

The Overemphasized Legacy of the Napoleonic Code

Zilei Li¹, Carlos Hernández^{2#}, Maria José Villalba Giubi[#]

¹Worcester Academy

²Southern Methodist University

[#]Advisor

ABSTRACT

When we discuss the legacies of Napoleon, it is inevitable to disregard his contribution to global jurisprudence: the French Civil Code of 1804. As Emperor, Napoleon proposed to enhance his military achievements with a comprehensive codification. Although he was not the precedent in doing so, it was him who created the paradigm of all codes that we now consider “modern.” For decades, historians investigating the course of Napoleon’s codification have developed a plausible explanation of its unparalleled significance in the world; that is, it extensively embodies the ideas of the radical French Revolution, which undermined feudal regimes and shaped modern society. However, this argument reflects a common tendency of glossing the Code by adding personal interpretations through modern lenses; it is neither objective nor inaccurate. The first part of this study is largely based on James Gordley’s essay (1994) on the myths of Napoleon’s codification. We will see that ideas expressed in the Code were not as novel to people in the nineteenth century as principles of the Revolution were, because many concepts were proposed by early French writers and framers of Roman law. In the second part of the study, we will investigate the relation between codification and the modern world. We will use Latin America as an instance to illustrate the limitations of the Code due to its relative antiquity. When we combine the conclusions of the two parts, it is plain that the legacy of Napoleon’s Code is often overemphasized in the modern world.

Introduction

“My true glory is not in having won forty battles; Waterloo will blot out the memory of those victories. But nothing can blot out my Civil Code. That will live eternally,” Napoleon once said when he was in exile on Saint Helena (De Montholon, 1847, p.401). For centuries, historians and jurists have exalted the codification for its enshrinement of the great principles of the Revolution and the profound transformations it brought to the modern world. British barrister Maurice Amos comments: “Ever since the day of its promulgation France has done an enormous export trade in law; indeed, until the German Code was published, she was without a rival” (Amos, 1928, p.13).

So, what is this Code that receives such an outstanding evaluation? What we now refer to as the Napoleonic Code is the first of the five codes passed for France from 1804 to 1810 under Napoleon’s rule (either as First Consul or Emperor). It contains much of the rules of the private civil law as it was considered expedient and practicable to embody in a single code. It consists of three books, preceded by a few preliminary articles on laws in general. Each book is divided into titles, each title into chapters, and each chapter into articles (Ilbert, 1905, p.5). The Code is often said to embody new ideas that emerged during the Revolution: nationalism, secularism, and above all, individualism. “The Civil Code was in reality the child of the Revolution, like Napoleon himself,” one historian notes (1905, p.5).

However, some scholars have taken the opposite position; the French Civil Code is not as revolutionary as many perceive. In the first part of this study, we will see that the Code only has limited relevance to the Revolution; some articles even contradict what the revolutionaries embraced. They reflect, in fact, the principles of French treatise writers from the *ancien régime*, many of which were extracted from passages from ancient Roman thinkers (Gordley, 1994, p.1). The second half of the study will discuss the Code’s relevance to the contemporary world. We will see that

despite its unparalleled significance, its influence on global jurisprudence gradually declined by the twentieth century, when its evident limitations proved incompatible with the changing society.

Relevance to the Revolution

France was long divided, almost equally, into two great legal regions: the region of written law, based on the Roman law of Theodosius and Justinian, and the region of customary law. The two distinctive legal systems were compatible to a certain extent with local diversities, yet the fact of their concurrence within a sovereign state proved chaotic. Attempts to unify law commenced under the reign of Charles VIII and Louis XII. Vigorous and instrumental efforts were made to digest the customary law, and by the late sixteenth century, the customs of all the provinces had been reduced to a written and authoritative form (Ilbert, 1905, p.5). By 1681, under the instructions of Louis XIV, Chancellor Colbert established the *Grande ordonnance de la marine* and extended it to the whole country. These laws were the “immediate predecessors of the Napoleonic Codes,” (1905, p.5) as they suggested the form and supplied the materials of the latter. Thus, the Napoleonic Code was not a precedent in unifying French law. It was more of a product of reexamination and integration of sources from ancient times.

If we closely examine the process behind Napoleon’s codification, we can identify its adherence to Roman ideas. The fundamental condition of Napoleon’s creation was a longing for a stable social order – after a decade of unrest and radical transformations – that resembled the *pax romana*. He believed in the Roman conception that his will would be legitimately imposed on native and conquered peoples through a system of laws (Kelley, 2002, p.3). The product, or the Code itself, exemplifies the influence of Roman law – despite it, like Justinian’s *Corpus Juris Civilis*, was claimed to make obsolete all “Roman laws, ordinances, local or general customs and regulations” (1865). In many aspects, Napoleon preserved the old principles. His endorsement of the concept of property, or “Romanoid paternal power,” family integrity, and other bulwarks of the emerging bourgeois establishment all reflect his attachment to Roman precedents (Kelley, 2002, p.9). In practice, as Kelley concludes, rationality in French law was almost extensively achieved via “recourse to these same sources,” and most importantly, Roman law, which was “identified with reason itself;” the so-called *ratio scripta* or *raison écrite* by jurists (2002, p.8).

The codification, then, seems rather to be a “natural expression of the genius of the French people,” who had been engaged for centuries prior to the fall of the Bastille upon the genial task of making the law into an orderly shape (Amos, 1928, p.3). In the discussion of specific provisions in the Code, we will trace back to the sources that did influence the framers, instead of radical ideas that emerged from the Revolution.

Property

Many scholars cited Article 544 as a typical instance of the Code’s enshrinement of individualistic ideas (Arnaud, 1969, p.180; Halpérin, 1992, p.95). The original text is as follows: *La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu’on n’en fasse pas un usage prohibé par les lois ou par les règlements* (art. 544, 1804). It defines ownership as the right to enjoy and dispose of things in the most absolute manner, if they are not used in a way prohibited by statutes or regulations. To determine whether the clause incarnates the spirit of individualism, we must first understand the origins of the idea of private property. The earliest remarks on this topic were in two great works in history. One of such was Gratian’s *Decretum*, when Saint Ambrose reprimanded the rich who failed to provide for the poor’s needs: “Let no one call his own what is common” (Gratian, 1855; Gordley, 1994, p.5-6). Another reference was in Aristotle’s *Politics*, a critique of his teacher Plato’s theory that all property should be held in common. Aristotle argued that there will be “perpetual quarrels,” and “those who labor much and get little will complain of those who labor little and get much” (Aristotle, 1905; Gordley, 1994, p.6). Thomas Aquinas summarized the arguments and concluded that private property is a human institution modifying natural law, to which Roman law subscribed, to eliminate the disadvantages that would arise if all things were held in common (Aquinas, 1963).

This vision, however, was not reflected in Article 544. The provision made no explicit reference to a modification of natural law ideas and embracing individualistic principles. It simply states the definition of property, which scarcely contains a trace of individualism. Contemporary French writers, as Gordley observes, have fallen into a tendency of glossing the word “absolute” to connect the codification to the glorious legacies of the Revolution. If we examine the drafting history and the early commentaries of the Code, we will realize that a new individualistic theory of property is missing (Toullier, 1828, p.41-46; Duranton, 1844, p.202-03). In fact, the drafters never broke with the idea in Roman law that all things should be held in common. When presenting his first and third drafts, Cambacérès explained that it was not his task to decide theoretical controversies about the origin of property (Gordley, 1994, p.8). In short, in terms of property, the framers of the Code did not express much attention to new liberal ideas that became popular during the Revolution. Instead, they tended to hold on to the old natural law that all goods should be held in common, which, to a certain extent, contradicts individualistic principles.

Contract

Another controversial provision regarding individualism relates to contract. Article 1134 states: *Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi* (art. 1134, 1804). In other words, agreements lawfully entered into take the place of the law for those who have made them. They may be revoked only by mutual consent, or for causes authorized by law, and they must be performed in good faith. Many scholars considered the text a proclamation of the autonomy of the will and the freedom of contract as it exalted contract to the same level as law. Some went further and claimed that the drafters themselves discovered this principle (Weill & Terré, 1986, p.10, 103; Carbonnier, 1977, p.66; Halpérin, 1992, p.279). Yet, just as we have discussed in the previous section, these writers tended to gloss over the original text with personal interpretations. If we focus on the passage itself, we can see that the reference to “autonomy” was obscure. The article does say agreements take the place of law. It does not, however, reveal anything about autonomy (Bürge, 1991, p.64-65). Hence, the claim that the drafters built the Code on the revolutionary idea of individualism is far-fetched. What possibly influenced this definition of contract was Thomas Aquinas’s theory that when something was transferred from one person to another, either it was an act of commutative justice that required an equivalent or it was an act of liberality (Gordley, 1994, p.13). Such an idea was neither individualistic nor revolutionary.

Admittedly, the Code did incorporate principles of the Revolution when it was drafted. This study will focus on two of those. The first was the revolutionary idea that all men are created equal. The drafters did consider it in the codification. The other was the triumph of republicanism, which led to the creation of, as Gordley puts it, “an ideal of what a code should be” (1994, p.27).

Equality among all citizens

By 1791, the *Assemblée nationale* had extended full civil rights to Protestants and Jews. There is no doubt that the framers were deeply aware of equality among persons. According to Portalis, the Code aimed to eliminate “all civil differences based on religious conviction or hereditary social status” (Portalis, an XII). The civil laws would be based on “respect for morality, national honor, a passion for public liberty, the maintenance of the sacred rights of property, and the need to recognize no other distinctions than those of virtue and talent” (Jaubert, an XII). Here Gordley raised an interesting point: to what extent did the drafters have to modify French law to make it conform to the great principles of the Revolution? In fact, the law did not have to be changed much because the privileged and the disadvantaged groups were already granted the same rights as everyone else. As framers of the Civil Code, all Cambacérès and Portalis had to do was to avoid reintroducing special privileges for nobles and disadvantages for Protestants or Jews (Gordley, 1994, p.35-36). Thus, we see that the influence of the Revolution on the Code was relatively limited in this respect.

Republicanism

In the republican vision, the science of politics is appropriately applied to creating a rationally designed government built on the grounds of a comprehensive legal system. Instead of being ideological, the government applies a scientific methodology to governance problems through the study of past experience and experimentation in governance (Adams, 1787). If we translate this idea into legal terms, it means that the country's Code should be clear and self-sufficient; its rules would describe simple, natural relationships based on reason (Gordley, 1994, 28). Cambacérès, the chief redactor of the codification, seemed to be a firm advocate of this republican ideal. In a speech delivered during the presentation of the third draft of the Code, he stated that the primary objective was "a collection of precepts where everyone could find the rules for his conduct in civil life... Where judges are not legislators, it is not sufficient to ensure the authority of law by justice; it is also necessary that the laws be so disposed to eliminate doubt by clarity and prevent exceptions by foresight" (Cambacérès, an IV; Gordley, 1994, p.28). Had the final draft followed his remarks, one could argue its relevance to the Revolution. But these principles were rejected by the framers themselves; his drafts were voted down. To his colleagues in the committee, Cambacérès's idea was too idealistic; it was almost impractical to achieve. Such Code was too complicated, they recorded, and "more simple and more philosophical conceptions were wanted" (*Discussion devant le conseil des cinq cents, Sur le troisième projet de Cambacérès*, an V). Hence, all attempts to establish a republican Code failed, and new efforts to revise the drafts ceased.

When Portalis was appointed to carry on the project, he made it clear that the final draft was not supposed to conform to the republican ideal. In a great state such as France, he argued, both agrarian and commercial, with so many different professions, the laws could not be as simple as in those of a poor society. Nor would the Code make the dangerous attempt "to govern all and to foresee all" (Portalis, an IX; Gordley, 1994, p.30). Portalis's draft ultimately became the Code that we now know. It hardly shows any feature in line with the republican ideal that triumphed during the Revolution.

As we see, the purpose of Napoleon's codification resembles that of ancient Roman emperors, and the ideas that the framers embraced were almost extensively extracted from precedent intellectuals, both domestic and international. Albeit the efforts to incorporate revolutionary ideals into the codification, the civil laws themselves were loosely connected to the Revolution. Therefore, the Code only shows limited relevance to the Revolution.

Relevance to the Modern World

Another controversial question is how relevant is the Napoleonic Code to the modern world. In terms of radical social changes that it instigated, the influence of the Code is unparalleled. Its promulgation fundamentally transformed and reshaped societies in the old world. Without much exaggeration to say, the Code was the paradigm for any state that desired to establish a modern legal system for almost a century.

In our discussion of the Revolution and the codification, we see that although the drafters endorsed the revolutionary idea of equality among persons, the extension of such an idea was not achieved via the promulgation of the Code. The codification did, however, introduce relatively egalitarian conceptions about family. Under the *ancien régime*, marriage belonged to the domain of the canon law, which was under the control of the clergy. Families had to conform to Catholic traditions and regulations when planning a marriage. With the advent of the Code, marriage became a civil contract. The family law reduced the power of the father and raised the position of the wife. Indissoluble marriages were abolished (Lobingier, 1918, p.13); divorce was now recognized as a legal right (Ilbert, 1905, p.6). These changes greatly shaped our perception of a modern family; they were genuinely unprecedented at the time.

Applications of the Code Abroad

The Code did not merely transform the daily life of French citizens; it also made significant progress on a nationwide scale. Many writers underscored the idea of “people’s law.” By Fisher’s evaluation, a more remarkable distinction of the Code is that it “has diffused the knowledge of law” and “made it comparatively easy for the ordinary Frenchman to become acquainted with the leading principles which govern the law of his own country” (1906, pg. 161; Lobingier, 1918, p.19). The ascendancy of its clearness made the Code an inspiration for jurists worldwide.

Over the course of the nineteenth century, the codification movement extended far beyond France. As Napoleon’s army galloped over Europe, neighboring states immediately adopted the Code. Belgium has preserved it ever since, and the Rhine provinces only ceased to be subject to it on the promulgation of the German Civil Code in 1900 (Lobingier, 1918, p.20). Even after his humiliating defeat at Waterloo, monarchs continued to imitate his codification. In 1820, Tsar Alexander I appointed a commission to establish a code for the kingdom of Poland on the model of the French Civil Code. The drafters extracted passages from the original text, several parts of which were promulgated as law (Amos, 1928, p.14). Had the codification’s influence only spread within Europe, its significance would be sharply reduced when we examine it worldwide. But the Code, along with the legend of the person who bore its name, had reached continents that were foreign to Europeans as well. Egypt was the first country to prepare its civil code on the grounds of the French Code in Arabic. When Nubar Pasha secured the consent of the Powers to the institution of the International Courts, it was unanimously agreed that the only possible law with which to equip them was that of the French Code (1928, p.15). This legal system was preserved even after the British occupation, giving rise to a peculiar society where British officials were administering and teaching French law (1928, p.15). Egypt was not a special case. As an awakening power of the East, Japan eagerly sought to modernize itself along western lines. One of the first acts after the Meiji Restoration was to translate the Napoleonic Code and invite French jurists to supervise the administration of justice and organize legal education (1928, p.15). The product of such effort was the Civil Code of Japan, which bore much resemblance to the French Civil Code. Though apparent distinctions existed between these codes aforementioned as they adapted to local diversities, their core was built, without exception, on Napoleon’s codification.

Declining Influence in the Modern World

The contributions of the Code are, indeed, not negligible; it would be such a fallacy to deny these impacts. But recognizing them does not address the question that was posted at the beginning of this section: how relevant, then, is the codification to the “modern” world? To answer that, we must distinguish the “modern” world from the world two hundred years ago, when immediate transformations attributed to the codification occurred. In two centuries, societies underwent changes that were previously unheard-of and unthinkable. We will see that the Code’s influence in the world diminished by the twentieth century, when its limitations became evident and proved incompatible with the changing society. To illustrate the evolution of the Code’s status, we will focus on its application in a specific region – Latin America.

According to Lobingier, the Code has made itself, to a great extent, “the code of all the Latin races” Lobingier, 1918, p.16). His observation was not an exaggeration devoid of evidence, at least throughout the nineteenth century. The long admiration of French culture and ideologies was no secret in Latin America, especially among the educated elite class. In the wake of achieving independence in the 1820s, intellectuals in each country immediately commenced the codification and prepared for the passage of the civil laws. Like Egypt and Japan, the jurists made substantial references to articles in the French Code. The Haitian Civil Code of 1825 and the Civil Code of Oaxaca, Mexico, appeared to be exact copies of the Napoleonic Code (Mirow, 2005, p.5). In many countries, the Constitution rendered legal protection to the position of the Civil Code as a body of law. For instance, Article 67 of the Argentine Constitution states that while Congress has the power to modify the Civil Code by repealing or amending any of its articles, it can only do so expressly (Amos, 1928, p.5). In other words, any law that does not explicitly proclaim to alter the Civil

Code but proves incompatible therewith is considered to be of no effect (1928, p.5). No region of the world placed the Code in such a high position as Latin Americans did.

However, by the twentieth century, the extent of the Code's influence gradually declined. Latin American jurisprudence had undergone substantial independent changes that deviated from the ideas in Napoleon's codification. The ultimate result was an evident reduction of French characteristics in contemporary private law. The study will analyze two primary factors that contributed to this departure.

One reason deals with the effects of globalization. We place it first because very few studies underscored its influence as a separate driving force. The twentieth century saw waves of globalization, primarily led by corporations that sought to extend their influence by operating on an international scale. Cooperations extended beyond borders, which diminished the significance of states and thus domestic law. Mirow notes that modern "business and property related transactions typically provide governing rules by contract or choice of law provisions" (Mirow, 2005, p.10). Under such circumstances, the Civil Code, which served as the foundation of Latin American domestic law, had become increasingly irrelevant (2005, p.10). As another consequence of globalization, Latin America has conformed to the tendency of avoiding traditional tribunals. It has adopted systems of alternative dispute resolution by mediation or arbitration, especially when resolving private law disputes (2005, p.11). This situation further limited the importance of the Code.

The growth of case law is another factor. As the United States consolidated its presence in the Western Hemisphere after the Second World War, its influence on the Latin American legal system increased. Throughout the second half of the twentieth century, Latin Americans were exposed to Anglo-American law through American education (2005, p.9). As a result, case law, or judicial precedent, had exerted significant influence in Latin America, a region once exclusively under civil law jurisdiction. This transformation is exemplified by the development of tort law and constitutional law (Miller, 1985, p.611; Bartels & Madden, 2001, p.59; Mirow, 2005, p.12), which required judicial interpretations of constitutional provisions by the Court. It is not surprising to see this process happening in an increasing number of states. The Napoleonic Code, after all, is a product of the old world, a world before globalization and the United States' dominance. It contains limitations that are unforeseeable to the drafters but evident to us. When developments in the modern world –from the twentieth century – magnified these limitations, jurists began to abandon the Code, therefore diminishing its influence.

Reforms and Revisions of the Code

In fact, in France and many countries where the civil law was based on the French model, calls for revisions to – if not a complete abandonment of – the Code were never absent. Part of the reason was technical issues. When explaining the prevailing tendency of decodification, historians evaluated that the old structure of the Napoleonic Code is no longer a useful organizational device as a result of the complexity and volume of new legislation (Lira, 1998; Diez-Picazo, 1992, p.480-81). The number of areas requiring legislative action has greatly increased as societies experienced constant transformations. This situation is present in all categories: labor law, agrarian law, mining law, and family law (Mirow, 2005, p.12). On many occasions, it seems too arduous to incorporate the new topics into the structures of the existing Code. For more than a century, French jurists had made efforts to insert laws enacted after the codification into the Code, but eventually they found themselves in a predicament: new articles were poorly drafted and often with scarcely any consideration of the harmony and the order of the Code (De La Morandière, 1948, p.7). Therefore, most of the newly-passed laws were separate from the old Code. It was, after all, an impossible task to be completed. The Code formed a sharp contrast with nascent foreign codes in the twentieth century, represented by the German Civil Code, which were much easier to use (1948, p.8).

Had technical difficulties been the sole issue, it would be reasonable to question the departure of states from the Code. However, not only was the structure of the codification obsolete, but also were the articles themselves. Some laws included were simply unsuitable in the context of the contemporary world. Many ideas expressed by the French framers proved incompatible with the values of modern society. To provide a few examples, in family law – although

considered relatively modern at the time it was published – the Code strengthens parental authority (1948, p.9). Articles 213 to 217 explicitly state the husband’s authority in the family and the virtue of being an obedient wife (art. 213-217, 1804). Moreover, as Brissaud observes, the codification was “preoccupied” by the conservation of the real property in the family despite the abolition of primogeniture and entail (1912, p.732; art. 215, 1804). Such beliefs expressed in the Code were abandoned and objected to in later views. For each article mentioned above, at least one revision, if not repeal, was made. Among others, the marriage clause was constantly modified. Restrictions for women on contracting a second marriage were modified two times prior to its repeal in 2004 (art. 228, 1804).

Likewise, laws regarding private properties also underwent significant changes. During the twentieth century, many states had departed from the traditional *laissez-faire* system and attempted to direct the market. The government intervention in the production and redistribution of wealth greatly contradicted the exercises of property rights (De La Morandière, 1948, p.10). It undermined the protection of private property that the drafters of the Code had envisioned. It is plain that a hundred years after its promulgation, Napoleon’s codification became obsolete. In multiple aspects, it was outcompeted by codes that were newly promulgated. For states that were deeply influenced by French jurisprudence, the most practical solution was not a complex revision of the existing Code, but an adoption of a new Code that could better serve society. In this case, the diminution of the Code’s significance is inevitable.

Conclusion

In short, this study breaks two common perceptions that many possess. Firstly, the French Civil Code does not demonstrate as great relevance to the Revolution as it purports to be because most ideas expressed by the framers were extracted from the works of writers before the nineteenth century. Secondly, the influence of the Code has been significantly reduced due to its incompatibility with modern society, both its structure and its contents. This is by no means to question its contributions to the world. There remains no doubt that the codification placed a role with unparalleled importance in the development of global jurisprudence. What we challenged in this study were the myths of the Code, and we observed a tendency to overemphasize the legacy of the codification.

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