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Codification of Law in Europe and the Codification Movement in the Middle of the Nineteenth Century in the United States

WIENCZYSŁAW J. WAGNER*

1. The Law in Civil and Common Law Countries

It seems undeniable that civil law lends itself more readily to codification than does common law. This fact may well be understood if we consider the historical elements which contributed to the formation of the "common law system" and the "civil law system." Development of this statement would exceed the scope of the present observations. Therefore, only the most important of these elements can be mentioned.

Common law proceeds from case to case and relies mainly upon experience. Common law lawyers do not believe in establishing principles based on abstract reasoning, unchecked by their application to actual practical situations. It is conservative, based as it is on tradition. It is adverse to quick and frequent changes and is indifferent to de-

† In a condensed form, the remarks contained in this article served as a lecture which the author, vice-president of the American Foreign Law Association, Chicago Branch, delivered at the Annual Meeting of the Association in Chicago in 1954.

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† Of course, it would be a gross mistake to assume that in the various civil law jurisdictions the systems of laws are as similar to each other as in various common law jurisdictions; in fact, there are as many systems of law in civil law countries, as numerous are the jurisdictions. The general term "the civil law system" means only the similar approach to legal questions, the common method of reasoning, establishing legal principles and interpretation, which are the same in the civil law countries.

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ductive logic as such. Inconsistent rules are applied in similar situations on the basis of distinctions which classify the cases as arising either from one or from another legal relation or branch of law, for example, either the law of contracts or property. The fact that a different result is reached in a chattel mortgage case than in a conditional sale case is not disturbing to a common law lawyer. Historical reasons account for this situation. Often, the common law approach is highly technical, resorting to pure fictions in order to accomplish results which are socially desirable. Even when political, social and economic changes completely transform the structure of the society, it often takes years for the common law to accommodate itself to the new circumstances and relinquish obsolete rules and procedures.

The civil law method is deductive rather than inductive. The whole system of law is permeated with some general principles which are to be applied in various situations, in all fields of law. From these broad principles detailed rules to be applied in specific situations are to be deduced. Civil lawyers consider the legal system as one coherent and logical whole; the different branches of law are interrelated, consequently, their principles cannot be applied properly if taken separately. The law should be quickly adjusted by legislation operating prospectively to any change in the society; laws which no longer conform to the current needs lose all grounds for existing; cessante ratione legis cessat lex ipsa. The law is an existing, complete system irrespective of any litigation which may arise.

The development of these two different approaches to law quite naturally paralleled the development of the importance of the various branches of the legal profession and their influence upon the formation of law in the common law and civil law countries. In civil law the progress of legal thought centered about the universities where famous law professors established their methods of under-

2. Fine and common recovery may serve as outstanding examples.
3. These generalizations need qualifications for which there is no space in these short observations.
standing, interpreting, and creating the law. The law professor is in Europe the highest priest in the temple of law; his authority is universally recognized and the courts submit to his superiority. Many a case has been decided, in fact, not by judges but by professors, because of the procedure of “transmission of the docket,” according to which courts at one time sent the records of difficult cases to law professors and asked them for opinions. Legal arguments are based, in civil law countries, on treatises by legal scholars rather than on judicial precedents, although the latter are gaining an ever-increasing importance. The fact that not a single practicing lawyer was appointed as a member of the commission which drafted the German Civil Code may be a good illustration of the statement that legal theory is in far higher esteem in civil law than is legal practice.

In the traditional common law system the law is to a great extent judge-made and based on custom. Its rules are formulated only in the face of an actual situation which arises before the court. In deciding a case the judge will consult voluminous law reports, digests and citators in order to find a precedent which covers the legal issue involved. He will discuss the judicial “authorities,” compare them, analyze and distinguish them, and, if his problem is one of “first impression,” he will make the law himself. Outside of the judicial process there is hardly any law, since the law is a prediction of what will be the decision of the judge in a given situation.

Of course, these traditional common law ideas underwent changes. Story said:

In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws. . . . The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws.

Legal theory becomes more important from day to day, and as a result, some authors of treatises were able to gain wide recognition, not only in the field of legal education, but also in the everyday practice of the courts. The judges no longer hesitate to cite Williston on contracts or Wigmore on evidence for the corroboration of their opinions. In some rare instances the court will even ask some distinguished legal scholar for an opinion helpful in deciding an important case. In quite a few instances the common and the civil law move slowly toward each other; however, the basic difference in the approach to legal problems persists. In common law the judge is still the undisputed leader in the legal profession and the most important person in shaping the law.

Another important element which has a bearing on the role of the courts in the making of the law is the doctrine of separation of powers. In civil law countries the theories of Montesquieu, enunciated two centuries ago, were instrumental in settling the principle that the courts are to apply the law and not to make it. This principle was the basis of Article 5 of the French Civil Code which prohibits the judges from deciding cases by way of enunciating general principles and rules. Until 1837 the liberty of the courts to disregard any judicial precedent was pushed to the extreme, with lower courts not obliged to follow the *Cour de Cassation* even in the very cases which were remanded to them. After the reform the lower

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6. "On the question of whether the contract provision against assignment by the purchaser is void as a restraint on alienation our investigation proved the correctness of the statement . . . that the law on the question is not clear. We invited Professor Edwin G. Goddard of the law faculty of the University of Michigan to file brief amicus curiae. We have been aided by his excellent brief, as we gratefully acknowledge." Sloman v. Cutler, 258 Mich. 372, 242 N.W. 735 (1932).

7. The judge "should not share the legislative power . . . the judge would become legislator if he could, by laying down regulations, pass upon questions which are submitted to his tribunal. A judgment binds only the parties between whom it is pronounced . . . the powers are regulated; no one can transgress their limits." PORTALIS REASONS FOR THE FRENCH CIVIL CODE (1803), 19. (Translated by the author.)

8. "It is forbidden to judges to pronounce by way of general and regulatory ordinance, upon the causes brought before them." BARRETT, THE CODE NAPOLEON (1811).

9. Supreme Court of France which passes only on questions of law.
courts were bound by the *Cour de Cassation* only after a second remanding of the case, decided at a joint session of all the Chambers of the *Cour* and only in the case which was passed upon.

In England there was no separation of powers and for many centuries in the history of the country, various organs of the state exercised all three governmental functions. There was never any clearly distinguishable borderline between the duties of the courts, the Privy Council and the Parliament, even when these bodies became definitely separated. The Parliament acted as a court of justice, and the courts were virtually the makers of the law. Even today the House of Lords remains the highest judicial tribunal.

It would require a long discussion to examine to what extent the doctrine of separation of powers has been accepted in United States constitutional theory. Perhaps the best conclusion is that the doctrine was never completely accepted, and in its application may best be described as a system of checks and balances. At any rate, while it is no longer disputed today in England that Parliament has the primary role in law-making, the traditional approach seems to be dominant in the United States even now.

The above conclusions may explain to some extent the fact that the European continent was better prepared in the nineteenth century for the codification of its laws than were the common law jurisdictions. However, the difficulties in codifying the law of civil law countries should not be underestimated. As a matter of fact, in some respects the situation on the continent in the eighteenth century was rather similar to that in England. In most jurisdictions the basis of the legal system was custom, which, together with Roman law, constituted the law of the country. The northern part of France could be divided into 60 jurisdictions, each of which had its own customs

10. For details, see *MC ILWAIN, THE HIGH COURT OF PARLIAMENT* (1900).
11. *Id.* at 385.
Local customs, *coutume locale*, were applicable to smaller areas, their number amounting to 300. Thus, the situation seemed to be not less intricate than in England, where customs were the basis of the judge-made law, although it may be asserted that before receiving judicial sanction customs in England could be considered as a basis for human behavior and that the role of the judges in the formation of common law was more important than repeated acts of the population.

On the other hand the fourteen French *Parlements*, which were mainly courts of justice but also exercised other governmental functions, issued *arrets de reglement*, which declared what rules of law would be applied in deciding cases which might arise in the future. Thus, state institutions which were vested with mixed powers were known in France as well as in England.

These facts did not preclude France from taking the lead in the codification movement which conquered all continental Europe and swept the world in the course of the nineteenth century.

2. *Codification in Nineteenth Century Europe*

The need for a certain and uniform system of law was so strongly felt in the eighteenth century in France that it resulted often in an exaggeration of the importance and dignity of written law. Rousseau thought that a statute "is the expression of the general will dealing with a general problem, and . . . it has a limitless power to command, can never be unjust, and should obtain an unconditional


15. These *arrets* were not supposed to change the existing law. Deak and Rheinstein, *The Development of French and German Law*, 24 GEO. L.J. 551, 554 (1936).

16. The power of the *Parlements* to issue such *arrets* was expressly withheld in 1790. Samuel, *Codification of Law*, 5 U. OF TORONTO L. REV. 148, 149 (1943).
and unlimited obedience." These assertions can easily be recognized as nonsensical, but their utterance should be understood merely as a cry for escape from the legal predicament of pre-revolutionary France. The diversity of the laws in the country and the ensuing confusion was for centuries a matter of general concern. Some progress in the direction of assuring a degree of certainty in law was achieved by a compilation of customs, a work ordered by the king and finished in the second half of the sixteenth century. Some efforts toward codification were made by Colbert a century later but did not effect satisfactory results. Until the Great French Revolution, royal ordinances had the most important unifying effect on the French legal system. The country still had to wait more than a century after Colbert for codification of its laws.

To be sure, France was not the first modern country to codify its laws. In the middle of the eighteenth century Frederick the Great of Prussia decided to grant his country a code, and the work on this was completed in 1794. However, the Code was a restatement of the existing rules of law based on customs and Roman law rather than a modern codification, had many shortcomings and did not serve as a model for any future legal reform.

If the Prussian Code is often described as the first in the civil law system, it is only because it is doubtful whether the Scandinavian states can be classified as civil law countries. Maybe they should rather be considered as forming a separate group. It should be mentioned, however, that the first civil code in Scandinavia, that of Denmark, dates back to 1683; the Norwegian code was enacted in 1688, and the Swedish one followed in 1736. Criminal law was codified in Scandinavia in the nineteenth century.

Some parts of the old Danish code are still in force today. In spite of its imperfections, it may be considered as meriting the honorable place of the first code in the modern sense of the word.17a

17. DUGUIT, LAW IN THE MODERN STATE (1919), 68.
France was second in introducing a code system, but was first in performing this work in so outstanding a manner as to assure the victory of codification in all civil law jurisdictions.

A commission of codification consisting of four persons was appointed by Napoleon in 1800, and in an extremely short period of time (four months), prepared a draft civil code. The draft was submitted to the Cour de Cassation and the appellate courts for comments and, after some amendments, was submitted to the legislature. Becoming effective in 1804, the Code was a tremendous success. It was progressive, abolished the remnants of feudal institutions, simplified and unified the legal system, made the law clear by avoiding minute details, left some discretion to the judges, and was flexible and adaptable to changing circumstances. However, it was not revolutionary. It took into account the historical background of many legal rules, and, although repealing the ancient law in matters covered by it, it expressly authorized the application of local customary law in some situations.

The influence of the Code was tremendous. In addition to the French Empire, Belgium, as well as some German states such as Baden adopted it in full and a large portion of it was enacted in Central Poland under Russian domination. For nearly three quarters of a century it was in force in a country whose historical and cultural background was completely different from that of France, namely, Egypt. It served as a model in Argentina, Bolivia, Chile, Columbia, Costa Rica, Ecuador, Greece, Guatemala, Haiti, Holland, Honduras, Italy, Louisiana, Luxemburg, Mexico, Monte-

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20. From 1875 to 1949 when a New Egyptian civil code became effective.
21. A new Greek civil code, enacted in February, 1946, was abrogated a few weeks later.
22. In the Netherlands the codification of the law was ordered by the Constitution of 1798, but the work was very slow and finally the French Civil Code was taken as a model. Fontein, A Century of Codification in Holland, 21 J. COMP. LEG. & INT'L L., 3d, 83 (1939).
23. Italy recently enacted new codes; the first part of the civil code took effect in 1939.
negro, Peru, Portugal, Quebec, Rumania, Salvador, San Domingo, Spain, Uruguay, and Venezuela.

In a short span of time other French codes followed the civil one: the Code of Civil Procedure in 1807, of Commerce in 1808, and the Criminal Code and Code of Criminal Procedure in 1811.

In Austria where preparatory studies lasted for about a century, a civil code went into effect in 1811. It is interesting to note that, although enacted by a conservative government, its jurisprudential basis was in quite a few instances similar to those of the post-revolutionary French Civil Code.24

Other states followed. Saxony adopted its civil code in 1863, and the French Code largely influenced the Italian (1865) and the Spanish (1889) codes.

The end of the century brought about a unified civil code for all of Germany; it was adopted in 1896 and became effective in 1900. A need for uniform laws has been felt in the several German states for quite some time, and as a result, the first steps were achieved in the middle of the nineteenth century. The Commercial Code of 1861 was adopted by all states. With the progress of German unification in 1871 the federal government was able to center its attention on law reform. The Criminal Code of 1871 was followed by the Codes of Civil and Criminal Procedure of 1877 and the Commercial Code of 1897.25

The process of codification in Europe was not completed by the end of the nineteenth century and therefore continued into the twentieth. The most famous piece of work was the Swiss Civil Code of 1907 (in force since 1912), which followed the enactment of the Swiss Code of Obligations.

In England, as has been mentioned before, the atmosphere of the traditional common law was not favorable to codification. "Fundamental law" which was nothing else than a version of natural law embodied to a great extent

in customs was believed to exist irrespective of any legislative enactments, to be binding on the king, the courts, and the whole society, and to be best discoverable by the courts. The importance and authority of legislation began to increase in the seventeenth century and resulted in a victory of the written law over the unwritten law in the nineteenth century. Even much earlier some statutes of unusual importance, such as the statutes De Donis and of Uses, virtually reshaped the law in some branches of human relations. Early projects to codify the law were advanced: first, in the first part of the sixteenth century (Henry VIII); second, in 1614 by Bacon. The trend toward codification was accentuated at the end of the eighteenth century, together with a similar phenomenon on the continent.

The most famous, although not the wisest representative of this current of thought, was Jeremy Bentham (1748-1832). He propagated the theory of the necessity for codification but did not try to draft any code himself. He disregarded the ever changing circumstances and progress in human life and developed a concept of legislative enactments which was too rigid and inflexible. He rejected the stimulating idea of the law of nature, criticized Blackstone and denounced common law as counterfeit and arbitrarily made by the judges, but he himself was unable to set up anything to replace the ideals which he discarded. He was considered by some "a curious man, with his complete neglect of all nobler elements of thought and feeling."

Austin (1790-1859) was next to gain fame as an advocate of the reform by statutory enactment of laws regulating human relations. However, codification was never achieved in England. After the plan of Lord Westbury (1860-1863) failed the country followed the course of increasing the certainty of law by way of gradual statutory enactments,
prescribing selected segments of law. Among the first and most important achievements, the Bills of Exchange Act (1882) and the Sale of Goods Act (1894) should be mentioned.

3. The Situation in the United States

To what extent were these ideas reflected in the legal thought of the United States?

The states of the Union, except for Louisiana, inherited the English common law system, with all of its virtues and vices. Although some of the obsolete feudal rules were quickly discarded, the basic approach to the problems of law followed the traditional common law philosophy. For quite a number of years, however, it seemed that the situation here might become completely different. The early American trend toward legal reform had as its basis the easily understandable reluctance to follow English example after national independence from the Crown was achieved. The lack of a system of colonial reports and the high prestige of the legislatures of the liberated colonies as the only representative organ of the people, protecting their rights and striving towards their freedom, were important elements which could shift the point of gravity in the shaping of law from the courts to the legislature. Many voices were heard to say that the new nation should make a completely new legal start; and hopes were expressed that the legislatures would work out the codification of American law. Of course, the development abroad, the writings of Bentham, and, above all, the French example and the success of its codes must have exerted an influence upon the minds of the American legal scholars of the nineteenth century. Moreover, the powerful idea of natural law, in its eighteenth century form, dominated well into the second half of the nineteenth century in the United States and was understood as encouraging legislative en-

32. Id. at 38.
actments of principles, which would be stable but adaptable to various circumstances and discoverable by human reason. Since the most outstanding result of the influence of natural law in America was the Declaration of Independence, it could be expected that it would go far in this direction of establishing a system of written law.

The trend toward codification in the United States found its highest expression in the middle of the nineteenth century in the works and achievements of the outstanding legal scholar David Dudley Field (1805-1894), who was on the very verge of success in transforming the American legal system into a codified one.

Field was not the first great American codifier of law, but his predecessor worked under much more favorable conditions: Edward Livingston (1764-1836), of New York, was the important figure in the codification of Louisiana law. It is self-evident that it was more natural for Louisiana, a civil law jurisdiction, to follow the French example than for the common law jurisdictions of the Union. The first Louisiana Civil Code, that of 1808, was based mainly on French law but incorporated some Spanish principles as well. In 1822 a commission was established by the legislature in order to bring about further progress in the codification of Louisiana law. Livingston became its moving spirit. A new civil code was published in 1824 and took effect the following year. The Code of Practice was enacted in 1825. Codification of other branches of the law met with more difficulties. The Code of Commerce, drafted in 1823, was not adopted. The same was the fate of Livingston’s Code of Criminal Procedure and the Criminal Code of 1824. The general opinion is that it was an outstanding piece of work but too advanced for its times.

Even in the American common law jurisdictions, Field was

33. “[T]he ... natural law ... became embodied ... in the Declaration of Independence and is behind our bills of rights. But this natural law is ... a ... recourse to constructive ideals, drawn from reason and used as agencies of creative change, and ... resort to a presumption that legal precepts which obtain generally over the civilized world are declaratory of reason.” POUND, THE FORMATIVE ERA OF AMERICAN LAW (1938), 17-18.

not the first either to conceive the idea of codification or to put this idea into practice. The earliest attempt to enact a kind of code was made in Massachusetts in the first half of the seventeenth century. A law revision committee was appointed in 1635, and had as its result the *Book of the General Laws and Liberties Concerning the Inhabitants of the Massachusetts, 1648.*

The *Book* was an advanced piece of work of that period and exerted a strong influence on other sister colonies. However, it was not a codification in the modern meaning of the word, and should rather be characterized as a restatement, although quite a few changes in the existing system of law were brought about by it.

Field was the first common law lawyer who approached the problem of codification both from the point of view of a profound theorist and a successful, experienced practitioner. He was not content with the mere advancement of his ideas but devoted his life to the painstaking task of drafting codes in the various fields of law and succeeded in having his ideas at least partially executed.

Following some demands to attempt to codify the law, two leading Eastern states decided slightly before the middle of the century to determine whether the task were feasible. Massachusetts was first. In 1835 commissioners were appointed by the legislature in order to report on the practicability of codification. A year later a report was presented by the commissioners, among whom were such outstanding persons as Story and Greenleaf; their conclusion was that codification should be undertaken.

However, the attitude of the legislature changed. The opponents of codification won the battle, and consequently the whole project was abandoned.

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36. Besides long studies on codification of internal law, Field devoted a great deal of time to the promotion of the idea of codification of international law, and drafted an international law code. His leading thesis was that war should be prevented. Reppy, *The Field Codification Concept*, DAVID DUDLEY FIELD CENTENARY ESSAYS (1949), 17, 43.

It may be that the same result, or rather a lack of any result, would have been the fate of New York, but for the strong personality of Field who caused rather fruitful developments.

The task was not easy, since most of the post-revolutionary enthusiasm for a new purely American legal system was gone, and since the old English common law approach to the question of statute and judge-made law began to gain ground considerably. The ideas of the historical school penetrated from Europe into the United States and found their most eloquent representative in the person of James Coolidge Carter. The fighters against codification asserted that to keep abreast of the development of the society, law must be born spontaneously following the usages of the people and must be declared to be binding by the courts. According to Carter no attempts at codification should be undertaken.38

But Field was not easily to be excluded from the controversy. He realized the various shortcomings of the unstable judge-made system of laws in which everything is uncertain, the rules are often not only completely unknown to laymen, but hardly ascertainable by men trained in the legal profession. The most important purpose of the proposed reform was to make the law certain, understandable and accessible to the average man, to render the administration of justice speedier and less expensive, through simplification of the procedure and to abolish permanently obsolete remnants of antiquated doctrines and illogical rules. Nothing could be more true than the inscription on Field's tomb: "He devoted his life to the reform of the law... To bring justice within the reach of all men."39

The whole work and life of Field were imbued with a profound conviction of the rightness of his ideas and a deep faith that sooner or later they must win in order to serve the community well, but his concept was far from

38. Id. at 6-7.
being revolutionary. He did not intend to discard the whole tradition and achievements of the common law and create a completely new legal system, unconnected with the realities of society in which it was to be in force and founded merely upon purely theoretical speculations. He believed in the spirit of the common law which he considered to be based upon natural justice, but he was convinced that this common law should be thoroughly revised and codified, so as to constitute a coherent and logical whole. In short, his approach to codification was historical. Field was well acquainted with the French Civil Code and its "new legal start" idea, and his knowledge of that Code helped him in his own codification work; but it seems that only Field's approach could have had any chance for success in his time and community.

The first effort to bring some order to the legal uncertainty and chaos in the state of New York was directed toward a systematic compilation and arrangements of statutes. In 1828 the New York Revised Statutes appeared and served as a model for many other states. This was, of course, far from the idea of codification. Largely through the efforts of Field the New York Constitution of 1847 ordered the appointment of a commission to codify the law. The first commission which was established had the task of reforming civil procedure, and Field, who was one of its members, became its spiritual leader. The result of the work was the "Field Code of Civil Procedure" which was adopted and was in force in New York from 1848 to 1877. Its influence upon the procedural reform in the sister states was tremendous. The fact that it was adopted or served as a model in not less than thirty of the United States jurisdictions proves the leading role of New York in the development of American law, as well as the value of the Code itself.

40. Id. at 51.
42. Goodrich, Restatement and Codification, DAVID DUDLEY FIELD CENTENARY ESSAYS (1949), 241, 253.
Field understood well what should be the role of a code. He avoided surcharging it with scores of details and limited its provisions to the establishment of general principles, leaving the details to be settled by practice and judicial decision. His Code of Civil Procedure had less than four hundred sections. In this approach the French influence was evident, but the proper way of drafting codes was not readily understood everywhere. The first continental code, the Civil Code of Prussia, was intended to be a complete set of answers to any legal questions which might arise. Legal rules were to be provided with all possible details, and the judge was not to be granted any scope of discretion whatsoever. In case of any doubt as to the interpretation of the provisions of the code, the judges were directed to ask for instructions from a royal commission whose answers were binding.

The approach of the French codifiers was directly opposed to the absurd ideas of the Prussian legislators. The spirit which guided the drafters of the French codes is well explained in the *Reasons for the Civil Code*, written by Portalis. "The purpose of the statute," we read in the *Reasons*, "is to regulate causes which arise most frequently. Accidents, unexpected and extraordinary cases cannot be the subject matter of a statute." This is a far-reaching proposition which delimits the proper scope of legislative enactments. But even in matters which should be dealt with by the legislator, according to Portalis, "it is impossible to regulate everything by strict rules. It is a wise prediction to realize that it is not possible to foresee everything."

Therefore, the judge should be granted a wide discretion: "The possibility of supplementing the law by natural truths and the right directions of common sense should be left to the judges. Nothing could be more childish than to endeavor to take necessary steps in order to provide the judges with strict rules . . . ." The theory of natural

44. *Id.* at 10.
46. CIVIL CODE (1803), 18-19.
law finds its further expression in the next observation: "When the statute is silent, natural reason is still speaking."

The broad powers of the judge are emphasized in quite a number of passages: "The exercise of the power to judge is not always directed by formal prescriptions. There are also maxims, usages, examples, opinions of textwriters." How far this approach differs from the picture of the civil law codification which some of the common law lawyers have! The next observation of Portalis could well be voiced by any common law lawyer opposing the idea of codification: "[T]he right approach, consisting in the knowledge of the spirit of laws, is superior to the knowledge of the laws themselves."47

It is sufficient to become acquainted with these few excerpts from the Reasons for the Code to understand its flexibility and the fact that with a few changes it is still in force today, in spite of the tremendous changes of circumstances of life, technical progress and transformation of political and social ideas in the last century and a half. Only recently a commission was appointed to overhaul the Code48 and modernize it. It might even be asserted that the Code was too terse and left too many gaps to be filled by custom, textwriters, and judicial decision. The whole law of torts, for example, is covered by five short sections of the Code.

Many subsequent codifiers of continental law imitated the French technique. They endeavored to include whole fields of law in as few provisions as possible. However, since every extreme is bad, some voices were raised against this tendency.49

The virtues of the Field Code of Civil Procedure were not appreciated in New York. It was in force for only about thirty years. In 1876-1880 a new procedural code (Throop

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47. These excerpts were freely translated by the author.
49. "The Swiss Federal Code on Obligations is . . . absolutely defective precisely because of its laconicism. Innumerable are the questions which it raises only to leave them unanswered." Roguin, The Form of the Law, 10 N.Y.U.L.Q. REV. 445, 450 (1933).
The new law was complicated, unclear, and extremely detailed. Its 3,356 original sections were supplemented by additional ones in 1890 and 1897, the total number amounting to 3,441. The Code finally included about 50,000 provisions, in about 2,000 pages.

It is unfortunate that in the period in which so much was expected from the legislature, it revealed many shortcomings. One of the most serious of these was the poor technique of drafting legislative enactments. The Throop Code was by no means an exception in the nineteenth-century United States. It is paradoxical that, whereas on the European continent legislative enactments in the nineteenth century were couched in general terms and left a wide power of interpretation and discretion to the judge, in common law jurisdictions, where the prestige and the law-making role of the judge are much greater, the legislatures too often followed the Prussian example of 1794 and attempted to make the courts an automat in the application of detailed rules to any situation which might arise. If we add some other defects of the drafting technique, such as lengthy sentences, complicated style, confusing language, inconsistent provisions, many repetitions, lack of a thorough preparation of the enactments and the resulting necessity of frequent amendments, we can easily see that the very technique used in the nineteenth century American statutes was one of the reasons why the fight for supremacy between the legislatures and the courts was won by the judiciary.

50. A new code of civil procedure (The New York Civil Practice Act) replaced the Throop Code in 1920. Some mistakes were corrected, but many still remain. "An elderly member of the New York Bar has been quoted as opposed to revision and simplification of New York civil practice, because it had taken him years to master our system and its simplification would leave him with no advantage over young lawyers." Mitchell, The Federal Rules of Civil Procedure, DAVID DUDLEY FIELD CENTENARY ESSAYS (1949), 73, 80.


53. The twentieth century movement towards codification of procedural rules by the supreme court of each jurisdiction was a reaction against the deficiencies of legislative lawmaking in procedural matters. Ibid. The most outstanding work
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Because of the opposition against Field he was not appointed as a member of the commission to draft the codes of substantive law. The result was the complete failure of the commission. Field said:

The commission failed because the men who were appointed to it had no faith in a codification of the Common Law; and neither appeared to understand what was meant by it nor were competent to undertake it if they had. They thought only of a new revision of the statute. What we wanted was a codification of the Common Law.

The repeal of the Act appointing a Commission to Reform Procedure and Codify the Law in 1850 did not close the controversy. The indefatigable activity of Field continued. In 1857 the pendulum of the legislature's favor swung again in his direction. A new commission was appointed, and Field was one of its members. The results of the work of the commission were presented to the legislature, in the form of reports, in the years 1858-1865. The Civil Code was completed in 1862 and was composed of 2,034 sections.

A dramatic fight for the Code ensued. It seemed that it would be victorious, when it was approved four times by the Assembly and twice by both houses of the legislature, but it failed to receive the signature of governors Cornell and Robinson, who were influenced by conservative representatives of the bar. Had the executives' veto not been exercised, the whole idea of codification of law might have been victorious in the entire United States.

In spite of its defeat in New York, the Field Civil Code was adopted in California, North Dakota, South Dakota has been done by the Federal Supreme Court which adopted the Federal Rules of Civil Procedure in 1938 (amended in 1948). The adoption of the Federal Rules has taken place in some states (Arizona, Colorado, Florida, Kentucky, Missouri, New Mexico, New Jersey, Delaware, Maryland and Texas) and influenced many others. Clark, Code Pleading and Practice Today, DAVID DUDLEY FIELD CENTENARY ESSAYS (1949), 55, 67.

55. Id. at 41.
56. Id. at 46.
and Montana. These four states enacted all the draft codes of Field.

In the field of criminal law the matter was less controversial. The Field Penal Code of 1864 was enacted in New York in 1887. His Code of Criminal Procedure of 1865, however, did not win general approval in his native state, and in 1881 another code was adopted. Both the Penal Code and the Code of Criminal Procedure of Field were adopted in sixteen states. The remaining draft codes of Field were: the Political Code (1860) and the Code of Evidence (1889).

Georgia is a state where law is codified. In 1858, the General Assembly of the state provided for the preparation of a code which should embrace "the laws of Georgia, whether derived from the common law, the Constitutions, the statutes of the State, the decisions of the Supreme Court, or the statutes of England of force in this State." The code was drafted by three commissioners and adopted in 1860. It is a very comprehensive piece of work and consists of four parts: I. The Political and Public Organization of the State; II. The Civil Code; III. The Code of Practice; IV. Penal Laws.

According to the report of the Committee on the Code, the leading idea of the codifiers was:

57. Id. at 36.
59. McFarland, Administrative Law and Codification of Statutes, DAVID DUDLEY FIELD CENTENARY ESSAYS (1949), 204, 210-211.
59a. The quotations are taken from the 1896 edition of the Code.
Thus the drafters of the Code applied the historical method of codification. Maybe the result of the work was a restatement of the existing state of the law rather than a codification in the full sense of this word. The Code was revised a few times, and particularly in 1894 when new commissioners were appointed “to codify the laws of Georgia.” The revised Code follows the general plan and system of the original Code, but sections were re-numbered.

The Georgia Code proved to be satisfactory. However, it did not exert much influence on the law of other states.

4. Reasons for the Defeat of Codification

It may be surprising that in the period under consideration, the middle of the nineteenth century, the results of the trend toward codification were not more fruitful, and that at the end of the century, the legislatures became as unpopular as the executives a century earlier. The problem of codification was, of course, strictly connected with the confidence in the ability and competency of the legislative branch of government, and the fate of codification, the supreme form of legislation, was dependent upon the success or failure of the legislature. Until the Civil War the hegemony of the legislatures of the several states could not be denied. However, during this period they were unable to cope adequately not only with the problem of codification but also with the enacting of important and good statutes as well. Outstanding students of the legislative branch of government in the first century of the American independence stress many instances of pressures placed upon the legislatures by interests of particular groups, political influences, direct corruption, greatly excessive number of legislative enactments, abuses of special legislation, surreptitious clauses inserted in bills, amending, repealing, and supplementing legislation and attempts to

60. POUND, THE FORMATIVE ERA OF AMERICAN LAW (1938), 38.
61. Id. at 39.
control the judiciary. These facts account for the constitutional limitations on the legislative power which began to be enacted at the end of the first half of the nineteenth century.

But the incompetence of the legislatures was not the only factor which deprived them of their prestige and the confidence of the people and prevented statutes and even codes from playing the role which they should have had in the American legal system. Even when good and well-prepared legislative enactments were passed, the courts often annulled them.

The first method was to ignore them completely. The legislature could do what it pleased, and the courts would follow their own way and simply forget all about the existence of some legislative acts; but this was not always possible. The strongest weapon of the courts in their fight with the legislatures was their power of declaring the statutes unconstitutional. The due process clause of the United States Constitution, which is capable of different interpretations and applicable in varied circumstances, became a real danger to any act of the legislature.

Even when the statutes were neither ignored nor declared void by the courts, the manner of their application by the judges often resulted in their nullification. The old common law doctrines of construing legislative enactments, generally discarded in nineteenth century England, were not only welcomed by the American courts but even extended.

Centuries ago legislative enactments were not supposed to bring about any changes in the common law system. Their purpose was to provide proper means for its administration and to prohibit practices inconsistent with its spirit. Therefore, statutes were regarded mainly as declaratory of common law. The courts made every pos-

63. POUND, THE FORMATIVE ERA OF AMERICAN LAW (1938), 52 ff.
sible effort to construe written law in the light of the pre-
existing common law rules.67 And, as a matter of fact, some statutes and even American nineteenth century
"codes," enacted in some states, were compilations of judge-
made rules rather than works of codification.68

Once it was admitted that some statutes clearly dero-
gated from the common law rules, judges attempted to
interpret them as narrowly as possible69 in order to leave
to the common law as much ground as they possibly
could. Moreover, since the very philosophy of the com-
mon law is to reason from case to case, from one set of
detailed facts to another, it is not surprising that statutes
were regarded as setting specific and detailed rules rather
than broad principles applicable in various situations.70
However, it is amazing to note that in its full scope the
doctrine of narrow interpretations of statutes was applied
only in the United States in the nineteenth century71 after
it had already been discarded in England.

The general approach of the courts to any kind of legis-
lative enactments was, of course, applied also to the codes.
Therefore, the role of the few codes which were enacted
in nineteenth century United States cannot be compared
to that of the continental codes. In Europe the code is
everything. In the exercise of their judicial discretion the
judges compare different provisions of the code involved
and of other codes; proceed by analogy; apply the general
principles of the codes, such as *bonos mores* and "public
order," to the most varied situations; examine the legis-
lative history of the codes; and finally, they consult the
textwriters and previous court decisions delivered after
the enactment of the code. They are reluctant to admit
that in some cases they face a gap in the law and that
they have to fill this gap themselves, even if they are ex-

67. *Id.* at 269.
68. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS
(1960), 71.
69. ILBERT, LEGISLATIVE METHODS AND FORMS (1901), 6-7.
70. POUND, THE FORMATIVE ERA OF AMERICAN LAW (1938), 46 ff.
pressly authorized to establish rules in such cases. In
the absence of an authorization of the code itself, they do
not regard the code in the light of preexisting law.

In nineteenth century United States the contrary hap-
penned. In California the Field codes were given an inter-
pretation which closely assimilated their provisions to the
common law rules, although these rules were intended to
be modified or discarded. Similarly, the Field Code of
Civil Procedure of 1848 was practically nullified by the
courts.

It may be that, just as Germany in the times of Savigny,
the United States was not yet ripe in the middle of the
nineteenth century for a codification in the modern sense
of the word. But it seems that at the beginning of the
twentieth century the American system of law entered into
a new stage of development. Although the Restatements
of Law of the American Law Institute are only a private
attempt to achieve some order and certainty in the appli-
cation of common law rules, do not purport to bring about
any changes in the existing system and no not bind the
courts in the slightest degree, they succeeded in eliminat-
ing some inconsistencies in the application of law, systema-
tized it and exerted an influence on the American judges
and lawyers.

The functions of the Commissioners on Uniform State
Laws resemble more nearly real codifying work and the
success of some of its acts is a good prognosis for the future.
Its most recent achievement is the Commercial Code which
is expected to gain wide acceptance in the states.

72. SWISS CIVIL CODE, Art. I: "... If the Code does not furnish an ap-
plicable provision, the judge shall decide in accordance with customary law,
and failing that, according to the rule which he would establish as legislator."
73. Lawyers and judges "were taught ... by no less a jurist than John Norton
Pomeroy ... [t]o assume the code to be merely declaratory of what they had already
learned and knew and had practiced ..." Pound, David Dudley Field: An Ap-
praisal, DAVID DUDLEY FIELD CENTENARY ESSAYS (1949), 3, 12.
75. Pound, David Dudley Field: An Appraisal, DAVID DUDLEY FIELD
CENTENARY ESSAYS (1949), 6.
76. For details on the restatement of law see Goodrich, Restatement and
Codification, DAVID DUDLEY FIELD CENTENARY ESSAYS (1949), 241.
However, these matters exceed the purposes of the present short study and should be considered separately. Let us close with the observation that at least in the field of procedure the continental approach to reform of law by codification is gaining approval.\footnote{"The inexorable logic of events is approximating our procedural institutions more and more to those in use on the Continent." Millar, Civil Procedure Reform in Civil Law Countries, DAVID DUDLEY FIELD CENTENARY ESSAYS (1949), 120, 139.} With the disappearance of the distrust of the legislative branch of government in the United States it may be hoped that codes and other legislative enactments will play a much more important role in American life than they did heretofore.