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THE CODE NAPOLEON.¹

The five codes which form the present written basis of jurisprudence in France, are, by such superficial thinkers as Alison, attributed to the first Consul, who was, perhaps, as incapable of aiding materially in their production, as of solving the mysteries of the immaculate conception. An American believer of such an absurdity will not be readily convinced that these five codes in substantially their present form, would have been the present law of France, if Napoleon had never lived, or had been killed at Toulon, or buried at the base of the pyramids of Egypt. If a truth like this be told plainly to this credulous reader of the fables, now called history, he will, perhaps, with a sneer of incredulity, refer to statements of Alison, or to the quotation by General Cass, of a complimentary observation made by Cambacères, who was

¹ The following extracts from articles lately published in the editorial columns of the *Pennsylvanian* newspaper, under the head of "The Province of the Future Historian," have been arranged for this article in such a manner as to present a brief outline of the compilation of the French "FIVE CODES," and a fuller history of that of one of them, the CIVIL CODE, ordinarily denominated the CODE NAPOLEON. The effect of the first paragraph is dependent, in part, upon its connection with portions of the original publication which are not inserted here because they have no relation to any subject of jurisprudence.

himself the primary compiler of the Civil Code, upon the part taken by Napoleon presiding as first Consul at some of the discussions in the Council of State, on the revised draught of one of the five codes. The name of this code,—called the “Code Napoleon” as the compilations of Tribonian and his coadjutors bear the name of Justinian,—and this complimentary remark of Cambacères, who had worked in its preparation before the name of Napoleon was known beyond the roll call of his regiment, have been hastily relied on by intelligent Americans, as confirmations of the impressions of Alison, who, in his laborious investigations, never penetrated far below the external surface of historical materials, of which he understood the *selection* better than the *use*.

In order to exemplify the fallacy of the man-worshipping method of historical investigation which we have thus ventured to condemn, we propose to demonstrate from authentic materials, that the conception or plan of none of the five codes, was, in any degree, Napoleon Bonaparte’s; and that the part which he took in executing the plan as to the one code which bears his name, however serviceable in the promotion of his own selfish interests, was in itself of insignificant importance to the promotion of the work. We will, incidentally, explain the mode in which the hastily conceived impression that he took an important part in its promotion, probably originated.

At the commencement of the French Revolution, in 1789, the experiment of codification in modern Europe was not a novelty. It had already to some extent been tried in Bavaria, in Prussia, and in Austria; and had also been tested in France herself. In 1667, France had, in the ordinance of procedure, established the basis of one of the five codes, that of “civil procedure.” This code, promulgated on the 24th April, 1806, was founded upon the ordinance of procedure of 1667. The ordinances of 1673 and 1681, forming a complete code of commerce and navigation, were in full force until the promulgation of the code of commerce of September, 1807, another of the five codes. This code superseded these ordinances, by re-enacting their provisions with modifications and extensions, rather than with any radical alterations. Commercial codes, embodied in prior ordinances of other countries of Conti-

mental Europe, have been published in English translations by Magens and Judge Peters. The French penal code, and code of criminal procedure, promulgated under the Empire, are generally recognized as having been results of the legislation of the Constituent Assembly. Trial by jury in criminal cases, which now prevails in France, and a penal code, with "a complete instruction on criminal procedure" were introduced before the end of the year 1791. "The code of crimes and punishments" was promulgated in 1795, before Napoleon Bonaparte had possessed any other than a simply military rank or station. His name has indeed never been connected with any of the four codes,—called the commercial code, the penal code, the code of civil procedure, and that of criminal procedure. It only remains, then, to consider the question with reference to the civil code, which honorarily bears his name.

The motive of the preparation of the civil code, was not the introduction of a new system of jurisprudence, but the removal of those uncertainties as to the legal doctrines in force which had constituted the principal evil of the former system. The remedy consisted first in devising a method of resolving for the future, the perpetually recurring doubts on doctrinal points in which the old system had been involved. The want of a tribunal, whose decisions might be received as of authority throughout France, had been a principal cause of the retention of those diversities in the local customs, which had formerly regulated the different territorial divisions of the country. The first remedy applied by the National Convention, was, therefore, the removal of the cause of these multifarious uncertainties of doctrine, by constituting, in the newly created tribunal of Cassation, a Court in which the judgments of the Courts of Appeal of all the several departments might always be reviewed. This tribunal, established by the National Convention as early as the year 1790, gave to France the benefit she has ever since enjoyed, of a secure standard of authority, the advantage of which had been tested by experience in England and in America. If France had always had such a standard of authority, and had fully comprehended the advantages of that progressive improvement of the law, which is derivable from adhering to the

decisions of such a tribunal, as precedents for the decision of other cases, there perhaps would not have been occasion for the general codification of the civil jurisprudence of the nation. In the existing state of her jurisprudence, there was, however, an obvious necessity of adopting such a measure in connection with the establishment of the Court of Cassation, in order to harmonize these conflicting local doctrines. A code framed for this purpose, would furnish secure points of departure, and the Court of Cassation, starting from such points, would, by its decisions, prevent the recurrence of the former evil.

The general codification of the civil jurisprudence, was the subject of one of the "fundamental provisions secured by the Constitution" of 1791. The last article of the first title of this Constitution, was in the words, "There shall be made *a code of the civil laws uniform* throughout the realm." Cambacères, while "a representative of the people" in the National Convention, was a member of "the section of legislation." On behalf of this section, or Standing Committee, he presented to the Convention in 1793, the first draught of the *Civil Code*. The Constitution of 1793 contained, in the 85th article, a provision which, literally translated, was in the words, "The code of the civil and criminal jurisprudence *is uniform* for the whole republic," meaning, *shall be uniform*. Subsequently, after the organization of the Council of Five Hundred, one of the sections of this Council was, that "on classification of the laws," of which also Cambacères was a member. On behalf of this section, he presented to the Council, in 1795, a new draught of the proposed civil code, and a summary of the laws from 1789 to September, 1795, relating to this code. The late Mr. Duponceau, referring to these publications of Cambacères, and to the part afterwards taken by Cambacères in the discussions upon the code in the Council of State, has often been heard to say that he was the author of the Code Napoleon. If, however, Cambacères had not thus aided the Convention in the work, other competent compilers were at their command. Cambacères, under the constitutions adopted soon after Bonaparte's first *coup d'état* of 18 Brumaire, (9th November, 1799,) became the second Consul. Jacqueminot, a

“representative of the people” in the Council of Five Hundred, at about this time, published a draught of the principal titles of the code, as prepared by the legislative committee of that Council. This Jacqueminot, as “President of the Committee of the Council of Five Hundred,” was one of those who, afterwards, with Bonaparte as First Consul, and the other Consuls, signed the above mentioned Constitutions of the Consular Government, which were promulgated early in January, 1800. In the following summer, a Consular decree nominated Tronchet, Portalis, Bigot-Preameneu and Malleville, Commissioners “to make a comparison of the system, followed in the compilation of the *draughts of the Civil Code hitherto published*, determine upon the plan which they might deem the most suitable for adoption, and afterwards discuss the principal heads of legislation upon civil affairs.” These Commissioners, in their subsequent report, after quoting this decree, say it “is conformable to the purpose declared by *all our national and legislative assemblies*.” This declaration alone, proceeding from such a source, is altogether decisive as to the origin of the plan, and proves conclusively that it was not a novelty. The language used in the commission, compared with the progress then already made in the compilation, sufficiently prove that any government which might have been permanently established, must have proceeded to carry the project of the civil code into effect.

But, at this crisis of Napoleon’s first usurpation of supreme power, adequate motives induced him to expedite the progress of the work. He was young, and had been hitherto known to the public in his military capacity alone. The progress of the codification of the laws under the national and legislative assemblies had propitiously matured the work for his intervention. It was essential to his plans, that his name should be associated with some such measure. In his remark, when an exile and prisoner at St. Helena, that the best monument which he had erected for himself, was the code that bore his name, we may trace the motive which governed him in taking advantage of this favorable opportunity to show himself to France in his newly assumed character of a statesman, participating in the administration of civil government. Precedents in

the Roman Empire of the East, particularly in the case of Justinian already mentioned, and in that of Theodosius, and in those of other Emperors and potentates, had been followed in the modern instance of the Prussian code. This code bore the name of the great Frederic, whom alone of modern strategists, Napoleon regarded as entitled to bear a comparison with himself, or with Hannibal, whom he regarded as the great commander of antiquity. Everything doubtless indicated clearly to his mind, that his name might probably be associated with this code in time to come. He therefore doubtless desired the reputation of an actual, as distinguished from a merely nominal, intervention in the work of its compilation, then far advanced towards maturity. More important motives than are thus to be traced in the characteristic egotism of his insatiable ambition, were however sufficient to account for his intervention in the matter of that intended code. The border line between political and civil jurisprudence, is not always readily discernible. The projected political constitutions, according to those illusory theories of government which he professed, were, at that crisis, dependent, in part, upon a reconstruction of the domestic and social institutions of the country. These interests were sometimes directly, and often indirectly, involved in provisions of civil jurisprudence. He was therefore anxious that the civil institutions of the country should, through this code, be harmonized with the political. If his motives thus explained have been rightly penetrated, his course as to the code will be readily comprehended.

Malleville, one of the Commissioners, tells us that the Minister of Justice, in communicating to them their appointment, informed them that the first Consul desired that the work should be performed in the promptest possible manner; and adds, "we made every effort to fulfil this wish. The arrangement of the titles was soon settled, the matter distributed and the days of meeting appointed * * * for the examination of each Commissioner's work." He says, "the result of our exertions was that we succeeded in producing a civil code in four months." This new draught of the code, with a preliminary discourse by the Commissioners was printed before the end of the following winter. The general course

of Cambacères in the subsequent discussions, indicates that this draught was thus compiled with the aid of those previously published by himself. It was, in the main, an adoption of the text of the Roman law, or its anciently approved glosses, except where the old local jurisprudence was adhered to, because there had been a general uniformity, or some approximation to uniformity, in the doctrines of the different provinces. By this judicious plan, which was generally followed in the repeated revisions which the work afterwards underwent, the Commissioners, with the aid of the previous labors of the legislative sections of the National Assembly and Council of Five Hundred, were enabled to submit this draught of the code at so early a day.

The draught was next submitted to the local Court of Appeal of each of the Departments, then one hundred, or more, in number. These tribunals reported freely their objections, proposed amendments, and made suggestions, which were afterward considered. The draught was also submitted to the Court of Cassation, who also revised it, and reported in detail their views. Afterwards, the original draught of the Commissioners, with all these reports of the Court of Cassation and Courts of Appeal, passed under the revision of the section of legislation of the Council of State, composed of Regnier, subsequently Chief Judge, Berlier, Emmeri, Real, Thiбаudeau, Muraire, the first President of the Court of Cassation, Galli and Treillard. The four Commissioners who had compiled it attended their sessions, at which each title was examined, and was either passed as reported, or amended by a vote of a majority of the Board. When the contents of a projected law had been settled by such a vote, it was printed, *and was then for the first time distributed among all the members of the Council of State.*

This preliminary work seems to have been completed thus far by the summer of 1801, a year after the institution of the commission under the above mentioned Consular decree. Thirty-six laws embracing the whole of the future civil code, appear to have been thus printed for the consideration of the Council of State. *Until after this publication and distribution of the laws, of which the form had been thus far settled, there is no trace of any intervention of the*

first Consul, except his verbal message to the four Commissioners communicated as above, a year before, through the Minister of Justice, urging speed in the performance of the work. The Council of State, when in session upon the code, was presided over, either by Bonaparte, who as first Consul, was *ex-officio*, the President, "assisted by the two Consuls, or, *in his absence*, by the Consul Cambacères." Thirty members, including the eight who had composed as above the section of legislation, participated in the discussions of the Council which ensued. Among them were Regnaud de St. Jean D'Angely, and other eminent jurists, who took important parts in the subsequent discussions.

After the civil code had been thus reported to the Council of State in a matured form, Napoleon's direct participation, such as it was, began. It has been seen that he did not always attend the discussions upon the code in the Council. When at Paris, during the discussion, he was doubtless from time to time apprised of occasions when his attendance at the Council to preside at these discussions, might be serviceable to his interests or his designs. On such occasions, when a clause of the code was in question, he was probably, at the same time, always furnished with all the printed matter bearing upon it, including the reports of all former discussions, &c. His intervention in the discussions was usually, if not invariably, upon questions in which, directly or indirectly, some political interest was more or less concerned. On such occasions, he, when present, expressed freely his opinion. When he gave reasons for it, they were cogent, and, according to the reports, were expressed with clearness and precision. But, as compared with Cambacères, or with Portalis, or with some others, the extent of his intervention was limited. Of course, what occurred was creditable to the sagacity of the first Consul; it indicated that intellectual power of which he was unquestionably the possessor. But he did not exercise either authorship, or general direction, or special supervision over the work.

The four Commissioners who had compiled the last draught of the code, and had attended the sessions of the legislative section, were, during these discussions, always called on to attend the ses-

sions of the Council. "Every one of the members or compilers was at liberty to make his observations; and the presiding officer declared the result *according to a majority of the votes.*"

The form of a law having been thus determined, it was transmitted from the Council to the tribunate, where it was again the subject of consideration and of discussion. The views of the tribunate were then reported to the Council of State, who passed upon such amendments as the tribunate had suggested. After the proposed law had been thus again passed upon in the Council of State, it was presented to the legislative chamber. Before this final stage of the business, "the motives" of each of the proposed laws had been set forth at length, in published discourses, by "the orators of the government, and of the tribunate," among whom this duty was either apportioned by their superiors, or divided by themselves, analytically. Portalis had, in the meantime, at the expiration of about a year from the commencement of the discussion in the Council of State, prepared a revised draft of the code, with a superadded preliminary book of definitions, of which, however, scarcely any portion was adopted.

After four years of discussion under the consular government, when all the thirty-six acts had been passed by the legislative chamber, they were, in the year 1803, just before the establishment of the empire, consolidated into a single body of laws, under the legal title of "CIVIL CODE OF THE FRENCH." This code contains in the whole about as much matter, in bulk, as a fifth, or perhaps a fourth, of the ordinary contents of one of the late annual volumes of the laws of Pennsylvania.

This, and the other four codes, together, constitute a sort of brief elementary catechism of the French law. It has neither superseded the former learning, nor prevented the subsequent multiplication of law books, cart loads of which have since been published in France, embracing commentaries without number on the contents of each of the codes, besides text books and institutional treatises. With the aid of the Court of Cassation, the codes have in part served the purpose of introducing something like a standard of authority,

where none had existed. This was, as has been stated, the main, if not only purpose of the codification of the laws.

An exaggerated impression prevails as to the extent of the operation of the so-called "Napoleon Code," beyond the limits of the French territory. This code, of course, had not, in itself, the authority of law out of the dominions of France. Even within the limits of her short-lived conquests, it could not, without an express act of state, acquire the force of law. In Prussia, where it was temporarily adopted, under compulsion, after 1807, the old Prussian code was substituted for it in 1814. In other countries, whose governments prepared civil codes for themselves, after the promulgation of the French code, its method and arrangement were ordinarily followed. In its preparation, Cambacères, and the compilers who succeeded and co-operated with him under the Consulate, had, in all cases, retained, as far as possible, the ancient jurisprudence. The common bases of the present, as well as of the former, civil jurisprudence of Continental Europe, are ordinarily found in texts of the Roman Civil Law, or in the glosses of Doctors and Commentators, whose eminence had been recognized in both France and Germany. There is consequently a great apparent similarity in many of the doctrinal provisions of all these modern codes. But those willing to take the trouble of looking into Saint Joseph's concordance, may discover there that the temporary predominance of French political influence, at the time when the greater number of these codes was prepared, did not prevent the permanence of such former distinctive local usages as differed from those of France. A prevalent impression that France, under Napoleon, arbitrarily forced her code upon other nations, which, after her armies were withdrawn, retained it, of their own free will, as a substitute for their former local jurisprudence, is as fallacious as it ought to have been regarded as incredible.