Chapter 2
Codification and Law Reporting: A Revolution Through Systematisation?

The belief that the nineteenth century movement towards codification constitutes a legal revolution is both commonplace yet somewhat questionable. Nobody doubts—even among those legal historians who have in the past considered (such as Savigny) or even consider codification today (as Manlio Bellomo[1]) as some kind of catastrophic event for legal science and the end of a European *jus commune*—that the writing of the "great" Codes, between the end of the eighteenth century (the 1794 Prussian *Allgemeines Landrecht*, *ALR*) and the beginning of the nineteenth century (the 1804 Napoleonic Code and the 1811 Austrian Civil Code, *Allgemeines Bürgerliches Gesetzbuch* or *ABGB*), is an important event in legal history, at least in continental Europe. It is more problematic to define this event as a revolution. Is not codification just a special kind of State legislation, which we might call a "massive" legislative event? If such a will to consolidate and centralize the legal order (confused with the State itself in Kelsen's pure law theory, which does not give a preferential treatment to codes, let alone to consider articles of a penal code as a model for explaining the nature of legal norms) is the only feature that characterizes these "modern" codes, it becomes difficult to make a clear differentiation with earlier and more antique laws (e.g. the law of XII Tables[2]) and, overall, with the compilations of the eighteenth century (in Piedmont, Sweden …). Such a perspective would has been discussed with in the previous chapter about the legal foundation of the modern State.

Confronted by such risks of misunderstanding, many legal historians have looked for clearer criteria to distinguish between legal "compilations" (or "consolidations", but we must also consider the specific use of "consolidated acts" all in England) and "true" codifications, without actually considering the detailed indications given by the titles of the acts themselves (even a law which is called "code" may not fall within the normal criteria or "ideal-type" which we have defined as code). Generally, since the end of the eighteenth century, legal codification has been linked with a form of special (and social) planning aimed at the construction of a new legal

[1] Bellomo, Mario. 1995. *The Common Legal Past of Europe 1000–1800*. Trans. Lydia G. Cochrane. Washington: CUA Press, 32–33.

[2] Concerning the reasons for considering the Law of XII Tables as a "code": Humbert, Michel. 1998. Les XII Tables: une codification? *Droits* 27: 89–111.

J.-L. Halpérin, *Five Legal Revolutions Since the 17th Century,*
Studies in the History of Law and Justice, DOI 10.1007/978-3-319-05888-7_2,

order. Systematic and comprehensive change of legal norms is thus associated with "modern" codification: the prevailing idea has been that older compilations (since those of Justinian for Roman law) were looking at the past (to garner source materials from previous normative texts), whereas codifications aimed to construct a new legal world *ex novo*, both by abrogating the "old law" (the *tabula rasa* effect) and by achieving a complete legal order (a completely new structure without any gaps). This reasoning seems a good starting point and can be refined through the use of Kelsen's criteria concerning the process of centralisation of legal orders. Firstly, modern codes have suppressed (or attempted to suppress) customary law and more generally all the pluralistic systems of legal sources (some of them independent of the State), which characterised the *jus commune* age and the *Ancien Régime* polities (which corresponds to the first criterion used by Kelsen to characterise centralised legal orders). Secondly, legal codifications have undoubtedly played a role in the movement towards national unification and reduced (even if not destroyed) the place of derogatory local laws (i. e. the third of Kelsen's criteria). And last but not least, the law codifiers have attempted to limit the arbitrary power of judges—remembering that the first modern codes were penal codes according to Beccaria's codifying ideology—and to subject them to a strict respect of statutory law (the second of Kelsen's criteria which appears the more relevant concerning codification if we take into account the prohibitive clauses concerning judges made law in the seventeenth and eighteenth century legislation, and of the incomplete range of this prohibitive rule before the achievement of gapless codes). As Paolo Grossi has proposed,[3] this phenomenon of State monopoly over the construction (and this is not just an intellectual matter) of the legal order can be called "legal absolutism" and thus distinguished from the "political absolutism" (such as the "absolute monarchy" in France in the seventeenth and eighteenth century), which could tolerate legal pluralism.

This approach can also be combined with Max Weber's schemes concerning legal rationalisation, which also focus on the content of codes (is it realistic to use Kelsen's method which focuses only on the forms of legal norms and is it possible to ignore the revolutionary substance of some codes?). Max Weber devoted numerous illuminating pages of his "legal sociology" to the "great" codes of the first "wave of codification" (from the end of the eighteenth century to the beginning of the nineteenth century) and has made a radical distinction between the Prussian, the Austrian and the Russian (the 1833 *Svod Zakonov*) codes on one hand and the Napoleonic Code (imitated throughout much of the world, notably in the young republics of Latin America) on the other.[4] Whereas the former (those codes linked with the *Ancien Régime* and the division of the society in "orders") were the expression of a particular form of legislation from "patrimonial monarchs" who attempted to achieve a "material" (all the while containing "fair" rules, supposed to achieve a

[3] Grossi, Paolo. 2010. *A History of European Law*. Trans. Laurence Hooper. Chichester: John Wiley & Sons, 85.

[4] Weber, Max. 1978. *Economy and Society*. Trans. Guenther Roth and Claus Wittich. Berkeley and Los Angeles: University of California Press, 856–866.

"welfare state") rationalisation through an elimination of professional jurists from the law creating process, the latter (the Napoleonic Code was itself a product and a child of the French Revolution) was the first systematic order of a "formal" rationalisation through epigrammatic expressions. To paraphrase the German lawyer Feuerbach (not quoted by Max Weber), when the Napoleonic Code was introduced (Feuerbach used that sentence in 1808 in the context of debates for imitating the French Civil Code in various German states, including Bavaria for which he has written a Penal Code), a new time, a new world and a new State began ("*Wohin Napoleons Gestezbuch kommt, da ensteht eine neue Zeit, eine neue Welt, ein neuer Staat*")[5].

This Weberian approach adds some original features to the traditional opposition between the codes of the enlightened despotism (the Prussian and, in some parts, the Austrian civil code which were respectful of the old social structure) and the Napoleonic Code based on the revolutionary conception of legal equality (which meant the complete abolition of privileges and of the old feudal structures). It focuses on the differences (despite some points of contact with the arguments to subordinate judges to a strict respect for legal texts) between the ideology of the Prussian codifiers (directed against the entire class of professional lawyers and using the casuistic method in order to achieve a gapless codification) and that of the French codifiers (especially Portalis, the writer of the famous 1801 *Discours préliminaire*, which Max Weber has not quoted, but would have known) that insisted paradoxically on the "incompleteness" of the Code and the need for a new "jurisprudence" (both case law and doctrinal writing).

If we try to go into depth about codification and legal rationalisation, we have to nuance the traditional opposition between codified (civil) law and un-codified (sometimes described as "unwritten") common law. Is it possible to maintain that, without a formal codification, the English legal system did not make any movement towards rationalisation and modernisation during the nineteenth century? Did not the Benthamian ideology effect an important development of statutory law (not to mention the codification of laws in India with the 1860 *Indian Penal Code* and the 1872 *Indian Contract Law*), which appear to be a change from an "old" common law to a "new" common law? Could not the organisation and standardisation of Law reports be compared with the growing importance of case law (for completing the codes) in nineteenth century France? To answer these questions in this chapter I propose firstly to refine the chronology of codes according to the question of "legal revolution", secondly consider the English exception compared with the place of case law and law reports in France, and thirdly to treat all these phenomena of legal systemisation as linked with new configurations of the legal field during the nineteenth century and the first half of the twentieth century, that is to say with legal education, legal professions and legal cultures.

[5] Quoted by Gagner, Sten. 1974. Die Wissenschaft des gemeinen Rechts und der Codex Maximilianeus Bavaricus. In *Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert*. Eds. Helmut Coing, Walter Wilhelm. Frankfurt a. M.: Klostermann, vol. I, 17.

2.1 From Consolidation to Codification, the Revolutionary Turning Point

As we have seen in Chap. 1, the increasing importance of statutory law, associated with State interventionism in the legal field through restrictions of the independence of judges and lawyers, is one of the main features of the legal revolution, which led to the foundations of modern States. For this reason, the compilations of codifications of the seventeenth century (for example the French ordinances of Louis the fourteenth concerning procedural and commercial law or the 1683 Danish Code) and even more so in the case of the eighteenth century (the Piedmont and Swedish consolidations, the Prussian and Austrian plans of codification linked with the enlightened despotism) are significant pieces of the "modern State" legal revolution and have to be distinguished from the expressions of the posterior "codification" legal revolution. Turning to the texts from the seventeenth century, one can distinguish between the French ordinances—which are clearly "modern" statutory laws (with clauses abrogating the previous rules in the matter), but are limited to procedural or commercial (important for mercantilist policy) subjects, the nucleus of private law remaining wholly untouched by the royal legislation—and the Danish Code, with its rather comprehensive compilation of older rules (originating in regional and customary laws of the Middle Ages) combined with the impact of Reformation (the first of the six books here is devoted to religion) and the influence of Roman law concerning contracts and torts (addressed in the fifth book). If these two "codes" (the 1667 and 1670 ordinances combined have sometimes been given the title *Code Louis*) were intended to unify the law in the kingdom and to submit judges to a State law, it is difficult to see in these books a systematic project (influenced by the Modern School of Natural Law) to achieve a new and complete legal order.

In the eighteenth century kingdom of Sardinia (centred on Piedmont), the 1723 (revised in 1729 and 1770) *Leggi e costituzioni* (Laws and Constitutions with an Italian version and a French one for the Duchy of Savoy) provide another example of the unachieved transition towards modern codification. Divided into six books (about religion, the courts, civil procedure, penal procedure, successions, feudal matters and minority), this "code" is also, largely, a compilation of earlier texts (now integrated into the new corpus with a fixed meaning), whose content does not break with the *Ancien Régime* structures (the monopoly of Christian faith and the segregation of Jews, the feudal tenures, succession rights with the institution of *fideicommissum* restricted to nobles, penal rules taking into account privileges without a clear legality of the offences and of the penalties) and is significantly influenced by Roman law[6]. Furthermore, the new statutory text did not aim to repudiate all other sources of laws: older statutes (if not abrogated by those contained in the code), case law and the *jus commune* could still be used to fill the gaps of the code. If the opinions of the *doctores* are excluded from court argumentation and if judges

[6] Cartuyvels, Yves. 1996. *D'où vient le code penal?* Bruxelles: de Boeck, 49–57.

were not supposed to "interpret" (through limitations or extensions) the statutory text, there is nothing revolutionary in this compilation.

Following this chronology, the 1734 Swedish Code (*Sveriges Rikes Lag*) is the next example in this wave of compilations or consolidations. As the 1683 Danish Code, this text is the product of a long tradition (beginning in the thirteenth century) of royal legislation taking into account regional and customary law (divided between rules applicable in the towns and rules concerning the countryside). It is also the product of a very small (a few dozen lawyers) group of learned jurists influenced by Roman law and some developments of the Modern School of Natural Law (Pufendorf had taught natural law in Sweden) who were teaching in Swedish universities (Uppsala, Dorpat/Tartu, Åbo and Lund where Pufendorf was called to in 1668). It is more comprehensive than the Danish code with nine parts devoted to marriage, succession, mortgages, feudal tenures, commercial law, penal law, procedure, credit), but does not systematise the whole legal order (religious matters are not addressed, whereas the relations between the King and the estates are excluded, presumably taking into account the failure of the absolutist monarchy when confronted by the resistance of the nobility)[7]. It could be said that the Swedish Code had introduced some subtle changes—for example, the restriction of the husbands' power concerning their wife's landed property—but this was no revolution in the legal order.

Similar comments can be made about the Bavarian codification, a complex of three codes (a penal code in 1752, a procedural code in 1753 and a civil code in 1756) written under the authority of the Duke Maximilian-Joseph III and his chancellor Kreittmayr. These codes are composite: the penal code was conceived as a completely new one (abrogating the older laws), whereas the civil code maintained many rules from Roman law and retained the opinions of the jurists, higher courts case law and customary law among the legal sources. The new penal law (intervening in a domain where many Roman rules had become completely outdated) was founded on the principle of the legality of offences and penalties, but it maintained certain privileges (for example, the death penalty could be replaced by imprisonment for nobility) and left judges with the power to extend the statutory rules through analogy. As the civil code continued to rule feudal tenures, there was no real break with the social structures of the *Ancien Régime*. Although these codes were not compilations, they were part of a consolidation of the *jus commune* system with recourse to Roman law "used in a convenient matter, as an aid in the matters not determined by the national law"[8]. If Bavaria was a "modern State"—relatively advanced in the construction of its State apparatus among those larger principalities of the Holy Roman Empire _, it is doubtful if the "national law" had entirely severed its Roman roots and could furnish a cultural basis for an entirely original formation. Furthermore, at the end of the eighteenth century, under the reign of Maximilian-Joseph IV and the influence of his reformist minister Montgelas,

[7] Wagner, Wolfgang. 1986. *Das Schwedische Reichsgesetzbuch (Sveriges Rikes Lag) von 1734*. Frankfurt a. M.: Klostermann.

[8] Gagner, as n. 5, 2.

Bavaria took the path of "enlightened despotism". In the legal filed, this change diminished the importance (in universities and in the judiciary) of the Kreittmayr Codes, before the 1813 publication of a new penal Code, prepared by Anselm von Feuerbach and allowing the principle of the legality of offences (the maxim *nullum crimen, nulla poena sine lege* was popularised by Feuerbach). No legal revolution took place in Bavaria before Napoleonic times and we will discuss the impact of the reforms of legal education in the next section.

The ambitious codifications planned by Frederick II the Great in Prussia and Maria Theresa in Austria have to be considered separately as examples of enlightened despotism. From the first days of his reign in 1740, which included the decision to abolish torture in criminal proceedings, Frederick II was committed to reform the existing Prussian legal order, a territorial law written in German during the seventeenth and the early eighteenth century (1620, 1648 and 1721 *Landrecht*) which combined (often incomprehensibly) elements of German and Roman law. Under the authority of the chancellor Cocceji, an initial project of the *Codex Fredericanus* was prepared and published between 1747 and 1751. Although this project was translated into French and was considered by many philosophers as a masterpiece of the Enlightenment, it was abandoned (except in procedural matters) by the king who judged it too faithful to Roman tradition and too emphatic. The reform process was restarted in 1780, after the famous affair of the mill worker Arnold. The king, upset was by a decision by judges favouring the rights of noblemen concerning a river over those of a small mill manager, he decided to arrest the judges and launch a new process hearing—under the authority of his new chancellor Carmer—with the explicit goal of publishing a simpler code overruling the judges.

The jurists Carl Gottlieb Svarez and Klein prepared a new code and the first book (called *Corpus Fridericianum*) concerning civil procedure (introducing a new procedural system based on inquisition and the end of the *Eventualmaxime* that forced the parties to present all the facts and arguments in written form) was promulgated in 1781[9]. At the same time advocates were replaced by "justice assistants" (*Assitenzräte*), young public agents (recruited and paid by the king) who assisted and represented the parties. The goal was undoubtedly to unify and simplify the legal rules, in order to make them more accessible to ordinary people and to limit the influence of lawyers and judges. However, this ambitious codification plan (divided into six parts carried out between 1781 and 1788) had not been completed at the time of Fredrick the Great death's in 1786 and his nephew Fredrick-Wilhelm III (who reigned from 1786 to 1797) reoriented the legal project in a more conservative manner (particularly in view of the fear of the French Revolution and of its strict legalism). Advocates were reintroduced with a general reform of the judiciary in 1793 (*Allgemeine Gerichtsordnung*). The outcome was published in 1794 under the title *Allgemeines Landrecht für die Königlich-Preussischen Staaten* (General and Territorial Law for the Royal-Prussian States) which avoided any reference to the "code" vocabulary (along with revolutionary laws in France).

[9] Schmidt, Eberhard. 1980. *Beiträge zur Geschichte des preussischen Rechtsstaates.* Berlin: Duncker & Humblot, 102, 187, 294.

The ALR (as it is designated by German writers) is, undoubtedly, the first "great" code of the end of the eighteenth century and the beginning of the nineteenth century. With more than 19,000 articles, in two parts and more than 40 titles, it was a comprehensive code aimed at the whole legal order, from public and ecclesiastical law to penal, commercial, feudal and private law. It was also a German code, written in elegant style (containing some words of French origin which had contemporary use in Berlin) and intended to be in force in a national (Prussian) State. This was no not so much of a compilation of previous statutes, but a systemisation of the legal order, a kind of legal encyclopaedia, following natural-law schemes (Svarez and Klein were influenced by Wolf's works). A monument to an absolutist State, which can perhaps be considered as a police State, not to mention the first outline of a Welfare -State, the Prussian General Code has often been compared, from Tocqueville to Dilthey, as a constitution or an "*ersatz*" of constitution[10].

Can we really argue that the ALR has triggered a legal revolution? The answer is rather nuanced. Firstly, it was, surprisingly, a "subsidiary law" that had to be applied after (and in the absence of) provincial and municipal laws. It was necessary, some years or decades later, to reform the *Landrecht* in Eastern Prussia (1802), then in Western Prussia (1844) to make the provincial law operate in accordance with "general" territorial law. The principle reason why the ALR was promulgated was to introduce a German law into the new Polish territories (inhabited by a majority of Polish and Catholic subjects) acquired by the King of Prussia after the 1793 division of the kingdom of Poland. In the Polish districts of South Prussia (around Posen and Kalisch), the introduction of the ALR was more difficult and gradual (with some exceptions concerning the law of successions)[11]. After the end of the Napoleonic wars, the ALR was extended to some further Prussian provinces in West Germany (Westphalia), but not those in the Rhineland. In these prosperous districts of the Rhine valley (with an affluent bourgeoisie), the Napoleonic Code had been introduced during the French domination (1804–1814) and elite members of the society (the bourgeois and even noblemen) demanded the retention of French rules under the new Prussian administration. As a consequence, the ALR was neither a "royal" law applicable to all the Prussian king's territories nor a national code of a completely unified State.

Thus the ALR was neither a revolutionary code through the abrogation of all the previous rules, nor innovative legislation based on the egalitarian concepts of the "rule of law". This enormous text was, with its two contrasting parts, a kind of legal Janus. The first part was a general systematisation of legal concepts—inherited from the *Usus modernus Pandectarum* doctrine and the Modern School of Natural Law—about persons, things, rights and actions. Written in a non-discriminatory style (according to § 26 of the Introduction, the laws of one State are mandatory for

[10] Vierhaus, Rüdolf. 1995. Das Allgemeine Landrecht für die Preußisschen Staaten als Verfassungsersatz? In *200 Jahre Allgemeines Landrecht für die Preussischen Staaten*, eds, Barbara Dölemeyer, Heinz Mohnhaupt. Frankfurt a. M.: Klostermann, 1–21.

[11] Janicka, Danuta. Das Allgemeine Landrecht und Polen, *in* Dölemeyer, Mohnhaupt (eds.), n. 11, 446–447.

all its members, without distinction on the grounds of conditions, rank or sex), the articles gave everyone the "general rights" of all persons based on their natural freedom (§ 83). Any special rights of different classes or orders (*Stände*) were subordinated to rules and duties established for the common good. At the same time human rights were recognised, but as a concession by the State (*ex lege*), and its absolutist power (which still ignored representative assemblies) was theoretically linked by these legal and reasonable rules. The ambiguities of this rule of law were reinforced by the maintenance of a traditional social structure based on the inequality of *Stände* (noblemen, bourgeois, urban, workers and peasants) that was proclaimed in the first part and developed in the second part through the specific titles devoted to the noble fees and peasants' tenures, the serfs, bourgeoisie, and the relationship between masters and servants. Here every stratum of a compartmentalised society had its own rules, which maintained a strict separation and hierarchy between the orders. Marriage laws (celebrated between members of the same religious communities, with some degree of tolerance for Catholics and even Jews in a Protestant kingdom) were characteristic of this *Ancien Régime* stratification. A nobleman could enter into a marriage "from the left hand" with a non noble woman who did not become part of her husband's family. At the same time, the Code permitted the adoption of children and imposed social duties on parents (mothers had to breast-feed their babies and parents had to give them corporal care). It could be said that the State tried to extend a form of enlightened tutelage on the whole of society. The code could appear as merely a programmatic text unlikely (and unwilling) to reform the society through law.

Finally, the contradictions within the ALR appeared in its style and its target. Conceived as an accessible law, designed to be broadly understood by everyone (by all speakers of a vernacular language), the Code was too complicated and sophisticated to be truly "popular" and even understandable by common people. Devised in a time of distrust of the judges on the part of the royal power, the Code tried to settle all legal questions by a very casuistic method (even the case of hermaphrodites was considered, for example) and it tried to prevent judges from developing innovative case law (if doubt arose, they had to submit the question to a legislation commission centrally controlled by the king). However this method appeared risky in the long run. Judges and lawyers could choose to ignore this subsidiary and sophisticated law and develop their own individual norms (without giving rise to a systemised case law, as we will see in the next section).

Deprived of revolutionary intents in the social sphere, the ALR failed to be a revolutionary text in the legal order during the first half of the nineteenth century for various reasons. As a comprehensive code, it was replaced or nullified in different ways and at different times, for example by the reforms of feudal laws (in 1848), the penal law (a specific penal Code was promulgated in 1851) or of the commercial law (with the 1861 German-Austrian Code). A process of "decodification" supported new laws modifying the rules of the ALR without being integrated into the Code[12]. Criticised and marginalised by German jurists since Savigny (in favour

[12] Bors, Marc. 1998. *Bescholtene Frauen vor Gericht.* Frankfurt a. M.: Klostermann about the 1854 law concerning actions of seduced women against the potential father of their child.

of the Roman law tradition), the ALR was not imposed as the curriculum of legal education in Prussia. It could never become the main reference point for the construction and the interpretation of the legal order. At the same time this eighteenth century code appeared too influenced by the Enlightenment movement (to the taste of conservative thinkers after the Napoleonic wars) and too old-fashioned (with the social structure of the *Stände*) for the liberals. The Prussian legal order was not rebuilt on new foundations, but rather stabilised through the ALR. After German unification in 1871, nobody proposed to extend the ALR to the whole Empire and it was finally replaced (with the exception of the relations between masters and servants) by the 1896–1900 Civil Code (BGB).

The 1804 French Civil Code (or Napoleonic Code, the term *Code Napoléon* became the official designation in 1807) has always been considered as the antithesis of the General Prussian Code. Firstly, this Civil Code is linked with the French Revolution, which made possible the unification of French private law through the 1789 abolition of privileges and all local particularism (provinces with historical "freedoms" were replaced by the splitting of French territory into equal departments). One must nevertheless take note of the fact that the revolutionary assemblies did not succeed in adopting a Civil Code, despite three official projects presented in 1793, 1794 and 1796 by deputy Cambacérès[13]. The first French Code, and the only one voted during the Revolution, was the 1791 Penal Code adopted by the Constituent Assembly and which recognized the legality of offences (only crimes were defined in this code, misdemeanours were addressed by another law) and penalties (with a strict system of fixed penalties, preventing judges from mitigating penalties following the jury's based upon the facts). If we want to demonstrate that the Civil Code had achieved a legal revolution, we must distinguish its impact (at least on some grounds) from the contemporary political revolution.

There is no doubt that, in its content, the Napoleonic Code supported several "social objectives" of the French Revolution: the legal equality of all French people before the law (article 8 of the Code states that every Frenchman has the same civil rights), the secularisation of marriage (which implies that only civil marriage had "legal" basis, and prevented any discrimination based on religion; which is contrary to the Prussian ALR and the Austrian ABGB, the Civil Code was a "Code without God", completely indifferent to religious issues), the end of feudal tenures and the establishment of an exclusive right of property, the freedom of trade (following the suppression of guilds and corporations) and of contracts (which meant, for example, the freedom to enter into interest-bearing loans, which was contrary to the canon and the royal law prior to 1789), and the prohibition of perpetual settlements. Viewed from this perspective the Civil Code had clearly stabilised the "bourgeois" society stemming from the French Revolution. But it is also commonly held that, in many ways, the Napoleonic Code was conservative, retaining rules based on "*ancien droit*" (through borrowings from written customs, Roman law and royal statutory law) and ran counter to some of the grander reforms or projects of the French Revolution (concerning divorce, the rights of illegitimate children, restrictions of freedom to testate). Presented by its drafters as a compromise (between

[13] Halpérin, Jean-Louis. 1992. *L'impossible Code civil.* Paris: PUF.

Southern and Northern traditions and between *Ancien Régime* and Revolution), the Civil Code was, on the one hand, reactionary (literally in that is a movement backwards in comparison with the Revolution or its more egalitarian trends in 1793).

Any attempts to weight in the balance the "traditional" part and the "revolutionary" elements would be somewhat in vain. Nothing is completely new in legal history and the Napoleonic Code is no exception. Like the later 1922 Soviet Civil Code, it had its origins in a normative and ideal (or doctrinal) past. However, the most important thing is not this apparent continuity: from the moment that a significant section of the Code reveals a revolutionary character, the Code itself becomes substantially revolutionary and much more revolutionary than the codes (like those of Prussia and Austria) linked with *Ancien Régime* structures. The break with the enlightened despotism is also clear. The Napoleonic Code is not just another step in the construction of the modern State—even if, of course, it reinforces the State's influence on society—it is in fact a new direction in the configuration of the legal field through a renovated—different from the *Ancien Régime* State as a secularised and economically liberal order—legal system. If we adopt Kelsen's idea of identity (from a legal perspective) of State and legal order (*Rechtsordnung*), the Napoleonic Code (and not the Napoleonic constitutions which comprised three or four texts, in 1800, 1802, 1804 and 1815, and abandoned after the collapse of the first Empire) had undertaken the complete substitution of an old legal order by a new one. It had undeniably broken the framework of the *jus commune* inspired, since the end of the eleventh century, by the rediscovery of Roman law.

It is obvious that the form of the Code cannot be separated from the content of the codification. Some technical peculiarities of the 1804 French Civil Code have to be considered. Firstly, the statute law of March 21, 1804 had brought together in "one sole body of laws" those 36 texts adopted (in a very formal, and undemocratic fashion) by the assemblies and which constituted the *Civil Code of Frenchmen*. The last article of this law had abrogated all those rules based on customs, Roman law and the royal legislation in all matters dealt with by the Code. Contrary to the ALR, which was only a "subsidiary" source of law, the Napoleonic Code had made a *tabula rasa* of old law (the so-called "*ancien droit*") and formulated a completely unified civil law for the whole of France and for all French people. The French Code is also the first code which defines the "quality of being French" (which will later be called the French "nationality") and determines the application of French law according to this national criterion, and not (like in the Prussian Code) according to the place of residence of the person. It is not a code for territories and people subjected (through allegiance) to a sovereign, but in fact a national law applying equally to all French people. Significantly, the Napoleonic Code is also the first code with continuous numbering, from article 1 to article 2,281, rather than a numbering system within each section. Of course, there was also a systematic plan within the ALR, but its extensive and complex development in regards to two distinct sections (the first concerning general dispositions, the second to do with the "declension" of rules accorded to each social class) made it a very obscure structure, at odds with the official goal of a law accessible to common people.

Other differences between the French Civil Code and the ALR are noteworthy and can be interpreted as clues to the form of this legal revolution linked with French

http://www.springer.com/978-3-319-05887-0

Five Legal Revolutions Since the 17th Century
An Analysis of a Global Legal History
Halpérin, J.-L.
2014, XVI, 194 p. 1 illus., Hardcover
ISBN: 978-3-319-05887-0