

OUTLINE — DISCUSSION CLASS 11

Domat and Pothier (cont'd) The Making of the Napoleonic Code

Domat, *The Civil Laws in their Natural Order* §§ 125

Para. 1. Things common to all.⁷

⁷. [Dt. 4:19 (“And when you look up to the heavens and see the sun, the moon, and the stars, all the host of heaven, do not be led astray and bow down to them and serve them, things that the Lord your God has allotted to all the peoples everywhere under heaven.”); JI.2.1.1; D.41.1.2.1] It is to be remarked on this article and the two following that our laws differ from the Roman law in regulating the use of the seas, except in so far as concerns that natural use of them, in communication which all nations have with one another, by a free navigation over all the sea. Thus whereas the Roman law allowed every body indifferently to fish, both in the sea and in the rivers [JI.2.1.2], in the same manner as it allowed hunting [JI.2.1.12], our laws prohibit them. And our ordinances have made several regulations concerning them; the origin of which is owing, among other causes, to the necessity of preventing the inconveniences of allowing a liberty of hunting and fishing to all sorts of persons. And we must observe in general, touching the use of the seas, seaports, rivers, highways, the walls and ditches of towns, and of other things of the like nature, that several regulations have been made in them by our ordinances; such as those that concern the admiralty, rivers, forest, hunting, fishing, and others of the like nature which do not belong to the matters that come within the compass of this design.

Para. 11. [125] *Animals, wild and tame*.— Animals are of two sorts. One is of those that are tame, and serve for the ordinary use of men, and are in their power; such as horses, oxen, sheep, and others. The other sort is of those animals that live in their natural liberty, out of the power of man; such as the wild beasts, fowls, and fishes. And the animals of this second sort are applied to the use, and come into the power of men, by hunting and fishing, according as the use of these sports is permitted by the laws.⁸

⁸. [JI.2.1.12.] We must understand this according to the ordinances which relate to hunting and fishing.

Para. 7: Possession of living creatures. As we may possess living creatures, which it is not possible to have always in our power and custody, so we retain the possession of them whilst we shut them up, whilst we have them under the care of a keeper, or if, being made tame, they return home without a keeper, as bees to their hives, and pigeons to their dove-houses. But the creatures which escape out of our custody, and do not come back, are no longer in our possession, till we recover them again.⁹

⁹. [D.41.1.3.2; D.41.2.3.15, 16, 13.]

Pothier, *Treatise on the Right of Ownership of Property* summary by CD

Pothier on the topic of wild animals is interesting. His discussion of the topic is quite long, and it contains a number of surprises:

Like Locke, but with somewhat more emphasis on the religious, Pothier begins “God has the sovereign dominion of the universe and everything that it contains: ‘The Lord’s is the earth and its fullness, the world and all that is contained therein.’ [Ps. 24(23):1–2.] He created the earth and all the creatures that it contains for humankind and granted them a dominion subordinate to his own: ‘What is man’, writes the Psalmist, that you are mindful of him? ... You have set him over all the works of your hands, you have made everything subject to his feet.’ [Ps. 8:4, 6]. God made that declaration to human kind by the words that he addressed to our first parents after their creation: ‘Multiply and fill the earth and subject it and dominate the fish of the sea.’ [Gn. 1.28].

“The first men had then all the things that God had given humankind in common. That community was not a positive community, such as the one that exists among several persons who have in the common the ownership of thing in which they have each their part, it was a community which those who have treated of these matters call a negative community, which consisted in that these things which were common to all belonged no more to one of them than to the others and in that no one could prevent another from taking from among these common things that which he judged fitting to take in order to satisfy his needs. While he was satisfying his needs with it, the others were obliged to leave it to him, but after he ceased to satisfy his needs with it, if the thing were not one of those which were consumed in the use that one made of them, that thing returned to the negative community and another could satisfy his needs with it in the same manner.

“Humankind having multiplied, men divided the land and the majority of things that were on the surface among themselves. That which fell to each of them began to belong to him to the exclusion of others. That was the origin of the right of property. ...

“So far as wild animals are concerned, *ferae naturae*, they remained in the ancient state of the negative community.

“All those things that remained in the ancient state of negative community are called *res communes*, by reference to the right that everyone has to seize them; they are also called *res nullius*, because no one has property in them so long as they remain in that state and cannot be acquired except by seizing them.”

Pothier next takes up the question of what the Roman law of the chase was. He notes the basic proposition that conforming to the natural law, Roman law made the chase available to everyone. He correctly interprets D.41.1.3.1 as making it irrelevant whether the capture took place on the hunter’s property or on another’s land. He notes, as does the same Digest passage, that the landowner may, however, prohibit the hunter from entering on his land (which he notes as a consequence of land-ownership), and he raises, as had many before him the question of what happens if the hunter takes game despite the prohibition. Cujas, he tells us, would decide the question in favor of the property owner (as had Accursius 500 years earlier), but Vinnius (a Dutch writer roughly contemporary with Voet) decides the case in favor of the huntsman giving the landowner an *actio injuriarum*: “because,” Pothier tells us, “being the owner of the land he has the right to prevent him [the huntsman] from passing over it, but not being the owner of the wild animals which the hunter has taken on his land he has no reason to prevent that the hunter acquire in it [the game] the ownership by seizing it.”

Pothier goes on to point out that the Romans did not require actual manucaption. He quotes the case of the boar that fell into the trap at length and seems to draw the conclusion that it belongs to the trapper if it cannot get out. He notes that in French law someone who wrongfully sets a trap on another’s land cannot claim ownership in the game.

Pothier then proceeds to consider the question of wounding and of interference with the hunt. He notes the conflict between Trebatius and Gaius on the topic. He makes no mention of how Justinian resolves the question. He then reports Pufendorf’s resolution, which he describes as allowing the huntsman an action if the wound was *considérable* and the animal could not escape. He then reports Barbeyrac’s opinion that pursuit alone is

enough and concludes: “Barbeyrac ... thinks that it suffices that I be in pursuit of the animal, even though I not have already wounded it, in order that I be regarded as the first occupant, with the result that another will not be permitted to seize it from me during this time. This idea is more civil; it is followed in usage; it conforms to an article of the ancient laws of the Salians (5.35): where it is said: ‘If anyone kills and steals a tired wild boar whom another’s dogs have stirred, let him be adjudged liable for 600 *denarii*’.”

So far Pothier has been quite consistent. He has grounded the privilege of the huntsman in a divine grant as a matter of natural law, and he has supported the huntsman at every turn. He prevails over the landowner even when he is expressly forbidden from entering onto the land. He prevails over the later huntsman, following a much more Lockean than Hobbesian version of the story. When Pothier gets to the law of France, however, he is surprising. This broad right of the huntsman does not apply in France. Hunting rights are restricted to the nobility. Proprietary rights prevail everywhere over poachers. How can this be? “Some of the old doctors have doubted whether the sovereigns had the right to reserve hunting for themselves and to forbid it to their subjects. They argue that God having given men power (*l’empire*) over beasts, as we have seen above, the prince had no right to deprive his subjects of the right that God had given them. The natural law, one says, permits everyone to hunt; the civil law that forbids it is contrary to the natural law and exceeds, by consequence, the power of the legislator, who is himself subject to the natural law and cannot ordain the contrary to that law.

“It is easy to respond to these objections. From the fact that God gave power over the beasts to humankind it does not follow that it ought to be permitted to every individual member of human kind to exercise that power. The civil law ought not to be contrary to the natural law. That is true with regard to what the natural law commands or that which it forbids. But the civil law can restrain the natural law in that which it only permits. The majority of civil laws do nothing but make restrictions on what the natural law permits. That is why, although in terms of pure natural law, the hunt is permitted to every individual, the prince was within his rights to reserve it to himself and [grant] it to a certain kind of person and forbid it to others. Hunting is an exercise likely to turn peasants and artisans from their work and merchants from their commerce. It would be useful and for their proper interest and for the public interest to forbid them from it. The law which forbids hunting is therefore a just law which it is not permitted to those who are forbidden from it to contravene either in the forum of conscience or in the external forum.” The notion of the permission of the natural law goes back to the first glossators of canon law, when they were seeking to justify property. Though I cannot recall having this argument in medieval authors with regard to wild animals, a medieval jurist would certainly have understood it.

In his general discussion of occupation, Pothier turns very briefly to the question that had plagued the Spanish scholastics in the 16th century, the justification for the conquest of the new world. Like all of his predecessors he says that a seaman who discovers an uninhabited land may occupy it and claim it for his own. If he claims it in the name of the prince, property in it passes to the prince. “But when a land is occupied,” Pothier continues, “however wild [the French word also means ‘savage’] the men who inhabit it appear to us, these men being the true proprietors, we cannot without injustice establish ourselves there against their will.”

The French Revolution

Some wars:

1756–1763, Seven Years' War

Miscellaneous Monarchs:

1740–1786, Frederick II the Great, King of Prussia

1740–1780, Maria Theresa, empress of Austria

France:

1715–1774, Louis XV (Cardinal Fleury, Daguesseau)

1774–1792, Louis XVI

The origins of the French Revolution:

A century of revolution?

Economic causes

The French Revolution and Napoleon:

May 5, 1789—Sept. 30, 1791: Estates-General and Constituent Assembly. Storming of Bastille and Declaration of Rights of Man. Government changes to limited constitutional monarchy. Dominance of the upper-middle classes in creation of distinction between active and passive citizens. Abolition of privilege; creation of the *départements*; permanent vacation for the *parlements*; civil organization the clergy; organization of commune of Paris.

1799–1804: Consulate: Constitution approved by plebiscite. Three consuls of which Napoleon was first, Senate (80) appointed for life which in turn appointed the two legislative bodies from lists submitted by voters: Tribune (100) which debated but did not vote and Legislative Chamber (300) which voted but did not debate. The first consul also appointed a Council of State. Tightening of centralization thru prefectures. Concordat with the papacy. New constitution: Napoleon consul for life; powers of Senate enlarged, that of legislative bodies reduced. Reorganization of the German Empire.

1804–1815: First Empire. Napoleon declared emperor by plebiscite. War of the Third Coalition (battle of Trafalgar). The Peninsular War (Wellington in Spain). Invasion of Russia. Congress of Vienna. Battle of Waterloo. Restoration of the monarchy (Louis XVIII) in a constitutional form similar to the British.

The Napoleonic Code

Why was there a codification in France in 1804?

A combination of “technical preconditions” and “societal driving forces” (Jean Maillet)

Roman law (Alan Watson)

Enlightenment thought (Carl Friedrich)

The beginnings of a codification movement:

1789—beginning of the French Revolution

1799–1815—Napoléon

Code civil (Napoléon, 1804)

Codex Maximilianeus Bavaricus civilis (Maximilian III Joseph, Bavaria, 1756) (not regarded as a “true” code by the purists because it was not exclusive; the work of Wiguläus Xaver Aloys Freiherr von Kreittmayr, 1705–90)

Allgemeines Landrecht für die preussischen Staaten (Prussia, 1789–1792)

Allgemeines Bürgerliches Gesetzbuch (Austria, 1811, but largely in existence in the 1790’s and tried out in the province of Galicia)

The French Revolution as an explanation for the codification, but how do we explain Prussia, Austria, and, perhaps, Bavaria?

The possible influence of Enlightenment thought.

The notion of Enlightenment thought plus political “push.”

The Drafters of the Napoleonic Code:

François Tronchet, 1726–1806 (from Paris, the defender of Louis XVI in the National Convention, former president of the Parlement of Paris)

Félix Bigot de Préamenu, 1747–1825, born at Rennes in Brittany, former member of the Breton parlement and advocate in the parlement of Paris.

These represented the *pays de droit coutumier*. From the *pays de droit écrit* were:

Jacques, marquis de Maleville, 1741–1824

Jean Portalis, 1746–1807

Also Jean-Jacques de Cambacérès, 1753–1824, who was the second consul and ultimately archchancellor of the Empire. He was from Montpellier, and came from a family of the *noblesse de robe*.

Outline of the Napoleonic Code:

bk. 1. Of Persons. (This is where the marriage sections come from)

bk. 2. Of Property.

bk. 3. Of the different modes of acquiring property. (This is where the wild animal section comes from)

After this comes 1. Succession. 2. Donation. 3. Contracts in general. 4. Engagements formed without a contract (quasi-contract and delict). 5. Of the contract of marriage (marital property). 6–13. [Different kinds of contracts: sale, hire, partnership, loans, deposit, insurance, agency] 14–18. Security. 19. Ejectment. 20. Prescription.

(The section on witnesses is in a separate Code of Civil Procedure.)

The so-called ‘exegetical school’

A[lexandre] Duranton (d. 1866), professor at Paris, (21 vols.)

Raymond Troplong (d. 1869) magistrate and president of the cour de cassation (27 vols.)

Charles Demolombe (d. 1888) (31 vols.)

François Laurent (d. 1887), theoretician of the school

Charles Aubry (d. 1883) and Charles Rau (d. 1877), professors at the university of Strasbourg (8 vols.)

Specifics about the Napoleonic Code

Titles of Book 1 ‘On Persons’

- tit. 1. On the enjoyment and privation of civil rights (arts. 7–33)
- tit. 2. On acts of civil state (arts. 34–101) [birth, marriage, and death certificates]
- tit. 3. On domicile (arts. 102–111)
- tit. 4. On absents (arts. 112–143) [a seemingly innocuous title, but it was used against those who had emigrated from France during the Revolution]
- tit. 5. On marriage (arts. 144–228]
- tit. 6. On divorce (arts. 229–311) [abolished in 1816, subsequently reinstated]
- tit. 7. On paternity and filiation (arts. 312–342)
- tit. 8. On adoption and legal guardianship (arts. 343–370)
- tit. 9. On paternal power (371–387)
- tit. 10. On minority, guardianship, and emancipation (arts. 388–487)
- tit. 11. On majority, interdiction and the judicial council (arts. 488–515) [interdiction and the judicial council have to do with the care of the mentally incompetent]

1. The correspondence of the structure of the Napoleonic Code to that of Justinian’s Institutes is deep. Titles 5–11 are close to J.I.’s titles. 5=J.I.10, 6=no correspondence, 7 approximates J.I.10, 8=J.I.11, 9=J.I.9, 10=J.I.13 and 12, 11 approximates J.I.23 and 24.
2. Overall, as the French might say, *c’est logique, n’est-ce pas?* (*Logique* is not quite formal logic, it’s more “it makes sense.”).
3. The role of property:

art. 544: “Property is the right to enjoy and to dispose of things in the most absolute manner, provided that one does not make a use of it prohibited by law or regulation.”

art. 545: “No one can be constrained to grant his property except for a reason of public utility and upon the provision of a just indemnity in advance.” (The French notion does not embrace regulatory takings.)

The element that I would emphasize is how powerful is the effect of the removal of “feudalism.” This has a tendency to aggrandize the category of “ownership” even to the detriment of the will of the parties.

The French code doesn’t tell us much about wild animals except that the authors think of wild animals in the context of the general rules about acquiring property and are at pains to emphasize that there are public law rules that deal with it. It does not mention occupancy. Perhaps a result of the desire to remove feudalism and perhaps also a result of the relative absence of natural law thinking in France.

4. The role of patriarchy and the secularization of marriage:

Sec. 213. “The husband owes protection to his wife, the wife obedience to her husband.”

There’s no doubt that it is there, and perhaps it’s amazing that it took so long to get

it out (1970). In the context of the time, it probably is not very extreme, though it certainly was exaggerated by Napoleon's sexism.

Marriage was radically secularized in the Napoleonic Code. A French marriage under the Code takes place before a civil officer, normally the mayor of the town. He reads the banns, any opposition to the banns and any renunciation of banns, the birth certificates of the parties, the consents of the parents; then he reads section 1.5.6 of the Code which begins "212. Married persons owe to each other fidelity, succour, assistance." and is followed by the article that I just read. The mayor receives from each party his/her consent; he pronounces them husband and wife in the name of the law and immediately makes up a marriage certificate. Parents have the right to oppose the marriage of their children.

5. The Code of Civil Procedure is generally regarded as not as successful as the Civil. It has largely been replaced (officially beginning in 1975), as the Civil Code has not been. One of the reasons for its lack of success is that the system of exclusion of witnesses is continued. The categories seem to be (a) [268] ascendants or descendants of a party or his spouse, who cannot be assigned as witnesses, (b) a somewhat wider set of relatives, those who have eaten or drunk, servants, heirs presumptive, and the infamous who can be reproached. Reproaching does not prevent the deposition from being taken, but it prevents it from being read if the reproach is admitted. Nothing is said about the key issue of discretion. This is really no improvement over what had come before. The other 19th century procedure codes try to come to grips with the issue of discretion.
6. Criticisms of the Code
 - a. Not every provision of the Code proved to be successful. The provisions on foreigners, a reflection of Napoleon's anti-foreign bias, were amended as early as 1819. On a more technical level, there were a number of provisions that should have required public notice and did not, provisions about dowries, mortgages, the transfer of immovables. These were amended in the 1850's. Some of the provisions got creaky as the economy changed radically over the course of the 19th century. The men of 1804 were not clairvoyant.
 - b. The Code was quite favorable to employers of labor and was generally deficient on the topic of labor law. A new code specifically devoted to labor law was passed in 1910.
 - c. Despite these changes, and others, it is remarkable how much of the original code is still in effect, more than 200 years after it was promulgated. In a country which has had numerous constitutions over the course of the last 200 years, the civil code has remained much more stable. Hence, it has a kind of constitutional quality for the French, and, as such, is difficult, perhaps too difficult, to change.