Schwartz has assembled in this volume the contributions of many eminent American and foreign jurists on the *Code Napoleon* and the common law world. Although not all the articles reflect the same degree of scholarship, a defect not unusual in the symposium form adopted here,[2] and in some instances a different choice of topics might have been made,[3] this work is a valuable contribution to the study of comparative law and should be read by any person interested in the great legal traditions.

First, the contributors have tried to determine the effect of codification in France and in the countries where the *Code Napoleon* has served as a model;[4] next they have tried to draw out of the experience under that code certain conclusions helpful in any attempt by codification of the common law to bring order out of its chaos of statute and case law. This is a problem which has perturbed common-law lawyers for more than two centuries, and the qualified affirmative answer given to this challenging

1 For instance, "The Future of Codification," Essays in Honor of the Centennial of the Tulane Law School, 29 TULANE L. REV. 177-327 (1955).

2 The sesquicentennial lectures delivered at the Law Center of New York University, December 13-15, 1954 is a study prepared under the auspices of the New York University Institute of Comparative Law. Contents: Preface by Bernard Schwartz, Director of the Institute; The Ideological and Philosophical Background, by C. J. Friedrich; The Grand Outlines of the Code, by André Tunc; Codification and National Unity, by René Cassin; The Code and Case Law, by Angelo Piero Sereni; Techniques of Interpretation, by Sheldon D. Elliott; Territorial Expansion of the Code, by Jean Limpens; The Code and Contract—A Comparative Analysis of Formation and Form, by Arthur Von Mehren; The Code and the Family, by Max Rheinstein; The Code and Property, by Claude Lewy; The Code and Unfair Competition, by Walter J. Derenberg; The Code in a Socialist State, by Nikola Stjepanovic; The Code and Public Law, by Bernard Schwartz; Codification in Anglo-American Law, by Roscoe Pound; Codification in a New State, by Benjamin Akzin; Codification and International Law, by Jack Bernard Tate; The Code and the Common Law in Louisiana, by John H. Tucker, Jr.; The Relations Between the Civil Law and the Common Law, by the Hon. Thibaudeau Rinfret; The Reconciliation of the Civil Law and the Common Law, by the Hon. Arthur T. Vanderbilt; A Selective Bibliography of Publications in English, by Julius J. Marke.

3 The topics selected were thought to be of special interest to American lawyers. A civilian approach might be different.

4 The first great codification in modern times, the *Code Napoleon* was voted into law on March 21, 1804.

question by leading authorities, after an objective and thorough analysis of the pros and cons of codification, gives this book its greatest value and illustrates best the claim of the *Code Napoleon* to international recognition.

Today many eminent jurists trained in the common law have abandoned a biased attitude against codification which was based on too strict an adherence to the ideas of Savigny and Austin. Bentham's views are being considered anew. As stated by Dean Pound, common law jurisdictions are approaching a condition in which codification is not unlikely to be resorted to. Codification, however, would have to be approached gradually as a step by step process, due to the absence of well developed techniques of building the law on legislative texts. (p. 287)

Thus using the code as a starting point, the contributors have very skillfully weighed some of the most important contemporary problems of interest to common-law lawyers.

The book may be divided into three parts. The first (chapters 1-6) deals with the background, outline, interpretation and expansion of the *Code Napoleon.* The second (chapters 7-10) consists of an analysis of some of its substantive rules. The last part (chapters 11-18) is devoted to codification in general. A very good selective bibliography of publications in English follows, as well as a comprehensive index.

In view of the magnitude of the subject and the number of contributions included in this book, it is difficult in a limited space to give a fair account of all of them, and I will only review some of the contributions which I found of special interest.

Professor Friedrich provides us with a good analysis of the complex background of political and philosophical thoughts and ideas which prompted codification in France. The teachings of Rousseau, who entrusted to the legislator the task of giving to the political community its basic form, the influence of Voltaire who demanded the total destruction of all existing laws and the making of new ones, the radical discontent with existing legal institutions, the ideology and aspirations of the revolutionaries, especially the Jacobins, all militated in favor of a code. Another factor of great importance from a political and psychological point of view was the desire of Napoleon to rival monarchical absolutism as represented by Frederick the Great. Napoleon, though a son of the Revolution, was obsessed by the desire of making his rule legitimate in terms of the ancien régime. Professor Friedrich even wonders whether the Civil Code was not intended to do in the field of legislation what the marriage to the Hapsburg was to accomplish in the strictly dynastic realm, a thesis which is not devoid of foundation.

Although the code was made by revolutionaries, it is not revolutionary in spirit; it is rather a code of reformation born of the revolutionary inspiration of the time. In 1804, the trend of responsible thinkers was toward moderation and appeasement without abandoning the conquests of

the Revolution. Thus the code appears as a successful compromise combining reform and tradition, progress and stability. The idea was to enable every man to find in it rules for his conduct in civil life which he could readily understand. That was a novel and interesting concept. The new code was meant to be available to both lawyers and laymen, containing as it did legal rules based on moral and political precepts in force in the society in which it applied. Although later codes have somewhat abandoned this approach, it is always hard to divorce the two precepts.

The structure of the French Civil Code is analyzed in the next chapter by Professor Tunc who concerns himself more particularly with the French concept of codification. In his broad outline of the code, he shows that the traditional French approach to codification is that the law should be clear and should be stated in written form in order to be accessible to everyone. A code should also be complete in its field; it should lay down general rules based on experience and arrange them logically. Although today the code is not complete and is subject to revision, it was deemed satisfactory in 1804.

An interesting feature of the code is that unlike Anglo-American statutory enactments, it contains many general rules. Challenging Justice Holmes' views that general provisions do not decide concrete cases, Professor Tunc very aptly demonstrates that only in general rules can sufficient flexibility be found, as the legislator cannot foresee every possible situation. This approach of the code leaves the courts with great responsibility, as it forces them to penetrate the spirit of the rules in order to apply or extend them to concrete cases. This judge-made law will fill the gaps of the code and enable it to last perhaps forever as Napoleon hoped. For the French at least, the life of the law has its logic. "In the field of law the draftsmen of the Code certainly considered that the natural development of any legal system leads to a point of logical consistency at which it can be codified." (p. 30) Any logic brings clarity. On the other hand the code is also a work of experience. As Portalis so memorably put it,[5] "Les codes des peuples se font avec le temps, mais à proprement parler on ne les fait pas." Professor Tunc's remarks are very accurate, and today in the common law world many rules which were the fruit of experience have become such a coordinated body of orderly organized rules as to enable them to be codified.

Professor Sereni's chapter on the code and the case law is one of the most remarkable comparative analyses found in this book. Starting with a survey of the legislative techniques adopted in the drafting of civil law codes, as contrasted with that followed in the drafting of common law statutes, he shows that in civil law countries the codes with their general provisions are held to be complete and self sufficient, while as a rule a

5 1 FENET, RECUEIL COMPLET DES TRAVAUX PREPARATOIRES DU CODE CIVIL 476 (1827-1828).

common-law statute does not supersede the pre-existing traditional law and may thus go into details.

> "Since code and other legislative provisions usually consist of broad statements expressed in general terms and do not go into details to the same extent as common law statutes, it is for the courts to proceed to the implementation, in connection with the particular cases submitted to them, of the general principles laid down by the legislature; as a result the administration of the law by the courts in civil law countries presupposes the exercise of judicial discretion to a greater extent than is customary in common law countries." (p. 61)

However each decision must find its ultimate justification in some specific provision of the written law. Similarly, provisions of the code must be construed together in relation to each other. Contrary to common law tradition, the French courts may not resort to unwritten law. Thus not only are the methods of interpretation different, but also the relationship between legal rules and the judicial function is differently understood. Finally, the French courts may not in the absence of enabling legislation adopt judicial precedent as rules of decisions. Here too there is a basic difference between the common law and the civil law, based on the civil law view that the written law is complete and that each solution must be derived directly from it by means of a process of legal reasoning and interpretation. This non-recognition of stare decisis enables the French courts to give a new construction to an article of the code in order to keep up with economic and social evolution. It is only by this method that codes in civil law countries may remain in force for a long period of time.

Professor Von Mehren's comparative analysis of the code and contract from the point of view of formation and form, shows that in these two basic areas the structure of the civil code is superior to that of the common law. The theory of contract formation based on agreement not only offered the generality that codification required, but it directly raised the problem of form which in turn the code handled through formalities easily understandable by the ordinary man. This in the opinion of Professor Von Mehren is due in large part to the role that systematic thought played in the evolution and ultimate codification of French law. It also shows that in this field of the law a logical approach is better than a pragmatic one. This is a good illustration of Professor Tunc's views.

Professor Derenberg's elaborate survey of the code and unfair competition affords another illustration of the superiority of the civil law over American common law and statutory law in certain fields. Here a few code provisions laid down in general terms are the basis for civil relief against all kinds of interference with a man's business. It is certainly surprising and comforting for civil lawyers to note the little place given to the law of unfair competition in the legal system of a country whose business methods

are admired all over the world, a condition which according to Professor Derenberg calls for practical solutions, some of which he suggests.[6]

Dean Pound's admirable survey of codification in Anglo-American law shows that, since Justinian, codes were demanded where:

"1. The traditional element of the law for the time being has substantially exhausted all its possibilities, so that a new basis is required for a juristic new start; or instead, a basis is required on which to build a body of law for a country with no juristic past.
2. Where there is a juristic past, the law has become unwieldy, full of archaisms and uncertain.
3. The growing point of the law has shifted to legislation and an efficient organ of legislation has developed.
4. There is need of one law in a political society whose several subdivisions have developed divergent local laws." (p. 278)

Applying to common law jurisdiction the lessons of history, he feels that the United States is approaching a condition in which codification is not unlikely to be resorted to, as the traditional element in America has for some time exhausted its possibilities of bringing the legal system abreast of the demand made on it by our modern society.

Today American law wants certainty; it is irrational due to partial survival of obsolete precepts. It is confused. Its unwieldy form entails much waste of labor. More disastrous, those who amend the law do not grasp and feel the law in its broad implications. As a result, codification of particular branches of the common law, as distinguished from reforming legislation, is an increasing phenomenon in the Anglo-American legal world. This codification is in most instances a private one, taking the form of restatements which pave the way for legislators, who are not yet ready to build the law on legislative texts. This is the only serious objection to codification in America. Until an efficient organ of law-making for the ordinary civil side of the law is created, codification will be a slow process. Could one imagine a chief of state or congressmen spending the greater part of their time drawing up a code, assuming that they have a proper knowledge of the law they are trying to codify? The law of modern states is so complex that our representatives are for most part ill prepared for that job. Only sufficiently large commissions of men trained in the law, judges, lawyers and university professors, can carry out such a task. With the economic unification of America, there is great need for one clear basic text of law, especially in commercial matters.

To sum up, it is possible to agree with Chief Justice Rinfret and Chief Justice Vanderbilt that the coexistence of both systems has been very profitable. Common law doctrines have entered the civil law while civil law

[6] See also, Derenberg, "The Influence of the French Code Civil on the Modern Law of Unfair Competition," 4 AM. J. COMP. L. 1 (1955).

doctrines have entered the common law, thereby leading towards ultimate unification or at least removing legal tensions and misunderstanding between these two great legal systems.

More important is the recognition that whatever the reciprocal influences of one legal system on the other may be, both systems tend towards similar conclusions. In other words, diversity of legislation is more in details than in fundamental principles, due to the essential unity of justice in our Western civilization. Issued from the same sources it is not surprising that they both have much in common. Perhaps the statement made by Chief Justice Vanderbilt, that very few common-law lawyers realize that in addition to customary law there exist other great bodies of law, stems from the fact that Roman law and legal history are not included in the law school curriculum of most universities. A knowledge of these subjects as well as a general survey of the civil law systems would certainly be of great value to common-law lawyers.[7]

Whether codified or not, both systems have tried with more or less success to fulfill the needs of the societies in which they operated. However, the real issue involved here is one of efficiency. After reading this book one should be convinced of the superiority of codification in this respect. The error in America is that the ordinary lawyer sees in codification the importation of foreign law concepts into the common law—a "civilizing" of the common law, the introduction of civil law concepts and doctrinal ways of reasoning. But codification is only a technique which may be adopted anywhere, a method for the formulation of written law. It has nothing to do with the value of the substantive law which is codified.

Professor Stone once wrote:

> "As the multiplicity of law increases, a demand for orderly presentation begins to be made. Even with its defects, mainly of man himself, the method of codification, newly adapted to our age, with provision for periodic revitalization, still appears to be the most useful tool for the doing of the task of stating the law clearly and concisely that man may know the rules and principles that are to govern his actions."[8]

It is unfortunate that no contribution has been included on the bilingual Quebec legal system, as the private law of this Canadian Province has grown as a distinct and original legal system deriving its inspiration and detailed rules from both the French civil law and the English common law.[9] Contributions on the *Code Napoleon* and private international

[7] Yntema, "Comparative Legal Research," 54 MICH. L. REV. 899 (1956).

[8] "A Primer on Codification," 29 TULANE L. REV. 303 at 310 (1955); also DAVID DUDLEY FIELD, CENTENARY ESSAYS CELEBRATING ONE HUNDRED YEARS OF LEGAL REFORM (1949).

[9] Fabre-Surveyer, "The Civil Law in Quebec and Louisiana," 1 LA. L. REV. 649 (1939); Johnson, "The Law Cannot Stand Still," 2 McGILL L.J. 11 (1955). Some references are made to the Quebec legal system in chapters 16 and 17.

law,[10] and the works of the *Commission de Rèforme du Code Civil*[11] would also have been of great interest to American readers, by providing them with valuable indications about the strength and weakness of the *Code Napoleon* in force now a century and a half. Contributions on codification in the U.S.S.R.[12] and in the Arab world[13] could also have been included. Of course in the latter case it is a matter of opinion, and one must remember that size and price are important factors influencing an editor's decisions. From the point of view of logic, chapters 7 to 11, dealing with the substantive law of the code, should have followed the arrangement of that code. Chapters 12 and 15 could have been placed after chapter 10, followed by the geographical division of chapters 13, 16, 11 and 14. Some contributions are too brief, considering the length of others and the importance of the subject matter they discuss. The style of the contributions is as varied as the authors, although some inevitable repetitions and contradictions occur. The terminology is not always uniform.

With no thought of arguing the superiority of the civil law over the common law, one must recognize the value of codification. Whether used as translation, source of inspiration, or legal technique, the *Code Napoleon* is the legal monument which has had the greatest influence upon and been the most durable foundation of the private law of modern times. As Dean Limpens so aptly says, the law is a long tradition and plagiarism becomes a virtue of humility for the legislator. (p. 105)

In terms of human achievements one should be careful not to minimize the role of Napoleon. It was without conceit and with prophetic pride, that he could say of the greatest legislative enactment of all times: "My glory is not to have won forty battles, for Waterloo's defeat will destroy the meaning of as many victories. But what nothing will destroy, what will live eternally, is my Civil Code."

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10 See Nadelmann and Von Mehren, "Codification of French Conflicts Law," 1 AM. J. COMP. L. 404 (1952); Delaume, "A Codification of French Private International Law," 29 CAN. B. REV. 721 (1951); "French Civil Code and Conflict of Laws: One Hundred and Fifty Years After," 24 GEO. WASH. L. REV. 499 (1956); Loussouarn, "The French Draft on Private International Law and the French Conference on Codification of Private International Law," 30 TULANE L. REV. 523 (1956); and 5 INT. & COMP. L.Q. 378 (1956).

11 Julliot de la Morandière, "The Draft of a New French Civil Code, the Role of the Judge," 69 HARV. L. REV. 1264 (1956); Preliminary Report on the Civil Code Reform Commission of France, translated by Joseph Dainow, 16 LA. L. REV. 1 (1955); Houin, "Reform of the French Civil Code and the Code of Commerce," 4 AM. J. COMP. L. 485 (1955).

12 Hazard, "The Future of Codification in the USSR," 29 TULANE L. REV. 239 (1955).

13 Badr, "New Egyptian Civil Code and Unification of Laws of Arab Countries," 30 TULANE L. REV. 299 (1956).