THE INFLUENCE OF THE FRENCH REVOLUTION ON LEGAL AND JUDICIAL REFORM

by

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ABSTRACT

THE INFLUENCE OF THE FRENCH REVOLUTION ON LEGAL AND JUDICIAL REFORM

The main impact of the Revolution on France and Europe may well have been political, administrative and legal rather than social and economic. There have been a multitude of political histories of the French Revolution, but few on the important question of legal reform. The purpose of this work is to provide a synthesis of the primary and secondary sources, in French and in English, on a subject which has received little attention.

The thesis is designed to analyze the process through which the ideals of the Revolutionary period were translated into important legal and judicial reforms. However as these reforms came about as a result of continuous demands for change, their significance cannot be accurately evaluated without reference to the situation which prevailed prior to the Revolution. Accordingly, the first part of this thesis describes those aspects of the judicial system of the old regime which provoked the most vehement criticism. This involves an examination of the defects in the administration of justice, the confusion resulting from the absence of legislative uniformity, and the brutality and inequality of the criminal law and procedure.
The deficiencies of the existing legal and judicial system gave rise to many demands for reform before 1789, especially during the last decades of the eighteenth century. Therefore, the thesis concerns itself with the part played by those individuals whose efforts largely inspired the reforms culminating in the Revolutionary assemblies. The ideas publicized by these reformers also influenced the royal government, and a discussion follows concerning the limited achievements realized by the court in the area of legal and judicial reform.

The thesis then examines the incorporation of the Revolutionary ideals into organic laws, and the several attempts made to unify the civil laws by means of codification during the years 1789 to 1799. This in turn leads to an analysis of the Code Napoléon and the influence upon it of the Revolutionary tradition which formed part of its immediate heritage.

The extent of the reforms involving criminal law and procedure are then explored with special reference to the various safeguards introduced on behalf of those accused of crimes. Although the attempts to codify civil legislation during the Revolutionary period were inconclusive, the various assemblies did successfully complete the codification of penal law and procedure. However as these codes were superseded by those compiled under the Consulate and First Empire, the latter are examined to determine whether the essential principles of 1789 were discarded or preserved.
The last part of this thesis concerns the reorganization of the judicial system which radically altered the method of recruitment of the magistracy. This reorganization was based upon the principles of the separation of powers and exemplified the determination of the Revolutionaries to free the executive from judicial control.

Although Napoleon imposed upon the Codes a characteristically authoritarian stamp, many of the basic reforms of the Revolutionary period survived: the uniformity of the law, equality before the law, the legality of crimes and punishments, trial by jury, and humanized penalties.
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INTRODUCTION

In this paper I will analyze the process through which the ideals of the Revolutionary period were translated into important legal and judicial reforms. As these reforms came about as a result of continuous demands for change, it is necessary to examine the situation which prevailed prior to the Revolution in order to access accurately their significance. Thus I begin with a description of those aspects of the system existing under the old regime which provoked the most vehement criticism. This involves a discussion concerning the defects in the administration of justice, the lack of legislative unity, and the cruelty and inequality of the criminal law and procedure.

The deficiencies of the existing legal and judicial system gave rise to many demands for reform before 1789, especially during the last decades of the eighteenth century. Accordingly, a discussion follows concerning the influence of the philosophes whose efforts inspired many of the reforms which culminated in the Revolutionary assemblies. The ideas publicized by these reformers also influenced the royal government, and reference is made to the limited achievements realized by the monarchy in this area.

I then describe the incorporation of the Revolutionary ideals into organic laws, and the several attempts made to unify the civil laws by means of codification during the years 1789 to 1799. This in turn leads
to an analysis of the Code Napoléon and the influence upon it of the Revolutionary tradition which formed part of its immediate heritage.

The reforms involving criminal law and procedure are then explored with special reference to the various safeguards introduced on behalf of those accused of crimes. Although the attempts to codify civil legislation during the Revolutionary period were inconclusive, the various assemblies successfully completed the codification of penal law and procedure. However as these codes were superseded by those compiled under the Consulate and First Empire, the latter are examined to determine whether the essential principles of 1789 were discarded or preserved.

The last part of the paper deals with the reorganization of the judicial system which radically altered the method of recruitment of the magistracy. This reorganization was based upon the principle of the separation of powers and exemplified the determination of the Revolutionaries to free the executive from judicial control.

Although the Napoleonic Codes were marked by some authoritarian ideas, they incorporated many of the basic reforms of the Revolutionary period, thus ensuring their survival: equality before the law, the legality of crimes and punishments, trial by jury, and humanized penalties.
CHAPTER I

THE SITUATION UNDER THE OLD REGIME

The Administration of Justice

According to absolutist theory, the king was the source of all justice in France. Although he had delegated its administration to officials in the many royal courts throughout the country, he had never alienated his rights in matters of justice. However, because of the procedure of buying and selling public offices under the old regime, venality and inheritance of judicial offices had become in practice the two principal factors which determined the recruitment of the magistracy of the sovereign courts.1 Venality was the main defect in the administration of justice and gave rise to most of the abuses: the numerous courts of conflicting competence; the multiplicity of appeal procedures with the attendant excessive costs; and the bestowing of gifts (épices) upon judges by litigants to expedite the arbitrary and dilatory processes of the law. The essential vices of the system are concisely enumerated by M. Marion: "Trop de tribunaux, et dans ces tribunaux trop d'officiers, parce que la vente des offices était une grande ressource . . . une justice très chère, très lente, très partiale, très accessible à la sollicitation, à la recommandation, à l'intrigue."2
The various courts were frequently in conflict over disputed jurisdictions, and even the procureur-général, Joly de Fleury, complained in 1763 that plaintiffs often had to plead their suits for two or three years in different courts in order to ascertain before which judge they should have the misfortune to appear.\(^3\)

The administration of justice in the seigniorial courts, as distinct from the sovereign courts, encompassed many of the deficiencies already described. In addition, justice was often dispensed by persons without benefit of legal training. These feudal courts were relics from medieval times and exercised a limited, and declining, criminal and civil jurisdiction.\(^4\) In the last decades of the old regime, their principal function was to decide disputes concerning the collection and payment of seigniorial dues. As the judges (baillis) were appointed by the seigneurs, the justice dispensed was far from impartial. The proceedings of these manorial courts represented one of the worst evils of the old judicial system. As R. Villers observes: "Il n'est pas exagéré de dire que de tels tribunaux étaient une des plaies de la justice d'alors et peut-être une des plaies du régime."\(^5\)

Thus, in the sphere of the administration of justice alone, the proceedings of the sovereign and seigniorial courts illustrated many of the weaknesses of the pre-revolutionary French legal system. This system, sustained by self-interest and privilege, was seemingly impervious to change. As summed up in the words of Arthur Young, "the
administration of justice was partial, venal, infamous...upon the question of expecting justice to be really and fairly administered, everyone confessed there was no such thing to be looked for."

On the eve of the Revolution, many of the cahiers demanded that the jurisdictional limits of the tribunals be limited in a clear and invariable manner in order to avoid conflicts of competence between the judges. Several called for the abolition of seigniorial courts and for the establishment of a single administrative tribunal throughout the realm. Still others demanded suppression of venality and proposed that judges be nominated by the king - from lists presented by local assemblies - and henceforth be paid by the State.

The condition of the administration of justice in the old regime was such that reforms effected by the Revolutionary assemblies would only prove to be far-reaching.

The Lack of Legislative Unity

Under the old regime the complexity and diversity of French law was such that no one was able to know it with certainty. As a consequence, many sought protection against the arbitrary administration of justice as practiced by the courts by advancing the concept of codification of the laws of the realm. They believed that once this was achieved everyone would be aware of his legal rights and that no discretion would
be left to the judges in applying the law.

The diversity of laws under the old regime was based partly on regional traditions. In the south of France, the governing system of law was known as "le droit écrit" which was founded upon the Roman law of Justinian as modified by custom and statute. It was characterized by its uniformity, its relative stability, its comprehensiveness, and its emphasis on paternal authority. In the central and northern regions of France, with the exception of Alsace, "le droit coutumier" prevailed. This customary law of the North, largely Germanic in origin, comprised different bodies of law - procedure, property, and succession - and displayed great diversity. However, the distinction between "pays de droit écrit" and "pays de coutumes" had been modified to a considerable degree by the compilation of customary law undertaken in the fifteenth and sixteenth centuries.

These two basic systems of law were complemented by the addition of two others of a general character. Feudal law, influential in the north of France, introduced an element of complexity into the laws with regard to the ownership and use of land; canon law exercised a dominant influence over personal situations, particularly in the matter of marriage.

In the seventeenth century, when royal legislative power under Louis XIV had attained sufficient recognition to have binding force throughout the kingdom, royal ordinances began to unify certain broad
areas of the law. As a result of Colbert’s initiative, several "Grandes Ordonnances" were drafted by a commission of codification appointed by the king. Of these enactments, the most significant one in terms of this study was the "Ordonnance Criminelle" of 1670. Its provisions were to govern criminal law and procedure in France until the Revolutionary decade.

Colbert’s work of codification was continued in the eighteenth century under Louis XV by the efforts of D’Aguesseau. This capable Chancellor initially contemplated unifying the entire civil law of the realm. Although his ambition was not to be achieved, three ordinances were promulgated as a direct result of his labours: Ordonnance sur les donations (1731); Ordonnance sur les testaments (1735); Ordonnance sur les substitutions fidéicommissaires (1747).

Codification of the law on a broader scale was not achieved under the monarchy primarily because of social and legal inequality and the tradition of local independence in the provinces. Thus many members of the robe nobility, and to a lesser extent of the sword, felt that codification encroached upon their judicial prerogatives. The achievement of national legislative unity would have meant that the existing differences in laws and customs of the diverse regions of France had to be subordinated to a dominant central authority which in turn was animated by the desire for legislative uniformity. This objective could only be obtained if the central authority was also prepared to remove the
existing legal distinctions between persons. Such was not the state
of affairs in France until the period of the Revolution.

Many of the cahiers expressed the desire of the people for legislative
unification - "une loi unique pour tout la royaume" - and for codification
of the civil and criminal law. In calling for legislative unity, the
cahier submitted by the Third Estate of Paris succinctly described the
unsatisfactory situation which prevailed under the old regime:

"Un assemblage informe de lois romaines et de
coutumes barbares, de réglements et d'ordonnances
sans rapport avec nos moeurs, comme sans unité
de principes, conçu dans des temps d'ignorance
et de trouble, pour des circonstances et un ordre
de choses qui n'existent plus, ne peut former une
législation digne d'une grande nation, éclairée de
toutes les lumières que le génie, la raison et
l'expérience ont répandues sur tous les objets."16

The State of Criminal Law and Procedure

During the latter part of the eighteenth century the most insistent
demands were directed, justifiably, towards the reform of criminal law
and procedure. The code that governed criminal procedure until the
Revolution was the Ordonnance Criminelle of 1670, which was regarded by
the judiciary as "un des plus beaux monuments de la législation". 17
Although it was modelled closely upon an ordinance of 1539, the noteworthy
fact is that the criminal law of France had undergone no radical change
since the thirteenth century. 18
The procedures set out in the Ordonnance Criminelle of 1670 showed little regard for the interests of the accused: a person suspected of a crime could be arbitrarily imprisoned (imprisonment being, in theory, a mere means of securing the execution of the sentence); witnesses were interrogated secretly and separately; the accused was questioned privately by the judge and strictly prohibited from communicating with anyone, including defence counsel. Until the accused was confronted by the witnesses against him, he often was ignorant of the offense for which he was charged. As A. Desjardins remarks: "Il semblait que ceux qui l'avaient rédigée fussent eu l'intention de rendre toujours la condamnation inévitable, tant ils avaient rendu la justification difficile."

Under the Ordonnance Criminelle the accused was not only subjected to an archaic and inquisitorial trial procedure but also to an equally archaic and irrational system of obtaining proof. As confession was treated as conclusive proof of guilt, torture was permitted during the "preparatory question" to obtain a confession from the accused before sentencing. Its use was also permitted during the "preliminary question" which was applied after sentencing to secure information about the accused's accomplices. Obviously, such proceedings disregarded the very real possibility that confessions would be obtained from the innocent who were weak but not from the guilty who were strong.
However, the most loathsome aspect of the criminal law of this period was the ferocity and cruelty of the punishments imposed upon those convicted of crimes. Capital punishments included burning at the stake, breaking on the wheel, quartering, hanging, and beheading. (The headman's block took the place of the gallows in the case of persons of noble birth.) For minor crimes the usual punishments were flogging and corporal mutilation.

Such punishments, held in public, were doubtless considered an important means of preventing crime and maintaining law and order. However, as R. Anchel observes, the deterrent principle did not work in practice: "Mais ni l'autorité omnipotente des juges, ni la sévérité des lois et des châtiments, ni l'organisation policière ne parvinrent jamais sous l'ancien régime à une répression efficace des délits criminels". 21

Where, under the provisions of the Ordonnance Criminelle, no penalties were specified for certain crimes, the judge was entitled to make his selection among punishments applied to other crimes. Even when the penalty had been specified, he had the authority to increase or diminish it according to the circumstances. This discretion permitted to the judges did not result in an alleviation of the severity of punishment: "Ni la misère, ni la passion, l'imbécilité ou la folie ne valaient à leurs yeux comme excuse. Bien plus, ils châtaient souvent avec la même rigueur un crime ou un projet criminel. Le plus mince larcin, un vulgaire recel pouvaient valoir la mort". 22
The Ordonnance Criminelle of 1670 had, by its many omissions with regard to definition of crimes and punishments, abandoned much to the prudence of the judge for the reason that a separate penal code containing such definitions was unknown in the old regime. The historical tendency in France had been to merge substantive criminal law with procedure, and to regard the former solely from the latter standpoint. Thus, until the period of the Revolution, judges and the official prosecutor alone had the power to declare what constituted a crime, where the Ordonnance was silent, and to prescribe what penal consequences should follow an act declared to be a crime. Such a situation naturally gave rise to the abuse of power on the one hand, and a degradation of the criminal law on the other. As A. Wattinne observes: "La trop grande imprécision des pouvoirs accordés aux juges était un grave défaut".

On the eve of the Revolution, the cahiers represented an accurate catalogue of the demands for reform of the criminal law: all proceedings should be held in public; the accused should be allowed the assistance of counsel; the powers of the examining judge should be restricted; the interrogation of the accused should take place within twenty-four hours; a system of jurors should be instituted for the determination of the fact; lettres de cachet should be abolished.
Other cahiers called for the compilation of a criminal code determining and classifying crimes and punishments: "Déterminer exactement les crimes, délits et peines, de manière que tout le monde puisse connaître ses devoirs et le danger de les enfreindre".\textsuperscript{32}

Punishment should be more humane, proportionate to the crime, and applicable to all: "...que la différence dans les peines ne soit déterminée que par la nature des délits et non par la qualité des personnes".\textsuperscript{33}

Arbitrariness, confusion, and, above all, cruelty were the attributes of criminal law and procedure in France under the old regime. Reactions against this lamentable state of affairs became more pronounced as the eighteenth century progressed. However, few practical reforms were realized until the decade of the Revolution.
CHAPTER II

THE MOVEMENT FOR REFORM PRIOR TO THE REVOLUTION

The Influence of the Philosophes

Public opinion in France was not openly critical of the criminal legal system throughout the seventeenth century; its cruelty, its inequality, its arbitrariness, were all deemed by the best minds of the time to be a necessary harshness. However, during the eighteenth century the aberrations and shortcomings of criminal law and procedure were increasingly subjected to critical analysis and demands for reform. In the forefront of the movement to make the criminal law more rational and humane, three names in particular stand forth: Montesquieu, Beccaríá, and Voltaire. Although it would be incorrect to ascribe to them the authorship of specific criminal reforms subsequently achieved during the Revolutionary period, it can be asserted that the cumulative effect of their efforts, by focusing attention on the deficiencies of the existing system, created a climate of opinion sympathetic to legal reform.

The first French writer in the eighteenth century who can be said to have dealt comprehensively with the criminal law in a philosophical way was Montesquieu. In his Lettres persanes, which appeared in 1721, he denied
the validity of the deterrent theory which holds that severe punishment will decrease the incidence of crime: "Dans un Etat les peines plus ou moins cruelles ne font pas que l'on obéisse plus aux lois. Dans les pays où les châtiments sont modérés, on les craint comme dans ceux où ils sont tyranniques et affreux".36

Montesquieu's views on criminal law were developed more fully in De l'Esprit des Lois which was published in 1748. In this work he reflected upon the meaning and purpose of penal laws. Among his proposals for reform, he advocated the necessity of a right proportion between crimes and punishments: "C'est un grand mal, parmi vous de faire subir la même peine à celui qui vole sur un grand chemin, et à celui qui vole et assassine. Il est visible que, pour la sûreté publique, il faudrait mettre quelque différence dans la peine".37

Montesquieu also called for a rational jurisprudence and inveighed against the barbarous use of torture: "Tant d'habiles gens et tant de beaux génies ont écrit contre cette pratique, que je n'ose parler après eux. J'allais dire qu'elle pourrait convenir dans les gouvernements despotiques, où tant ce qui inspire la crainte entre plus dans les ressorts du gouvernement; j'allais dire que les esclaves, chez les Grecs et chez les Romains...mais j'entends la voix de la nature que cri contre moi".38
The secret procedure of the courts was criticized by Montesquieu for the reason that repressive criminal proceedings not only constituted a deprivation of rights for the accused, but also made suspect the safeguard of liberties for all.\textsuperscript{39} Two conditions are essential, Montesquieu argued, in criminal proceedings: the certainty of form and the possibility of liberty of defence. In addition he called for the necessity of clearly framed laws that leave nothing to the judge's discretion.\textsuperscript{40} The English system of trial by jury received Montesquieu's praise, and he called for its incorporation into French law.\textsuperscript{41}

Montesquieu's ideas concerning criminal law and procedure were motivated by a sense of humanity and reason. Although he did not deal with the subject exhaustively, his efforts caused the shortcomings associated with criminal law to be brought out into the open, thus paving the way for subsequent reforms.\textsuperscript{42}

The famous book authored by Cesare Beccaria, the \textit{Treatise on Crimes and Punishments}, was published in Milan in the Italian language, but a translation into French appeared in 1766. With the publication of this treatise the interest in penal reform became widespread in France and went beyond concern over individual miscarriages of justice.\textsuperscript{43}

A Milanese jurist, Beccaria was the first to formulate precisely the criticisms of the existing system of criminal law and to propose a plan of reform.\textsuperscript{44} He advocated fixed punishments and attacked the
abuse of imprisonment pending trial, secret accusation, and torture. He called for publicity of proceedings and judgments and stressed the importance of the nature of proof required to establish the offense. Beccaria argued that punishment should be confined to offenses which were dangerous to public order, and that only as much punishment should be inflicted as was absolutely necessary for deterrence. Using these principles, he proceeded to assail the grave abuses in criminal law and procedure: the wanton infliction of the death penalty, the cruel punishments, and the severe penalties for minor offenses.

Although Beccaria's treatise provoked considerable discussion in France, there was little attempt by jurists to apply his theories systematically to the conditions of the time. In fact, resistance by the judiciary to the ideas contained in the treatise was lively and opinionated. As J. Declareuil observes: "Les criminalistes de la vieille école, Jousse, Muyart de Vougtons, Serpillon, se révoltèrent contre les nouveautés dangereuses de l'écrivain milanais."

In contrast to the attitudes of indifference and hostility displayed by the jurists, Voltaire readily acknowledged his indebtedness to Beccaria's treatise, and in the later years of his life he became the recognized leader of the movement for legal reform. His enormous prestige and reputation, his prolific literary output, and his personal involvement in many causes célèbres, enabled him to publicize effectively the
brutality and injustice which characterized the criminal law and procedure of the old regime. He interested himself in individual cases of notorious injustice (Calas, Sirven, La Barre), and he also published many works showing the necessity for reforms. The Calas case, in particular, awakened Voltaire's passion for legal reform, and focused on French criminal law his aversion to injustice.\textsuperscript{53} The wide publicity given to this case by Voltaire dramatized for the French the deficiencies of their legal system. As E. Nixon observes: "The Calas affair, which echoed and re-echoed throughout Europe, covering France with shame and glory, revealed fatal weaknesses in certain of the institutions of a country that was the intellectual hub of the world."\textsuperscript{54}

While using his influence to rehabilitate victims of injustice, Voltaire also published several works attacking the faults of the existing criminal system.\textsuperscript{55} In "Prix de la justice et de l'humanité", for example, Voltaire called for the most sparing use of the death penalty and argued that the severity of punishment - far from reducing crime - increased it.\textsuperscript{56} Harshness and cruelty were not merely inhuman, he contended, but also irrational and uneconomic; forced labour should be preferred as a punishment to capital execution because the criminal should be made as useful as possible to society.\textsuperscript{57} Voltaire condemned the use of punishments for heresy, sorcery and sacrilege, and he decried the influence of canon law regarding the crimes of bigamy, adultery,
Voltaire reserved his most scathing criticisms for the systems of procedure in the Ordonnance Criminelle of 1670 which prescribed irrational methods of inquiry and rules of evidence. He attacked the secrecy of procedure, the denial of counsel to the accused, the detention of the accused pending trial, and the use of torture. The object of a legal proceeding, Voltaire argued, should be the discovery of truth. However, the secret character of French procedure - which permitted judges to give their verdicts in secret and keep secret the reasons for their decisions - made the discovery of truth difficult, if not impossible.

As mentioned previously, in the area most criticized by the philosophes - that of criminal law and procedure - the courts and most of the jurists were frankly reactionary. Voltaire regarded the parlement of Paris as a conservative, fanatical body that was plagued by all the limitations of corporate self-interest. As A. Wattinne observes: "Voltaire, comme la plupart de ses contemporains, n'aimait point les gens de robe. Il jugeait la GENS TOGATA avec une clairvoyance redoutable; magistrats et avocats recevaient également ses sarcasmes. Il ignorait la science juridique, qu'il semble avoir dédaignée."
The *philosophes* believed that if significant legal reforms were to be achieved it was necessary to circumvent the magistrature. This attitude had a certain basis in fact. The new natural law philosophy had not penetrated into the law schools, whose curricula remained largely unchanged and continued to emphasize Roman law.\(^6_2\) Such works as were produced by the jurists retained the basic presuppositions and context of established law, and from the point of view of the reformers failed to go to the heart of the problem.\(^6_3\) During the eighteenth century, the jurists, who necessarily worked within the framework of tradition, forfeited leadership in this area to the *philosophes* who had little use for tradition and who made the major contribution to legal and judicial reforms.\(^6_4\)

In contrast to the majority of their colleagues, however, a few jurists of reputation had adopted the natural law philosophy of individual rights and were actively working for reform - especially in criminal law and procedure. For example, the Attorney-General Servan reproduced the ideas of Beccaria in his celebrated address on the "Administration de la justice criminelle", which caused much consternation.\(^6_5\) In this address Servan severely criticized procedure, with particular reference to detention pending trial, insidious interrogations, torture, and the doctrine of legal proofs. He threw doubt upon the legitimacy of capital punishment and called for fixed
and accurate laws. In conclusion, he demanded the amendment of the Ordonnance Criminelle of 1670.66

In like manner, Dupaty, president of the parlement of Bordeaux, appealed for reforms of criminal procedure in his writings entitled, Lettres sur la procédure criminelle de la France. His conscientious efforts at reform were met with intense hostility on the part of the judiciary: "Il était détesté de la plupart de ses collègues pour l'indépendence de ses idées et sa passion à vouloir réformer la procédure criminelle."67

Although jurists such as Servan and Dupaty were imbued with the philosophy of natural rights and worked for legal reforms, they were never leaders in the realm of ideas. As W.F. Church observes: "...they were followers rather than leaders. Their role was to implement and bring to fruition the concepts that others had developed before them."68

Thus it was principally through the efforts of the philosophes that reform of the judicial system became a prominent subject of discussion and study in the years preceding the Revolution. To state that their influence was alone responsible for the significant reforms that came about at the end of the century would be to assign to ideas an exaggerated force. Nevertheless it can be said that the philosophes— in particular Voltaire— contributed in great measure to a climate
of opinion favouring the creation of a more reasonable and humane society which would no longer tolerate an archaic system of criminal law. As R. Anchel observes: "...leurs principes triomphèrent avec la Révolution qu'eux-mêmes contribuèrent à préparer."70

**Crown and Parlements**

The new ideas which were developed and publicized by the philosophes had not been without influence in the Court itself during the last decades of the old regime. The royal government attempted, and in some instances achieved, judicial reforms. Nevertheless, its most creditable efforts tended to be obscured by the charges of despotism and extravagance made against it.

The Crown had every motive, if only in the interests of efficient administration, to undertake judicial reform. However, its ability to initiate reforms, to govern even, had become effectively limited during the latter part of the eighteenth century by the organized opposition of the parlements.71 These sovereign courts of law were corporate bodies, each acting as a supreme court of law for its part of the country. Besides their judicial functions, they claimed and exercised certain
political powers which derived from the right of registering royal edicts and ordinances. This right of 'verifying' and of demonstrating against royal legislation endowed the parlements with the power of checking and thwarting the theoretically absolute monarchy. Such a power was one which could be held in check only by a strong king like Louis XIV or destroyed by an enlightened despot. 72

The need to curb the increasing opposition to the monarchy by the sovereign courts had been belatedly recognized by Louis XV with the appointment of Maupeou to the chancellorship in 1770. In January 1771, Maupeou proceeded to strike down the political power of the parlements by abolishing the Parisian court outright and by establishing a new system of appeal courts with functions narrowly restricted to the judicial sphere. In these new appeal courts the purchase and sale of judicial offices and the taking of épices were forbidden. 73 In lieu of a proprietary right to their position, the new magistrature received a salary from the government with assurances of fixed tenure. 74 The problem of conflicting jurisdictions among the courts - a continuing source of confusion, expense and delay - was removed by means of a precise redefinition of their competence. 75
In spite of the widespread agitation that these changes caused, the newly established courts were able to function effectively and the reform seemed to be definitive. Although Maupeou was subjected to much verbal abuse by the exiled magistrates, who posed as the victims of a despotic minister, Louis XV continued to support his chancellor. Had this king lived a few years longer, it is probable that sufficient time would have been gained for the 'Maupeou' courts to consolidate themselves on a permanent basis. However this judicial reorganization, which might have been the salvation of the French monarchy, was reversed by Louis XVI upon his assumption of the throne. This youthful king had a strong desire to be a popular monarch and was persuaded that, by recalling the parlements, he would receive universal approbation. In the event, the restoration of the parlements in 1774 has been held to be the monarchy's final and fatal mistake. The result of the recall, as Alfred Cobban observes, was that "the royal government lost the advantages it had gained by Maupeou's coup d'état, while it continued to suffer from the odium of having proved itself an arbitrary despotism and from a further loss of prestige by its capitulation."

In contrast to the reforming efforts of his predecessor, which came at the end of a long and unrespected reign, those of Louis XVI were manifested from the outset and doubtless reflected the young monarch's desire to be a 'good' king. As F. Piétri observes: "Il appartenait à Louis XVI d'être, par raison autant que par goût, le premier réformateur
sincère de la monarchie et de jouer, dans ce travail d'une activité insoupçonnée, autre chose qu'un rôle passif ou symbolique.\textsuperscript{80}

The legislation enacted under Louis XVI was distinguished by its emphasis on social reforms and its attempts to ameliorate the criminal law. As examples of the former, we can cite the following royal enactments: "L'arrêt du Conseil sur la liberté du commerce des grains dans la royaume" - September 23, 1774; "L'Edit portant suppression des jurandes et communautés de commerce, arts et métiers" - February 1776; "L'Edit supprimant les droits de mainmorte dans les domaines du roi et la servitude personelle" - August 1779; "L'Edit concernant les protestants et réorganisant leur état civil" - November 1787.\textsuperscript{81}

The rigours of criminal procedure under the Ordinance of 1670 were mitigated by the royal "Déclaration" of August 24, 1780, abolishing the "question préparatoire" which was designed to wring a confession of guilt from the accused. This measure was one of the most important undertaken by Louis XVI during the period in which he was in full possession of his regal power.\textsuperscript{82} Shortly thereafter, on August 30, 1780, several ordinances were issued in the king's name having as their object the improvement of prison conditions.\textsuperscript{83}

It was on the eve of the Revolution, however, that the royal government introduced truly radical measures to bring about judicial and legal reforms. These measures promised such fundamental changes in the administration of justice that they have been hailed as the most important
revolution which France saw before the final fall of the old regime. 84

The famous six edicts of May 1788, drafted by Lamoignon, the Keeper of the Seals, were designed to carry out much needed reforms toward a simplification of judicial procedure, amelioration of criminal justice, and a diminution of the obstructive power of the parlements. It has been argued that, despite the advent of a genuine supporter of legal reform in the person of Lamoignon, the juridic changes were engineered less for their own sake than as a weapon against the parlements.85 The opposing point of view has been argued by M. Marion: "Il n'est pas vrai que la réforme judiciaire de 1788 n'ait été qu'un expédient de circonstance imaginé pour faire accepter la cour plénière"86; and further: "La réforme judiciaire de 1788 fut autre chose et mieux qu'un appât grossier tendu au pays pour obtenir sa soumission au despotisme."87

Although the May edicts were not destined to be applied, it is useful to subject them to a brief review as many of the measures reappeared in the legal reforms enacted by the National Assembly. The first edict, entitled "Ordonnance sur l'Administration de la Justice", created forty-seven new appeal courts which were styled "grands-bailliages." These tribunals were intended to absorb the greater part of the appellate jurisdiction of the parlements in both civil and criminal cases, and thus to render possible a radical reduction in the number of magistrates.88
Prior to this edict, civil and criminal cases were judged, in the first instance, in courts called "bailliages," and on appeal, in courts called "présidiaux." Henceforth, "bailliages" were to be suppressed, the "présidiaux" becoming courts of first instance, with the "grands-bailliages" receiving appeals from the judgments of the "présidiaux." 89 In civil matters, the "grands-bailliages" were to have jurisdiction where the amount under litigation did not exceed 20,000 livres; in criminal matters, where the accused were persons other than clergy or nobility. 90 The edict thus left to the parlements only civil cases on appeal involving amounts in excess of 20,000 livres, and criminal cases involving clergy and nobility. Concerning these two estates, E. Glasson observes: "On ne se décidait pas encore à prononcer l'égalité des Français devant la justice répressive." 91 The direct result of these provisions was to remove a substantial amount of judicial business from the parlements' jurisdiction, with a consequent loss of income to the magistrates.

The provisions of the "Ordonnance sur l'administration de la justice" promised similar fundamental changes with respect to the seigniorial courts. The possibility of suppressing these courts outright was momentarily considered but quickly discarded for the reason that "On n'osa pas aller jusque-là à cause du respect dû à la propriété." 92 Nevertheless, the effect of the ordinance was such that the seigniorial courts were practically legislated out of existence. 93 Their exercise of criminal jurisdiction was made conditional on the possession of adequate court and
prison facilities, and on the employment of a licensed judge, scribe, and resident jailer. These conditions were prescribed in the confident belief that hardly any seigniorial courts would achieve them.94

The second edict of May 8, 1788 ordered the suppression of various courts of specific competence such as the "Bureaux des finances", "Elections", "Greniers à sel", "Table de marbre", and "Chambre du domaine." Those matters which had been handled previously by these "tribunaux d'exception" were to be placed under the jurisdiction of the "présidiaux" and the "grands-bailliages."95

This reform represented the fulfillment of desires long expressed for the suppression of the "tribunaux d'exception." The dilatory and expensive proceedings which characterized these courts was the object of bitter complaints by litigants. As E. Glasson observes: "Ceux-ci étaient en conflits incessants entre eux ou avec les juridictions ordinaires, de sorte que les plaideurs ne savaient que s'adresser pour obtenir justice, et que des incidents de compétence retardaient à chaque instant la solution des procès."96

The third edict was directed towards reform of criminal procedure which was to be effected by means of amendments to the Ordonnance Criminelle of 1670. In the "Déclaration" of May 1st announcing the edicts homage was paid to the Ordinance of 1670, but the necessity of a revision was stated at the same time: "Malgré des précautions si dignes de concilier à cette loi le suffrage universel, nous ne saurions nous dissimuler qu'en conservant
le plus grand nombre de ses dispositions, nous pouvons en changer avan-
tageusement plusiers articles principaux, et la réformer sans l'abolir.\textsuperscript{97}

In his speech on May 8th at the \textit{lit de justice}, Lamoignon was
more precise concerning the government's intentions: "La nécessité de
réformer l'ordonnance criminelle et le code pénal est universellement
reconnue. Toute la nation demande au Roi cet acte important de
législation et S.M. a résolu dans ses conseils de se rendre au voeu de
ses peuples."\textsuperscript{98} However, it was desired that a general reform should be
the result of lengthy deliberation. The method of inquiry proposed was
noteworthy: "Tous nos sujets auront la faculté de concourir à
l'exécution du projet qui nous occupe, en addressant à notre garde des
sceaux les observations et mémoires qu'ils jugeront propres à nous éclairer.
Nous éléverons ainsi au rang des lois les résultats de l'opinion publique,
après qu'ils auront été soumis à l'épreuve d'un mûr et profond examen."\textsuperscript{99}

Pending this general reform, the edict repealed several abuses
which required an immediate remedy: the use of the prisoner's kneeling
stool (sellette) was abolished (Art. 1\textsuperscript{100}); judgments of conviction had
to state the reasons therefore (Art. 3\textsuperscript{101}); a majority of two votes was no
longer sufficient to sustain a capital punishment – three were necessary
(Art. 4\textsuperscript{102}); sentences involving capital punishment were, as a rule, not
to be executed until a month after confirmation (Art. 5\textsuperscript{103}); accused
persons, who were subsequently acquitted, were given the right to reparation
for injury to their reputation (Art. 7\textsuperscript{104}); the abolition of the preparatory
torture was confirmed and the preliminary torture was abolished (Art. 8)\textsuperscript{105}.

This edict, like the other five, was never applied. However, it is an interesting document as it represents the last time that royalty exercised, in criminal matters, the absolute and independent legislative power recognized in it by the old regime.\textsuperscript{106}

The fourth edict registered on May 8th reduced the number of offices of the Parisian and provincial parlements. As a result of having "moins d'affaires à juger", there was no further need for the same number of judges. However provision was made in the edict for reimbursement by the Crown to those magistrates who suffered loss of office. Contrary to the action previously taken by Maupeou, Lamoignon recognized the maintenance of venality and permitted the abuse of épices to continue.\textsuperscript{107}

The fifth edict ordered the reestablishment of the plenary court (cour plénière). The judicial component of this institution was to consist of the senior judges of the parlement of Paris and the president and one other magistrate from each of the provincial parlements. Apart from these magistrates, the court was to be composed of princes of the blood, peers of France, court officials, and leading representatives of the church, the army and the civil service.

The power of registering royal laws applying to the country as a whole was transferred from the parlements to the plenary court. It was assumed that the new court would prove a pliable instrument in the hands of the government: "La loi de l'enregistrement nous paraît trop
conforme à nos intérêts et à ceux de nos peuples pour n'être pas invariablement maintenue; et il est par conséquent indispensable qu'il y ait habituellement dans nos états une cour toujours substitante pour vérifier immédiatement nos volontés et les transmettre à nos peuples."108 Although the parlements were not abolished as they had been in 1771, the effect of this edict was to deprive them of all power of opposing the monarch's programs of judicial and fiscal reform.

The sixth and final edict of May 8th placed the parlement of Paris "en vacances." Stating that a large amount of judicial business - by virtue of the implementation of the first edict - would be turned over to the newly organized trial and appeal courts, the king announced that: "pour éviter toute confusion dans le partage des procès, les parlements allaient être mis en vacances et y demeurer jusqu'après l'établissement des grands-bailliages... et l'entièr e exécution du nouvel ordre judiciaire."109

The registration of the May edicts evoked a furious resistance led by the parlements throughout France.110 The magistrates, whom many regarded as leaders in the resistance to royal oppression, were joined in their struggle by the clergy, nobility, and provincial estates. Although most of the reforms echoed the demands of enlightened opinion, the edicts were represented by the sovereign courts as a means to delay the summons of the Estates-General and as an attack on provincial liberties.111

Against this concerted attack the Crown gave way and on August 8th the Estates-General were ordered to convene on May 1, 1789. At the
same time the plenary court, which had caused such vehement opposition, was suspended. Henceforth, the initiative for reform would not come from the monarchy. As A. Wattinne observes: "Dès ce moment, il n'était plus permis à la royauté de prétendre, à elle seule, réformer quoi que ce soit. Déjà le public, grisé par les grands mots de nation et de révolution, ne raisonnait plus; il voulait autre chose et mieux que des édits préparés par des ministres." The task now fell to the Revolutionary assemblies to overcome the obstinate maintenance of privilege which had confounded all attempts to achieve fundamental reform.
CHAPTER III

THE REVOLUTION AND CIVIL LEGISLATION

Ascendant Principles

Certain philosophical influences existed prior to the Revolution which undeniably had their effect upon ensuing legal and judicial reform, notably the belief in the existence of a natural law. This law, older than positive law, was founded on God's commandments as understood by theology and by the requirements of reason. Under these theories it appeared to be possible, by analyzing and going to the essence of human nature, to discern the fundamental rules of natural law and to deduce therefrom a positive law which, because of its origin, was both absolute and universal. Furthermore, in an age in which the concept of Reason was a dominant intellectual force, there was an optimistic belief that existing laws could be repealed and new ones, rationally derived from unimpeachable first principles, put in their place.

These philosophical influences found expression in the Declaration of the Rights of Man and the Citizen which was adopted by the Constituent Assembly on August 25, 1789, and which was subsequently prefaced to the Constitution of 1791. In the words of the Declaration we find at once the essential principles of the Revolution and the desired legal and
judicial reforms. The preface restated the theory of natural law which defined the natural, inalienable and sacred rights inherent in all men, and several articles reflected the ardent wish of the Revolutionaries to eradicate the abuses of the existing judicial system. Arbitrary arrest and detention were proscribed: "Nul homme ne peut être accusé, arrêté, ni détenu que dans les cas déterminés par la loi, et selon les formes qu'elle a prescrites." (Art. 7) Security would henceforth result from the existence of a single legal system, equally applicable to all: "la même pour tous, soit qu'elle protège, soit qu'elle punisse." (Art. 6) The law would be administered by courts in which innocence was presumed until guilt was proven. (Art. 9) Cruel and arbitrary punishments would no longer be tolerated: "La loi ne doit établir que des peines strictement et évidemment nécessaires, et nul ne peut être puni qu'en vertu d'une loi établie et promulguée antérieurement au délit, et légalement appliquée." (Art. 8)

The Declaration of Rights has since been criticized for its bourgeois character; its inadequate treatment of economic principles; its failure to define satisfactorily private property; its apparent neglect of the right of association; and its insufficient attention to religious liberty. Nevertheless this significant document, by espousing the aspirations of the Revolutionaries, heralded the end of privilege - and so of the old regime - and in this respect it inaugurated a new age.
At the outset, then, victory appeared to belong to the party which preferred reason to dogma, liberty to authority, and the individual to the State. The resulting character of the legislation of these first years was thus determined, on the one hand, by the influence of natural law philosophy, and on the other, by the necessity of reacting against the existing institutions and replacing them by others more equitable and useful to society.

As the Revolution progressed, however, the emphasis on individualism gave way to the need for an all-powerful State, independent of all obstacles which might hinder its freedom of action. This deviation from principle was caused by the need to withstand enemies from within and without and to consolidate Revolutionary achievements. As P. Sagnac observes: "Mis aux prises avec les événements, obligés de lutter contre les résistances du passé, les révolutionnaires furent forcés d'agir avec plus de hardiesse et de vigueur que les maîtres de la philosophie ne l'avaient désiré." 120

Apart from political exigencies, the principles of the Revolutionaries were tempered by another powerful force: the spirit of tradition. If the philosophical spirit was a source of inspiration to the legislators, the influence of the conservative juridical tradition tended to dampen this enthusiasm and to interpose caution with regard to legal and judicial reforms. Therefore, throughout the period of the Revolution both the
philosophical spirit and the traditionalist spirit were to exercise their influence upon legal reform. On the one hand, the theory of the natural rights of men, which tended to remove all distinctions between persons; on the other hand, the juridical tradition, which tended to maintain legal distinctions and to temper absolute equality with certain restrictions.

During the early years of the Revolution, however, the "esprit juridique" was dominated by the "esprit philosophique" and the great legal reforms of this period drew their major inspiration from natural law philosophy. Thus, the first enactment of consequence of the National Assembly was the abolition of feudal rights and usages which had survived the political system out of which they had sprung. The famous August 4th Decrees renounced prerogatives attaching to property and may be said to have terminated the manorial regime in France.

The first Article of the Decrees begins with the following words: "L'assemblée nationale détruit entièrement le régime féodal. Elle décrète que, dans les droits et devoirs, tant féodaux que censuels, ceux qui tiennent à la main-morte réelle ou personnelle, et à la servitude personnelle, et ceux que les représentent, sont abolis sans indemnité; tous les autres sont déclarés rachetables ... ." It can be observed that the contents of this document are more conservative than the tone of finality in the opening sentence might imply: qualifications remain
concerning redemptions and compensation, and there are provisions for
the temporary continuation of certain obligations (Articles 1, 5, 6). Nevertheless, it may be said that this legislation constituted a significant
program of reform by emancipating and disencumbering the ownership of
land, and by introducing the fundamental principle of equality of
opportunity to all citizens (Article 11). A second basic reform undertaken by the Constituent Assembly was
the introduction of the principle of equality in the regulation of
inheritances. The old law of succession had been principally concerned
with the maintenance and preservation of the great landed estates. Noble
houses had preserved their fortunes by means of the privileges of the
male line and of primogeniture, and by the use of entailsto restrict
the alienation of land. Much of the law of succession had its origins in
the system of land tenure associated with feudalism, and with the abolition
of the feudal regime during August 1789, the Assembly thereby effectively
curtailed many of the existing inequities. However, the legislators
also wished to enact inheritance laws restricting testamentary
freedom and ensuring equal partition. As A. Esmein observes: "L'Assemblée
constituante était en majorité hostile à ces préciputs ou avantages, dont
profitaients quelques-uns des héritiers au détriment des autres." This egalitarianism resulted in the decree of March 15, 1790,
which abolished "primogeniture, preference for male offspring ...
and unequal divisions based on the standing of the persons concerned."
In addition, the decree of April 8, 1791, proclaimed the principle of equal partition among children: "Toute inégalité devant résulter entre héritiers AB INTESTAT de la qualité d'ainé ou de puîné, de la distinction des sexes ou des exclusions coutumières soit en ligne directe, soit en ligne collatérale, est abolie." 128

The Constituent Assembly further demonstrated its preoccupation with individual liberty and with the supremacy of State over Church by inscribing two promises in the Constitution of 1791 relative to laws concerning civil status and civil marriage: "La loi ne considère le mariage que comme contrat civil. Le pouvoir législatif établira pour tous les habitants, sans distinction, le mode par lequel les naissances, mariages et décès seront constatés; et il désignera les officiers publics qui en recevront et conserveront les actes" (Tit. II, Art. 7). 129 This programme was subsequently fulfilled by the Legislative Assembly with the enactment of two important laws.

The Decree Determining the Recording of Vital Statistics, September 20, 1792, established in France the institution of civil marriage; that is to say, marriage before the public officer of the municipality without the intervention of a priest. All transactions affecting civil status were at the same time secularized; the written registers of births, marriages, and deaths were taken from the clergy and entrusted to municipal officials (Tit. I, Art. 1). 130
The decree secularizing marriage was followed on the same day by a Decree Regulating Divorce, which may be considered as a logical accompaniment. If, under the Constitution, marriage was only a civil contract, it followed that the State had the power to authorize the dissolution of marriage by divorce. This legislation was another manifestation of "les idées courantes au XVIIIe siècle sur la légitimité des penchants naturels et sur l'inaliénabilité de la volonté humaine." The Legislative Assembly passed other noteworthy decrees which were inspired by the principles of individual freedom and equality, as witness the one of August 28, 1792: "L'Assemblée nationale décrète que les majeurs ne seront plus soumis à la puissance paternelle; elle ne s'étendra que sur les personnes des mineurs." Until the enactment of this decree, in areas where "le droit écrit" obtained, paternal authority had not been completely relaxed until the actual death of the father. In areas subject to "le droit coutumier", on the other hand, emancipation from paternal authority at the age of twenty five had long been the rule. Henceforth, those who attained the age of majority were free not only in respect of their person, but also in respect of property, in both northern and southern France. Shortly thereafter, the Decree Determining the Recording of Vital Statistics reduced the age of majority to twenty one years (Tit. IV, Section 1).
On August 25, 1792, the Assembly also struck a rude blow at the organization of ancient aristocratic families by condemning entails and fiduciary trusts that secured them (thus prohibiting the surreptitious perpetuation of birthrights): "L'Assemblée nationale décèrte qu'à partir de ce jour, il n'est plus permis de substituer."135 This measure was subsequently confirmed by a decree of the Convention dated October 25, 1792.136

Notwithstanding the progressive character of these laws passed by the Legislative Assembly, it remained for the legislation of the Convention to mark the complete triumph of the "esprit philosophique": "Consommer la ruine de l'aristocratie territoriale, morceler les fortunes, ramener la condition de chacun à une douce médiocrité, sans aspirer cependant à un nivellement absolu, tel est l'idéal des Conventionnels."137

Among the several measures passed by the Convention which were inspired by the ideal of equality, we can cite the example of the law of 12 Brumaire, An II (November 2, 1793) dealing with the succession of illegitimate children, who were granted a share equal to that of legitimate children. A. Esmein explains the motive behind this legislation: "La condition ainsi faite aux enfants naturels révoltait la sensibilité des hommes de ce temps. Elle paraissait également contraire à la justice (c'était une peine infligée à un innocent) et aux principes sur lesquels allait reposer le droit de succession."138
Similarly, the legislators sought to achieve a "médiocrité des fortunes" with the enactment of the Law of 17 Nivôse, An II (January 6, 1794) dealing with succession, gifts, and bequests. The provisions of the act called for an equal division of inheritance among heirs, irrespective of the wishes of the testator - thus ratifying the decree of April 8, 1791 (see above). In addition, the law was made retroactive to July 14, 1789, in order to "effacer toutes les inégalités encore subsistantes, résultant de la loi ou de la volonté des hommes, quant au partage des successions." 

Needless to say, the Revolutionary spirit - as exemplified by these laws passed during the first years of the Convention - was subjected to an inevitable reaction after Thermidor. That which had constituted the originality of "le droit révolutionnaire" of the first three Assemblies also constituted its vulnerability. The existence and maintenance of this legislation was intimately connected with the Revolutionary ideals which had attained such potency from 1789 to 1794. When these ideals were modified after 1794 by reason of the increasing influence of conservatism, the subsequent legislation, as would be expected, reflected this change in dominance.

Thus, during the period of the Directory, several provisions of the civil legislation of the previous Assemblies were amended, having been considered too extreme or vexatious. Divorce was more strictly regulated
by an enactment of September 17, 1797; the rights of succession of illegitimate children were restricted, and retroactive effect was taken from the law which had conferred these rights upon them (15 Thermidor, An V, August 5, 1796); the complications which had been caused by the Convention's laws on succession were lessened and simplified (18 Pluviôse, An V, February 6, 1797).

In spite of these amendments, however, it is important to note that the legislation enacted subsequent to Thermidors did not abandon the essential principles of the Revolution. By 1799, tangible evidence of the realization of the ideals of the Revolutionaries was plainly visible: uniform codes of law (ultimately completed under Napoleon) had supplanted the earlier chaos and confusion; an elected judiciary, trial by jury, humanized penalties — all had come into being; and equality before the law had taken the place of privilege.

Codification of the Civil Law

The Work of the Revolutionary Assemblies In 1789 there were no less than 366 regional codes of law in existence in France, some of them applying to entire provinces but more usually applying to very limited jurisdictions. This unsatisfactory situation under the old regime is succinctly described by P. Sagnac: "Rien de fixe, rien de cohérent, c'est
Among the most steadfast aspirations of the Revolutionaries, therefore, was the desire to provide the nation with a code of uniform civil laws - a desire which had many times inspired the jurists of prior centuries. The French Revolution, with its ideal of a rational social order, imparted a fresh and powerful impulse to attaining this objective. The triumph of the "esprit philosophique" seemed to demand a code of uniform laws suitable to an enlightened people, and those obstacles which had hitherto stood in the path of legal unity - the tradition of local independence and the spirit of opposition in the provinces, as well as class and clerical privilege - had been swept away.

The Constituent Assembly, realizing the danger posed to the concept of unity by the numerous codes of law in existence, decreed, in the law of August 16, 1790, concerning judicial reorganization, that: "The civil laws shall be reviewed and reformed by the legislatures; and a general code of laws, simple, clear, and in harmony with the Constitution, shall be drafted" (Tit. II; Art. 19). This promise to achieve simplicity and
uniformity in legal matters was subsequently incorporated into the Constitution of 1791: "Il sera fait un Code de lois civiles communes à tout le royaume" (End of Tit. 1). 150

In spite of these promises, the first Revolutionary assembly was unable to realize such an immense undertaking. Although official efforts during this period to endow France with a uniform body of civil law went no further than statements of general principle, the jurists did attempt to effect a conciliation between the two dominant systems of law which divided the country. 151 However, in the juridic domain the principal efforts at this time were directed, at public insistence, toward the reform of the criminal law. The Constituent Assembly, in recognition of this fact, gave to its legislative committee the title of "Comité de législation criminelle" 152 and a Penal Code was duly promulgated in 1791 as a result of the labours of this body (see below).

The succeeding Legislative Assembly, which sat from September 30, 1791 to September 21, 1792, again took up the project of a code of civil laws. The legislative committee, given the name "Comité de législation civile et criminelle", issued, on October 16, 1791, an invitation to all citizens to communicate to it their ideas concerning the drawing up of a civil code. 153 Although this was heeded, the resulting progress towards codification proved slow and arduous. Before this Assembly was dissolved, it passed important organic laws concerning marriage, divorce, and
inheritance, but it failed to devise the code.

In spite of the violence and disorder associated with the ensuing Revolutionary assembly, "ce fut la Convention Nationale qui eut la gloire de concevoir le code de lois civiles uniformes que la nation désirait. Le Comité de législation est le véritable créateur de Code Civil français." 

On June 25, 1793, the Convention instructed the legislative committee, composed of forty eight members on a rotating basis, to present a scheme for a civil code within one month's time. This remarkable order was virtually obeyed when, on August 8, 1793, Cambacérès, the chief draftsman of the committee, presented a plan which encompassed all the civil legislation of France within 719 articles. This plan followed the traditional divisions of the law in the "pays de droit écrit" and was comprised of four distinct sections: of Persons, of Things, of Contracts, of Actions. The proposed code incorporated many of the laws enacted since 1789 and was animated throughout by the "esprit philosophique": "C'est la voix de la nature et celle de la raison qui se font entendre; on a fait l'entreprise de tout changer à la fois dans les écoles, dans les moeurs, dans les coutumes, dans les esprits, dans les lois d'un grand peuple."

From August to October 1793, during a turbulent period of internal troubles and foreign war, the Convention studied in detail the various
provisions of the recommended civil code. This initial project, which exemplified the influence of rationalism at its height, was finally rejected by the deputies for being too complicated, long and legalistic. On November 3, 1793, the Convention voted to appoint a commission of philosophers who were charged with bringing forth a new draft, more in conformity with its own spirit: "une commission, formée de six membres choisis par le Comité de salut public, révisera et retouchera le code civil présenté par le Comité de législation."  

A second project, containing only 297 articles, was duly presented by Cambacères on behalf of the committee on September 9, 1794, after the downfall of Robespierre. The Convention soon perceived that this second scheme, which only contained the principles involved and their immediate consequences, was more a plan of a code than a code itself. Cambacères was later to remark that the project represented "un recueil de préceptes où chacun pût trouver les règles de sa conduite dans la vie civile."  

This second draft of a civil code met the fate of that which preceded it: it was discussed but not promulgated. Its failure of adoption can be explained by two principal reasons: "Avec des lois aussi brèves ... les juges deviendraient fatalement législateurs; puis, les idées avaient changé, une réaction générale se manifestait."  

The Directory, in its turn, set its hand to the codification of the civil law. On June 14, 1796, a third project containing 1104 articles
was presented to the Council of Five Hundred by Cambacérès in the name of the "commission de la classification des lois." This latest project reflected the traditional view of the purpose of a code of laws: it attempted to resolve as many questions, and let subsist as few doubts, as possible. Portalis, one of the chief draftsmen of the Code Napoléon, was later to describe the code of 1796 as "un chef-d'oeuvre de méthode et de précision." As to substantive content, its provisions displayed a reaction in favour of Roman law, away from the rationalism of the Enlightenment.

Although the Council of Five Hundred enacted several important civil laws, especially with respect to the registration of mortgages, the proposed civil code was discussed by this body on only two separate occasions in 1797. As a result of the partisan dissensions in the Councils, the distractions of war, inflation and generally unsettled conditions, the project for codification under the Directory was destined to remain in abeyance.

Thus the Revolutionary assemblies did not succeed in realizing the enactment of a civil code of laws, in spite of the various attempts to achieve this end. But the systematic and methodical work of the jurists of the legislative committees had not been wasted, for it considerably lightened the labours of the draftsmen who ultimately compiled the Code Napoléon. By eliminating those interests which had obstructed unification of the law and by introducing reforms of a
national scope in all aspects of French life, the men of the Revolution had laid the foundation for eventual codification.

In assessing the reasons why codification was not successfully achieved prior to Bonaparte, aside from its inherent difficulty, it is necessary to take into account the great legislative fertility and the high passions and constant changes which characterized the Revolutionary assemblies. Such an atmosphere is unfavourable to the drafting of a code which requires thorough and dispassionate deliberation to accomplish the task. As P. Sagnac observes: "Le code exigeait des discussions très longues, et les Assemblées de la Révolution étaient pressées par les événements. La rapidité avec laquelle se succédaient les Assemblées, et, dans celles-ci, les partis dominants, le changement continu des idées et des passions, faisaient que ce qui avait plu l'année précédente cessait de plaire l'année suivante."166

In spite of the unsuccessful Revolutionary attempts to codify the civil law, the legislation of this period was to exert a salutary influence upon the substantive content of the Civil Code of 1804. The Revolutionary legislation, in its turn, was a reflection of the ideals which made possible the ultimate realization of a national civil code.
During the Consulate and the first Empire the codification of French law was successfully accomplished. In this period five separate codes were drafted and promulgated: le Code Civil (1804); le Code de procédure civile (1806); le Code de commerce (1807); le Code d'instruction criminelle (1808); and le Code pénal (1810).

This enormous production of legislation in a relatively short span of time has several explanations. In the first place, the very work of the Revolution had removed the vested local interests which had obstructed the unification of the law under the old regime. Secondly, the time was propitious and considerable groundwork had already been done. The Revolution had yielded a large body of civil and criminal legislation and it was now only a question of determining what should be retained from this period and what should be revived from the laws of the old regime.

*Originally entitled Code civil des français, the title was changed to Code Napoléon by the law of September 3, 1807. By royal ordinance of Louis XVIII it became Code Civil in 1816. It reverted to Code Napoléon by decree of Napoleon III in 1852, and was finally restored to Code Civil with the beginning of the Third Republic in 1870. The term Code Napoléon is usually employed today to designate the original form of the Code.*
A further reason for the expeditious completion of codification under Bonaparte concerned the relative stability and tranquility of the early years of the Consulate. If the Constitution of An VIII was less well disposed to the principle of individual liberty in comparison with the Revolutionary constitutions, its effect, nonetheless, was to provide a more favourable atmosphere for the preparation of comprehensive and technical legislation. This situation afforded the draftsmen a unique, and essential, opportunity for temperate discussion and deliberation. As A. Esmein observes: "La Constitution de l'an VIII, par ses défauts mêmes, assurait en quelque sorte cette méthode de travail."169

In assessing the reasons for the successful completion of the Civil Code under the Consulate, it is also necessary to give due recognition to the personal influence of Bonaparte whose will and energy proved to be the catalyst in bringing the task to a conclusion.170 Furthermore Napoleon intervened frequently in the sessions of the "Committee of Legislation" of the Council of State, and his authoritarian views were to leave their impress upon the Code.171

In his last years at Saint Helena, Napoleon maintained that his glory rested in large part upon the Code that bears his name: "Ma gloire n'est pas d'avoir gagné quarante batailles ... ce que rien n'effacera, ce qui vivra éternellement, c'est mon Code Civil."172 But if the glory of its completion properly belongs to him, the idea of legal unity, and the concepts which inspired its provisions, belong to the history of the
French nation. As A. Esmein observes: "A la légende qui voit en lui un éminent collaborateur dans l'oeuvre du Code civil, il y a loin. Le Code civil est l'oeuvre de la nation, non celle des individus; il renferme ce qu'a produit l'ancien droit, et ce qu'a produit la Révolution, ramené à une commune mesure."173

On 24 Thermidor, An VIII (August 13, 1800), a decree of the Consuls appointed a commission of four members who were charged with the responsibility of preparing a draft of the Civil Code.174 Of these four members, eminent lawyers and judges of the pre-revolutionary era175, only Tronchet represented "le droit coutumier"; the other three - Portalis, Bigot de Préameneu, Maleville - had been raised in the "pays de droit écrit."176 Cambacérès, who had been the chief draftsman under the Convention and the Directory, was prevented from being a member of the commission due to his rank of Second Consul.177

The two principal authors of the Civil Code were Portalis and Tronchet.178 Although the former championed the Roman concepts of law, he was a moderate and enlightened man who realized that unity calls for a tolerance of divergent ideas and a sense of accommodation. Under his guidance, "la commission devait, dans ses travaux, se préoccuper à la fois de consacrer les conquêtes de la Révolution et d'opérer une synthèse du droit romain et du droit coutumier, afin que la société pût passer sans heurts de l'ancienne législation à la nouvelle."179
As both the Revolution and tradition were part of their immediate heritage, the draftsmen did not intend to create a new law, but merely to restate it, choosing on the basis of experience when "le droit révolutionnaire" was at variance with the previous law. In this regard, Portalis wrote that "il ne doit point perdre de vue que les lois sont faites pour les hommes, et non les hommes pour les lois; qu'elles doivent être adaptées au caractère, aux habitudes, à la situation du peuple pour lequel elles sont faites." 180

This pragmatic approach explains why in certain areas the draftsmen deferred to tradition, why elsewhere they appeared to support the ideals of the Revolution, and why on many points they attempted to bring about a compromise between opposing views. Pragmatic considerations alone, however, did not dictate the content of the Civil Code. Its provisions were further inspired by the concept of an immutable natural law whose principles should be enunciated in order to promote justice and a better society. As Article 1 of the draft of the Civil Code said: "There is a universal, unchanging law that is the source of all positive law; this law is the natural reason that governs all peoples of the world." 181 This proclamation was consonant with the ideas of the Enlightenment which sought to clarify, and hence to a degree to reform, the law in terms of natural law.
Thus, in compiling the Civil Code, the draftsmen were influenced by the desire to provide clarity and simplicity, and to present the law in a form readily accessible to all citizens. They adhered to the concept that a code should not contain too many detailed provisions or too many exceptions to the principal rules. As Portalis explained: "L'office de la loi est de fixer, par de grandes vues, les maximes générales du droit; d'établir des principes féconds en conséquences, et non de descendre dans le détail des questions qui peuvent naître sur chaque matière."\(^{182}\)

"Le Code civil des français", enacted in its final form on March 21, 1804, achieved the clarity, brevity, and conciseness of style intended by the draftsmen. Within its 2281 articles are encompassed the law of "Persons" (Articles 7 to 515) which treats of such matters as marriage, divorce, the status of minors, guardianship, domicile, and absentees; the law of "Property" (Articles 516 to 710) which treats of property, usufruct and servitudes; and the law concerning "Various Methods of Acquiring Ownership" (Articles 711 to 2281). This last section is a curious mixture, dealing with matters as diverse as gifts, wills and intestate succession; obligations in general, including contract, quasi-contract and tort; marriage settlements, sale, lease, partnership and other special contracts; mortgates, liens and pledges; and prescription. The first six articles of the Code consist of a "Preliminary Title" which embodies philosophical assertions rather than enactments of a legislative nature.\(^{183}\)
The sources upon which the draftsmen relied in the compilation of the Civil Code were very diverse. "Le droit coutumier" furnished most of the provisions dealing with the community of possessions between spouses, and the rules relating to succession. 184 "Le droit écrit" provided the basis for the general rules governing obligations, contracts, and the marriage-portion system. 185 As the laws concerning obligations and contracts had already been essentially unified through the work of the French Romanists, practically no innovations were made upon incorporation into the Code. 186 The royal ordinances promulgated under Louis XIV and Louis XV were largely preserved in those articles treating of gifts, wills, evidence, and the redemption of mortgages. 187 Finally, the influence of "le droit révolutionnaire" was to manifest itself in several parts of the Code, especially those sections dealing with marriage, divorce, and inheritances. 188

Bearing in mind the diverse sources employed in its compilation, the question arises as to whether the Code Napoléon preserved the essential legal reforms of the Revolution. This question can be answered in the affirmative in the sense that the basic social principles of 1789 were retained: equality before the law, freedom of conscience, and the secularity of the State. Hereditary nobility was not reestablished, and no attempt was made to revive the system of feudalism in any form. However, as the Code was designed to reconcile opposing points of view, it inevitably had to discard part of the Revolutionary thinking.
In dealing with the institution of marriage, the draftsmen had to decide between the two experiences of France. Although marriage as such had never been assailed during the Revolutionary years, the imposition of secularization and the introduction of divorce had tended to diminish its significance. In recognition of the diversity in the religious feelings of the French people, the decision was made to retain the secularized view of marriage which reserved to public officers the right to celebrate marriage under the law (Articles 63 et seq.). Religious marriages had no legal validity and could not be celebrated before the civil ceremony. The reason for retaining the essentials of the Revolutionary marital law are explained by P. Lerebour - Pigeonnière: "Les législateurs de 1804 considéraient certainement que la liberté de conscience désirée par tout le monde a pour corollaire naturel l'indépendance de la loi vis-à-vis de la religion: voilà ce qui justifie la sécularisation du mariage dans le Code civil, voilà ce qui en détermine l'importance." As previously mentioned, the Revolutionaries had authorized divorce with the enactment of the "Decree Regulating Divorce" of September 20, 1792. After careful consideration by the draftsmen, it was decided to permit divorce under the Civil Code, but in more restricted fashion than under the Revolution. Portalis was especially hostile to the institution of divorce, and this hostility was manifested in the narrow grounds allowed to petitioners: adultery, conviction of a serious crime, and grave insults, excesses or cruelty (Articles 229 to 232). Divorce
for reasons of incompatibility was suppressed as being contrary to the theory of contract: a contract cannot be dissolved by the wishes of only one party to the agreement.\footnote{194} At the insistence of Bonaparte\footnote{195}, divorce by mutual consent was introduced in the final text of the Code (Article 233)\footnote{196}, but it was only permitted under stringent conditions (Articles 275 \textit{et seq.})\footnote{197}.

The decidedly inferior status assigned to women under the Code was particularly evident in the matter of divorce. In the case of divorce for cause of adultery, the adultress could be confined in a house of correction for a period not less than three months, nor exceeding two years (Article 298).\footnote{198} However, the husband was empowered to mitigate the effect of this sentence by consenting to receive his wife again (Article 309).\footnote{199} No similar provisions were incorporated into the Code to punish the errant husband.

Concerning the subordinate position accorded to women, which represented a definite regression from Revolutionary ideals, J. Godechot observes: "Ce qui tranche surtout avec la législation révolutionnaire, c'est l'esprit de tout le titre VI du code, consacré au divorce: en effet, c'est là que l'inégalité de l'homme et de la femme, si marquée dans presque tout le code civil atteint à un degré d'injustice révoltant."\footnote{200}

Whereas "le droit révolutionnaire" had attempted to introduce the concepts of liberty and equality into the familial unit, the Civil
Code, by contrast, partially restored the traditional view that the head of the family was the real authority. Provisions were incorporated into the Code permitting the father to incarcerate his children without governmental authority (Article 375 et seq.)\textsuperscript{201}, and the marriage rights of sons and daughters were subjected to varying degrees of parental control, depending upon age and sex (Article 148 et seq.).\textsuperscript{202}

The Code expressly subordinated the married women to her husband by categorically stating that she owes him obedience: "The husband owes protection to his wife, the wife obedience to her husband" (Article 213).\textsuperscript{203} Furthermore, she was denied the capacity to give, alienate, pledge, or purchase property without the written consent of her husband (Article 217).\textsuperscript{204} In the field of property relations, the husband was given absolute power to administer the community property of his spouse without her concurrence (Article 1421);\textsuperscript{205} and he was also given the power to manage all his wife's personal property (Article 1428).\textsuperscript{206}

The effect of these provisions, which reflected the influence of Bonaparte's authoritarianism\textsuperscript{207}, was to extend to all areas of France disabilities previously known only in the "pays de droit écrit." It is worth noting that, except for a few changes of small import, the condition of the married woman under the Civil Code was not appreciably improved until the passage of a law on July 13, 1965, by the National Assembly.\textsuperscript{208}
In the field of successional legislation, the Civil Code incorporated the Revolutionary principles concerning restriction of testamentary liberty and equality of shares among heirs of the same degree of kindred. Article 745 of the Code declares that "Children ... succeed ... without distinction of sex or primogeniture .... They succeed by equal portions ... when they are all in the first degree ...." However, in contrast to "le droit révolutionnaire", the Code was more permissive in the freedom granted to testators to dispose of their property by will: a person who leaves one child may freely dispose of one half of his estate; if he leaves two children, one third; if three or more children, one fourth (Article 913). Although relatively more permissive than the Revolutionary legislation, the dispositions authorized by the Code effectively prevented the creation of inequalities through inheritance.

The retention of the Revolutionary ban on primogeniture and unequal inheritances, and the virtual prohibition of entails (Article 896), reflected the desire of the nation to prevent any return to the situation which existed under the old regime. The liberation and division of the land resulting from the collapse of the "régime seigneurial", and the destruction of the corporate properties, had benefitted the middle classes in particular. It was thus in their interest to ensure that the provisions of the Civil Code made irrevocable the disappearance of the feudal aristocracy which the Revolution had accomplished. As P. Lerebours-Pigeonnière explains: "... la suppression de toute inégalité
entre l'aîné et les puînés était moins inspirée par le respect du à l'individualité des puînés que par le désir de niveler les fortunes, les situations, et d'empêcher le retour d'une féodalité foncière ... elle vise à réduire à un certain niveau le rang qu'une famille peut atteindre, pour consacrer le caractère démocratique de la nation."

The institution of adoption was maintained in the Civil Code, but it was subjected to many precautions. The adopter had to be childless and over fifty years of age (Article 343)\textsuperscript{213}; the adopted was not permitted to sever the ties which bound him to his natural family (Article 348)\textsuperscript{214}; nor could adoption take place so long as the adopted was a minor (Article 346).\textsuperscript{215}

The provisions concerning the status of illegitimate children reflected the influence of Bonaparte who maintained that society has no interest in having natural children recognized.\textsuperscript{216} Under the Civil Code, as under the old regime, they were isolated and excluded from the family, unless afforded legal recognition. Their situation was exemplified by Article 756 of the Code regarding successoral rights: "Natural children are not heirs; the law does not grant to such any rights over the property of their father or mother deceased, except when they have been legally recognized. It does not grant to them any right over the property of relations of their father or mother."\textsuperscript{217}
The Code reinforced the disabilities of illegitimate children by making no provision to facilitate investigations into questions of paternity; in fact, scrutiny as to paternity was expressly forbidden (Article 340). Thus, in the matter of natural children, the Code represented a decided regression from the laws of the Revolution which had attempted to remove their social inferiority.

In returning, then, to the question posed earlier concerning the Code Napoléon and its effect on the Revolutionary tradition, it is evident that the draftsmen were not prepared to reject entirely "le droit révolutionnaire." While reverting in part to the juristic traditions of France, the Code, in sum, represented a settlement by way of compromise. As Albert Sorel remarks: "Le Code civil, c'est la jurisprudence du droit romain et l'usage des coutumes combinés ensemble et adaptés à la Déclaration des droits de l'homme, selon les moeurs, convénances et conditions de la nation française ...." Arising out of the Revolution, the Code Napoléon succeeded in providing the nation with a unified system of law which incorporated the historical tradition while preserving the essential principles of 1789. Indeed, the very act of codification tended to consolidate the social conquests of the Revolution and to symbolize its accomplishments. In this sense it was revolutionary.
CHAPTER IV

THE REVOLUTION AND CRIMINAL LEGISLATION

The Work of the Revolutionary Assemblies

As noted previously, the cahiers which the constituents delivered to their representatives contained numerous demands for radical reforms of the criminal law and procedure. The preparation for necessary reform had been largely accomplished through the writings of Montesquieu, Beccaria, and Voltaire, and the alleged merits of English criminal procedure had received wide publicity in the years before the Revolution. It was inevitable, therefore, that the Revolutionary assemblies would be called upon to undertake comprehensive revisions to laws "écrites avec du lait pour les Nobles, avec du sang pour le peuple." As a result of this intense activity, two laws of great significance were enacted on the subject of criminal procedure: the Decree of October 8-9, 1789, and that of September 16-29, 1791.
The first of these two laws, meekly registered by the **parlement** of Paris on October 14, 1789,\(^{224}\) was intended to rectify the graver abuses which required immediate attention. However, as the preamble indicated, this legislation was considered to be provisional in nature, pending a more comprehensive reform in the future: "Although the execution of the whole of this reform requires leisureliness and the maturity of the deepest reflection, it is, nevertheless, possible to enable the nation to enjoy the benefit of various provisions, which, without subverting the order of procedure at present followed, would reassure the innocent and facilitate the vindication of those accused."\(^{225}\)

Under the provisions of the Decree of October 1789, no attempt was made to remove the existing criminal procedure in its entirety. Much of the written and complex procedure was retained, such as the information, the ruling to the "extraordinary" action, the confirmation and the confrontation, the report of the action, and the final interrogation. In fact, Article 28 of the Decree specifically provided that the Ordonnance Criminelle of 1670 remained in full force: "The Ordinance of 1670 and the edicts and rulings concerning criminal matters shall continue to be observed so far as consistent with the present Decree, and except as otherwise formally ordained."\(^{226}\)

Nevertheless, various progressive elements were incorporated into the Decree which provided safeguards for the accused. These
consisted primarily in the allowance and assurance of defence counsel, and in the publicity of the procedure required: "... all the steps of the examination shall take place confrontatively with him, publicly, with the doors of the chamber of examination open ... (Article 11)." 227 Further amendments to the old procedure also appreciably improved the lot of the accused: reasons had to be given for every condemnation to afflictive or degrading punishment (Article 22); no sentences involving degrading or capital punishment could be pronounced except by a two-thirds or four-fifths majority, respectively, of the votes cast by the judges (Article 25); the use of torture and of the prisoner's seat were abolished forever (Article 25).228

Although the Decree of October 8-9, 1789, was not expected to have more than an ephemeral existence, it served the purpose of introducing immediate reforms in criminal procedure demanded by public opinion. Reform of a more fundamental nature would be forthcoming in less than two years with the promulgation of the Decree of September 16-29, 1791, which would organize criminal procedure on an entirely new basis.

In the meantime, various laws were passed by the Constituent Assembly during 1790 which were intended to ensure equality before the law and to confine punishment to the offender himself. Article 1 of the law of January 21, 1790, provided that "offenses of the same nature shall be punished by the same kind of penalties, whatever be the rank and the station of the offender."229 This law further declared that "neither
the death penalty nor any infamous punishment whatever shall carry with it an imputation upon the offender's family", since "the honour of those who belong to his family is in no wise tarnished."\textsuperscript{230} The penalty of general confiscation of property was henceforth abolished, and the record of the accused's death was no longer to include reference to the mode of death.\textsuperscript{231}

The position of the accused was also strengthened by the Decree Reorganizing the Judiciary of August 16, 1790. Article 14 of Title II provided that: "In every civil or criminal matter the arguments reports and judgments shall be public, and every citizen shall have the right to defend his case in person, either orally or in writing."\textsuperscript{232} Furthermore, the following Article stipulated that: "Trial by jury shall take place in criminal cases; examination shall be made publicly ...."\textsuperscript{233}

This reference to trial by jurors in criminal matters foretold the basis upon which the Decree of September 16-29, 1791, reorganized criminal justice; namely, the establishment of the procedure by jury. The cahiers of 1789 had demanded the institution of juries for judgment of fact and had recommended the study of the English system where the accused was tried by twelve of his fellow-citizens.\textsuperscript{234} However the importation into France of the English criminal procedure was an arduous task. In England, the examination prior to trial was entrusted almost entirely to justices of the peace, and it formed but an insignificant element in the total proceedings. In France, on the other hand, the
examination by the judge had constituted the greatest part of the procedure and represented the foundation of the whole edifice. 235

Again, in England, the procedure was entirely oral and precluded the reading of written depositions to the trial jury, whereas actions in France were judged mainly upon written documents. 236

After prolonged debate, the legislative committee of the Constituent Assembly decided to sacrifice the traditional institutions of France to the principles of English criminal procedure which were felt to be in harmony with the spirit of the Revolution. 237 The essential characteristics of the new system, which were incorporated into the Decree of September 16-29, 1791, were the adoption of the "jury d'accusation" and the "jury de jugement" which corresponded to the English grand jury and trial jury. The Decree provided for an oral, public, and uncomplicated procedure before the criminal tribunal and the "jury de jugement", which was to be composed of twelve jurors. The oral character of the procedure was precisely defined: "The examination of the witness shall always be made orally and without writing out their depositions" (Part II, Tit. VII, Art. 3). 238

It was recognized, however, that no servile imitation of the English system was possible and that various particulars would have to be changed. Unlike the English tradition, which required the judge to restate the issues to be solved at the conclusion of the argument, the
Decree stipulated that issues should be put to the jurors in writing so that they had only to reply by "yes" or "no." Furthermore, the Decree did not adhere to the traditional English rule requiring the jury's decision to be unanimous: "But the opinion of three jurors ought always to be sufficient, in the accused's favour, either to decide that the fact is not certain, or to decide in his favour the questions put by the president relative to intent" (Part II, Tit. VII, Art. 28).

With the enactment of the Decree of September 16-29, 1791, establishing the "jury d'accusation" and the "jury de jugement", the Constituent Assembly achieved a truly radical departure from existing criminal procedure. In the case of proceedings before the trial jury, progressive rules were set forth that assured to the accused those indispensable guarantees of which he had been so long deprived. However, the provisions of the Decree concerning preliminary examination before commencement of trial were less successful. In this area, an imperfect and inadequate mechanism was substituted in place of the old procedure.

The secret preliminary examination, which had been the longest and most important part of the proceedings under the old regime, was reduced to a summary examination before the officer of the judicial police, to the possible hearing of witnesses by the "jury d'accusation", and to the interrogation of the accused by the director of this jury. The justice of the peace, who was primarily the magistrate of detective police,
caused the appearance before him of those accused of crimes by means of a "warrant of production." If, upon interrogation of the accused, he believed there were no grounds for criminal prosecution, the accused was set free; if not, the latter was imprisoned by virtue of a "warrant of arrest."  

The justice of the peace could initiate action either officially or by means of a complaint laid by an injured party. Thus, criminal prosecutions were no longer exclusively initiated by the State, and the functions of the public prosecutor were greatly diminished. Conversely, private individuals were allowed much greater and more effective rights of accusation than formerly. Notwithstanding these changes, the Decree unwisely created a conflict of interest with respect to the powers conferred upon the justice of the peace. As the individual occupying this position was authorized to initiate criminal proceedings, two qualifications were united in his person which should have been kept separate: those of prosecutor and of examining magistrate.

Although the next stage of the proceedings was held behind closed doors, more emphasis was placed on oral examination and the public was now represented by the "jury d'accusation." This body, consisting of eight jurors, was charged with the duty of determining whether the prosecution should go forward or be disallowed. If the jury allowed the prosecution, an "acte d'accusation" was drawn up and the matter then passed to the criminal tribunal and the trial jury.
Thus the preliminary examination, which constituted nearly the whole of the action under the old system, was greatly reduced in importance. It could consist merely of summary examination by the justice of the peace, and the hearing of witnesses by the "jury d'accusation." Although written depositions were taken, their purpose was only to serve as information; they were submitted neither to the "jury d'accusation" nor to the "jury de jugement." However the accused's position was prejudiced at trial by the fact that these "notes d'interrogatoire" and "éclaircissements par écrit" were made available to the public prosecutor, but not to the defence.

The system of preliminary examination inaugurated by the Decree of September 16-29, 1791 was not destined to have lasting success. Despite the fact that the new procedures represented a vast improvement over the secret and inquisitorial methods they replaced, experience showed that too much reliance had been placed upon the responsibilities assigned to the justice of the peace. Furthermore, the right of prosecution conferred upon private individuals proved to be unsuccessful as well. A. Esmein explains the reasons for these failures: "Le juge de paix français était un trop petit personnage, un magistrat trop peu instruit, pour bien jouer le rôle important qui lui était dévolu; et dans notre pays les individus sont peu enclins à prendre en mains l'intérêt public, lorsque leur intérêt privé n'est pas en jeu."
In conjunction with its work on criminal procedure, the Constituent Assembly brought to completion a Penal Code on September 25, 1791. The Assembly had previously proclaimed the basic principles of criminal law in the Declaration of the Rights of Man of August 26, 1789. Article 8 of this document declared that: "La loi ne doit établir que des peines strictement et évidemment nécessaires, et nul ne peut être puni qu'en vertu d'une loi établie et promulguée antérieurement au délit, et légalement appliquée." These principles were duly applied in the Penal Code which established the determination of crimes and punishments by written law. Under its provisions, no person could be sentenced to a punishment other than that which the law had formally specified for a crime defined prior to its commission.

The penalties prescribed by the Code, in contrast to those of the old regime, were neither arbitrary, atrocious, nor perpetual. The infliction of the death penalty was limited to decapitation, and corporal mutilation was virtually abolished. The principle that offenses of the same nature should be punished by the same kind of penalties, irrespective of the rank of the perpetrator, was exemplified by Article 3 of the Code dealing with capital punishment: "Tout condamné aura la tête tranchée." In this regard, M. Foucault observes: "La guillotine utilisée à partir de mars 1792, c'est la mécanique adéquate à ces principes."

The Code was divided into two main parts, the first dealing with the various punishments prescribed for convicted criminals. These
punishments were death, labour in chains, confinement, transportation, and civic degradation. The second main part of the Code embraced the definitions of specific crimes and was subdivided into two titles; the first title dealt with crimes against public interests, the second, with crimes against individuals.

The second main part of the Code embraced the definitions of specific crimes and was subdivided into two titles; the first title dealt with crimes against public interests, the second, with crimes against individuals.  

The general system of criminal law resulting from this body of legislation was greatly superior to that which existed prior to the Revolution. Nevertheless, certain defects, resulting from a reaction to the previous regime, were apparent. Through aversion to arbitrary punishments, the penalty for each offense was fixed specifically and unalterably. As the judge was required to apply the written legal provision without regard to extenuating circumstances, his function was reduced to the reading of a law. If found guilty, the accused was at once subjected to the rigid legal punishment which could not even be varied between a minimum and a maximum. The result of this system, observes C. von Bar, "was that the penalty was frequently disproportioned to the deed which it aimed to repress; and that juries, making a compromise with their consciences, preferred to acquit the offender rather than to bring upon him a punishment which they regarded as exaggerated."

A second defect of the Penal Code of 1791 was the abolition of the executive power of pardon for all offenses tried by juries (Tit. VI, Art. 13). This provision also represented a reaction to previous abuses, and doubtless expressed the confidence that the legislative reforms
enacted would henceforth render unnecessary the ancient right of pardon. Nevertheless, the decision to remove this right was in error. As C. von Bar remarks: "... the power of pardon must have a place in any rational system as the necessary complement of social justice."\textsuperscript{255}

After the dissolution of the Constituent Assembly, relatively little was done by the succeeding Legislative Assembly in the field of criminal legislation. The achievements of the first Assembly had been considerable in this regard, and the changes realized in procedural and penal laws were now taken to be substantially complete. However the Convention, in its turn, elected to continue the work of penal reform and, by the Decree of 23 Fructidor, An II, commissioned the jurist Merlin to prepare a comprehensive code on the whole of criminal legislation.\textsuperscript{256} The new code was to encompass both procedural and penal legislation, and its special purpose was to provide a work at once synthetic and detailed, as distinguished from the laws of the Constituent Assembly.\textsuperscript{257}

In pursuance of the Decree, a draft of the Code of Offenses and Punishments (Code des délits et des peines) was presented to the Convention on 3 Brumaire, An IV (October 25, 1795). Begun eighteen months earlier, the Code was principally the work of Merlin and represented a prodigious task for one individual. It was voted into law in two sittings of the Convention which adopted it in reliance upon the author's sponsorship.\textsuperscript{258}

The Code of Brumaire was primarily a code of criminal procedure; substantive penal law occupied only a limited place in its provisions.
Although some of the principles affirmed in the laws of 1791 were somewhat palliated, no changes were made in the broad features of the previous legislation.\footnote{259} However several amendments were introduced which concerned procedural details.

Whereas the Decree of September 16-29, 1791, had been exceedingly brief regarding the part to be played by the justice of the peace in the preliminary examination, the Code of Offenses and Punishments devoted thirty articles to this subject.\footnote{260} Similarly, the new Code dealt more minutely with the proceedings before the trial jury. This was a natural evolution resulting from procedures that gradually became more precise and standardized with the development of an institution unknown to the old law.

Again, while the new Code continued the principle of orality in criminal proceedings, more emphasis was placed upon written documents during the course of preliminary examination. Although their use was now permitted at trial, they had to be placed at the disposal of the accused and his counsel as well as the public accuser.\footnote{261}

Other than these modifications, the system of criminal procedure contained in the Code of 1795 was essentially the one established earlier by the Constituent Assembly. In like manner, the portion of the new Code dealing with substantive penal law did not depart from the principles embodied in the Penal Code of September 25, 1791. The
provisions devoted to the enumeration and definition of crimes and punishments confirmed the general system of penal law instituted by the former Code, including the defects referred to previously. 262

In spite of their imperfections, the criminal laws enacted by the Constituent Assembly and the Convention constituted a definite break with the past. In place of a procedure that had been secret, inquisitorial, and highly unfavourable to the accused, there was substituted one which assured to him many safeguards. Furthermore, the elimination of the many grave abuses which had characterized the penal law of the old regime represented a fundamental reform of the greatest importance.

As no further alterations were made to the Code of Offenses and Punishments during the balance of the Revolutionary decade, it remained in full force until the early period of the Consulate.

Le Code d'instruction criminelle of 1808; and le Code pénal of 1810

The two codes of the Napoleonic period concerning criminal procedure and substantive criminal law continued many of the changes that were introduced during the Revolutionary period. Nevertheless these codes also contained reactionary elements which unequivocally reflected the authoritarian views of Bonaparte. 263
Criminal procedure, in particular, underwent a radical change after Napoleon's assumption to power. An early amendment to the rules was contained in the Constitution of 22 Frimaire, An VIII, where it was decreed that the public prosecutor was henceforth to be the agent and nominee of the executive power: "The duties of public prosecutor before a criminal court shall be performed by the commissioner of the Government" (Tit. V, Art. 63).264 Thus the stage was set for the reinstitution of the old office of public prosecutor in its entirety in the proceedings before the criminal courts.

Legislation followed shortly thereafter which marked a distinct return to the past. Under the Law of 7 Pluviôse, An IX, the preliminary examination was reorganized along lines akin to the old procedure: witnesses were to be heard out of the accused's presence, and judges were not required, at the outset, to give the accused any information concerning the charges brought against him.265 In addition, the new legislation materially altered the proceedings before the "jury d'accusation" with the substitution of written for oral procedure.266 However the provisions of the Revolutionary laws were partly retained in that the accused was allowed to review the depositions placed before the "jury d'accusation", after which he could insist upon a second interrogation by the judge.267

The Law of 7 Pluviôse also called for the appointment of deputy government commissioners in every arrondissement, and gave them power to imprison pending the report of the "jury d'accusation." These
deputies, appointed by the First Consul, were to receive denunciations and complaints and to prosecute all manner of crimes. Justices of the peace were henceforth placed under deputies' orders and thus became mere assistants of the public prosecutor. 268

This legislation, then, showed a definite return to the old system of preliminary examination while the rules of the Codes of 1791 and 1795 were, in this respect, abandoned. However as no changes were made in the Revolutionary laws concerning procedure before the jurisdictions of judgment, it was evident that a compromise between the old and the new was still desired. The Law of 7 Pluviôse thus represented a transition between the codes of the Revolutionary period and the "Code d'instruction criminelle" of 1808.

The Constitution of 22 Frimaire, An VIII, like those which had proceeded it, guaranteed judgment by jury for all actions determined to be crimes: "In the case of crimes entailing corporal or ignominious penalties, a first jury shall admit or reject the indictment; if it be admitted, a second jury shall take cognizance of the facts, and the judges forming a criminal court, shall apply the penalty ..." (Tit. V, Art. 62). 269 In spite of this constitutional provision, the retention of the jury system was by no means assured. This institution was the object of continuing criticism on the part of the magistracy and, more importantly, it was looked upon with disfavour by the First Consul. 270
In practice, the trial jury had not proved entirely effective because of reasons of intimidation and political prejudice. The problem of brigandage, in particular, had created an environment in which the jury was hard put to perform its duties adequately. Juries were criticized for being too timorous, for allowing too many crimes to go unpunished, and for being too susceptible to political influence.\textsuperscript{271}

However as any suggestions to destroy the jury system met with sturdy resistance by many of the legislators, Bonaparte resolved to reduce its influence with the establishment of a concurrent criminal jurisdiction. Two jurisdictions were proposed, the one entailing the use of the jury for ordinary criminal cases, the other involving the use of special courts without juries to deal with cases of armed rebellion or threats to the internal safety of the State.

After much acrimonious debate, the legislature allowed this duality to exist in the Law of 18 Pluviôse, An IX.\textsuperscript{272} Many members of the Tribunate were strongly opposed to what they considered to be the reestablishment of the "prévotal" courts of the old regime. Assurances by the government that these were temporary measures did not assuage their concern, for they realized that provisional matters tend to become definite. In fact, the newly created system was destined to pass into the "Code d'instruction criminelle" which maintained the special courts as a permanent institution (Tit. VI, Book II, Art. 553 to 599).\textsuperscript{273}
Several of the provisions of the Law of 18 Pluviôse were regressive in nature. The accused was denied an opportunity to prepare his defence, and the right to be released on bail was abolished. Furthermore, the judges of the special courts were not required to provide grounds for judgment, and the right to appeal from their decisions was denied. Certain Revolutionary reforms were maintained, nonetheless: the procedure was public and oral, and the accused had the benefit of counsel and the right to know immediately the nature of the charge against him.

Concurrently with the establishment of the special courts, preliminary work had begun on the recasting of all criminal legislation by an appointed commission. Initially a single text was contemplated, containing the rules of criminal procedure and substantive criminal law. However it was eventually decided that procedure should be dealt with first because regulations governing procedure tend to facilitate the formation of opinion concerning substantive law.

In due course, a draft of procedural law was submitted by the commission which preserved the jury system while incorporating several changes in its rules and composition. Since it was felt that the existing system of choosing jurors had resulted in too many bad selections, restrictions were introduced which required future jurors to meet certain census qualifications. In addition, the parties to an action were given
the right to challenge, in court, the proposed panel of jurors. Finally, the rule of unanimity was suggested for the decisions of the trial jury, as was the practice in England. 277

In view of the many reservations expressed concerning the wisdom of retaining the jury system, an extensive inquiry was ordered by Bonaparte to obtain the opinions of the magistracy on the work of the commissioners. As soon as the draft legislation was reviewed by the courts, it became clear that many were hostile to the institution of the jury and wished to see it suppressed. The fact that England was the implacable enemy of France at this time doubtless influenced opinion. However a genuine belief was expressed that the Ordinance of 1670, as modified by the Decrees of 1789, offered more safeguards to the accused. As A. Esmein observes: "... la procédure criminelle de l'ancien droit, purgées de ses atrocités et de ses injustices, avait conservé de nombreux partisans." 278 Of the seventy five criminal courts whose observations were published, only twenty six were in favour of retaining the jury; twenty three did not express an opinion for or against; while twenty six, mainly from the south of France, pronounced against its retention. 279 Thus the problem of whether to retain the jury remained a burning question.

The draft of the suggested criminal code, together with the results of the inquiry, came before the legislative section of the Council of State on May 22, 1804. Prior to the commencement of discussion on the
proposed legislation, Napoleon ordered the drafting of a list of fundamental questions to serve as a basis for debate in the Council of State. Accordingly, fourteen questions were duly submitted, the first seven concerning the institution of the jury. These seven questions were as follows: Shall the institution of the jury be preserved? Shall there be a grand jury? How shall the jurors be appointed; from what class shall they be appointed; by whom are they to be appointed? How is the challenge to be exercised? Shall the examination be purely oral, or partly oral and partly written? Shall several questions be put to the jury, or only one: "Is the accused guilty or not guilty?" Shall the verdict to the jury be unanimous or shall a certain number of votes determine the issue?  

The main part of the debate thus revolved around the issue of the jury and although several argued for its suppression, others, not wishing to abandon the principles of the Revolution, defended it with ability and eloquence. After listening to the conflicting arguments, Napoleon set forth his own opinions on the subject. A despotic government could more easily influence a jury than a judge, and, given the publicity of proceedings and counsel for the defence, the jury represented a superfluous guarantee. Furthermore, a jury would always acquit a person who could afford a lawyer, and always condone an offence against the police. Nonetheless, if the jury was properly composed it might have a
place in criminal proceedings, as long as the special courts were available to punish organized crime. 281

In spite of Napoleon's unmistakable ideas concerning the jury, the members of the Council only partially concurred with them and, in due course, the retention of both grand jury and trial jury was voted in principle. 282 As the matter now appeared to be at an end on this point, the Council proceeded to hold several sessions on other parts of the draft legislation. However this body was soon presented with another draft law proposing the amalgamation of civil and criminal justice, which was to give effect to Bonaparte's intention. In answer to the arguments put forward for its adoption, it was stated that, under the suggested plan of wider judicial competence, the use of the jury would be impossible in practice. Taking note of the objections, Napoleon tacitly withdrew his plan and shortly thereafter the work of the commission was suspended. It was apparent that Bonaparte believed that the moment was not favourable to press for the suppression of the jury but that opinion would change over time. 283 Thus all the matters relating to criminal law and procedure were allowed to fall into oblivion for a three year period.

When the debate was resumed in January, 1808, it was decided to separate procedural law from substantive law. The former was presented as a draft Code of Criminal Procedure (Code d'instruction criminelle), the latter as a draft Penal Code (Code pénal).
Concerning procedural matters, the great problem of the institution of the jury continued to dominate discussion. In the end, a compromise solution was agreed upon: the trial jury would be retained, provided it was properly constituted; and the grand jury would be abolished, its functions being transferred to a special section of the Court of Appeal. The fact that the grand jury was guaranteed by the Constitution of 22 Frimaire, An VIII, did not prove to be a deterrent. As S. Esmein explains: "On passa outre declarant, par un de ces ingénieurs détours si souvent employés à cette époque, que la Cour d'appel était le meilleur des jurys d'accusation."284 Thus, in the prolonged struggle between the procedure by jury and the Ordinance of 1670, the former can be said to have gained a partial victory.

But while the Code of Criminal Procedure based its rules for the trial in court upon the legislation of the Revolution, it borrowed from the Ordinance of 1670 almost all its rules concerning the preliminary examination. Witnesses' depositions were to be taken secretly in the presence of the examining judge and his clerk, and in the absence of the accused; the judge could not be compelled to hear witnesses nominated by the accused; and the accused was kept in complete ignorance of the testimony given, and the nature of the charges laid, throughout this stage of the proceedings (Art. 71 to 86).285
In comparison, under the Revolutionary laws the accused had been allowed to be present at the hearing of witnesses, and the complaint and all documents had been read to him before he was publicly interrogated. Thus the safeguards granted to the defence since 1789 were now withdrawn. As J. Godechot observes: "Le code d'instruction criminelle de 1808 marque encore une nouvelle réaction dans la procédure criminelle, puisqu'il rétablit le secret, presque dans les mêmes conditions que l'ordonnance criminelle de 1670." 286

As previously noted, the Code of Criminal Procedure incorporated the Revolutionary rules governing proceedings at trial. Court trials were to be open to the public and the accused was allowed the production of witnesses and the assistance of counsel. However the impartiality of the proceedings was potentially diminished because of the Code's provisions dealing with the composition of the trial jury. Henceforth, prefects were charged with the task of assembling lists of jurors whose eligibility was limited to certain categories of persons, especially those of means (Art. 381 and 382). 287 Criminal justice thus assumed the character of a "justice de classe" with the inevitable impairment of the impartiality of the jury. Furthermore, challenges to jurors in court were now regulated; there could be no more challenges for cause assigned (Art. 399). 288
The Code of Criminal Procedure was finally enacted on November 27, 1808, and was promulgated on January 1, 1811, together with the Penal Code of 1810. As in the case of the Code Napoléon, it represented a compromise between the competing influences of "le droit révolutionnaire", the laws of the old regime, and the opinions of Bonaparte. After due allowance has been made for its reactionary elements, it still represented a vast improvement over the procedure used before 1789, and in this sense it consolidated the accomplishments of the Revolution.

The Code of Criminal Procedure could not be put into force until the completion of a penal code, and the legislators took this task in hand at the end of 1808. As mentioned previously, Napoleon had ordered the preparation of a questionnaire in 1804 to facilitate the debates before the Council of State. Of the fourteen questions submitted, the following six were concerned primarily with penal law: Shall capital punishment be continued? Shall there be punishments for life? Shall confiscation be permitted in certain cases? Shall judges have a certain freedom in the application of punishments; shall there be a maximum and a minimum which will give them the power of imposing punishment for a longer or shorter period according to circumstances? Shall surveillance be introduced for a particular class of criminals, after the expiration of their punishment, and shall bail be demanded in certain cases for
future good conduct? Shall rehabilitation be accorded to convicts whose conduct will have made them worthy of it?289

Although these questions were answered mainly in the affirmative at that time, the debates were before long postponed because of the impasse over the matter of the jury. When the work was resumed in 1808, despotism had assumed sterner forms, and this fact was evidenced by the severity of the ensuing penal legislation. As M. Ancel observes: "We are no longer facing a Code of the Revolution or even the "Consulat", but, in fact, a Code of Empire, enacted at the apogee of Napoleon's reign. One should not be surprised therefore that ... this Code was marked by some authoritarian ideas, and that felonies and misdemeanours against the State as such were repressed with harshness."290

In essence, the Penal Code of 1810 aimed to secure the defence of society by means of intimidation.291 Under its system of penalties, the concept of rehabilitation was ignored and emphasis was placed exclusively upon punishment. For this reason, several punishments employed during the old regime, such as the use of the branding iron (Art. 7)292 and the practice of severing the right hand of a parricide prior to his execution (Art. 13)293, were reinstated. In addition to these excessive chastisements, the death penalty and life imprisonment were freely applied, and penalties unjust in their effects were restored, such as general confiscation (Art. 7)294, and "la mort civile" (Art. 18).295
However the Penal Code of 1810 did institute some changes of a progressive nature. In the first place, it renounced the rigidity of punishments adopted by the Revolutionary legislation and allowed the judge a discretion between minimum and maximum. Furthermore, the judge could now take into consideration extenuating circumstances, in the case of misdemeanours, before arriving at his decision (Art. 463). 296

Secondly, the power of pardon, which had already been restored to the executive by means of a "senatus-consultum" of 16 Thermidor, An X, was reestablished. 297 Finally, from the point of view of legislative technique, the Code was drafted with great clarity and the various provisions were presented systematically and methodically. Crimes of the same generic type were now grouped together, even though they might vary as to their gravity or sanction. 298

In comparison, then, with the Codes of 1791 and 1795, the Penal Code of 1810 was especially retrogressive concerning severity of punishments. Nonetheless, the essential principles of the Revolutionary legislation were maintained. Equality before the law was recognized by having the same penalties for all citizens, and the fundamental principle of legality of crimes and punishments was retained (Art. 4). 299 As with the other Napoleonic codes, it represented a fusion of the old and the new.
CHAPTER V

THE REVOLUTION AND JUDICIAL ADMINISTRATION

The defects in the system of judicial administration had been one of the chief grievances under the old regime. As a result, the Constituent Assembly turned its attention to this matter at an early date. Although the parlements no longer influenced the course of events and had sunk into the background, the overriding concern was to prevent the reestablishment of any courts of justice with pretensions analogous to those of the sovereign courts. As A. Esmein explains: "cette crainte des parlements, ou en général des grands corps judiciaires, a pèse constamment sur l'esprit de la majorité dans l'oeuvre de la reconstitution judiciaire." In light of the concerns expressed, the continued existence of the parlements represented an incongruity and on November 3, 1789, they were sent on a prolonged vacation. A year later they were formally suppressed.

Venality of judicial office was suppressed by Article 7 of the Decrees of August 4-11, 1789, and, more importantly, the judiciary was entirely reorganized by the Law of August 16-24, 1790. Under this legislation, the Constituent Assembly attempted to resolve the two basic problems involved in the reconstruction of the judicial system, namely
the method of choosing and remunerating judges and the composition and competence of the new judicial hierarchy.

Concerning the first problem, it was decided that those who were to exercise judicial power should hold it through election. As judicial power was considered by the deputies to be one of the manifestations of national sovereignty, it was felt that title to this power should be achieved in the same manner as those who exercised the legislative power, or who exercised administrative functions. Accordingly, Article 3 of the Law of August 16-24, 1790, declared that "Judges shall be elected by the persons subject to their jurisdiction." Judges were to be elected for a period of six years, and their services were to be rendered gratuitously and paid for by the State - venality being abolished forever (Article 2 and 4). In addition, restrictions were introduced which provided that no one could be selected as a judge unless he had attained thirty years of age and had been a judge or lawyer practicing publicly before a court for five years (Article 9). Thus, by making the judges elective, the Constituent Assembly succeeded in reducing their independence by abolishing the principle of irremovability which was regarded as incompatible with Revolutionary ideas.

The Law of August 16-24, 1790, expressed the Revolutionaries' distrust of the judiciary by barring courts from interfering in the operation of administrative acts or issuing summonses to administrators
on charges connected with their duties (Article 13).\textsuperscript{308} Furthermore, in order to prevent the judges from exercising a rôle similar to that of the \textit{parlementaires}, they were forbidden from taking any part in the legislative branch of government or obstructing the execution of legislative decrees (Article 10).\textsuperscript{309}

These provisions restricting the judicial power within clearly defined limits were incorporated into the Constitution of September 3, 1791: "The courts may not interfere with the exercise of the legislative power, suspend the execution of the laws, encroach upon administrative functions, or summon administrators before them for reasons connected with their duties" (Tit. III, Chapt. V, Art. 3).\textsuperscript{310} Thus understood, the principle of the separation of powers, as conceived by the Constituent Assembly, amounted to a deliberate avoidance of a powerful and creative judiciary capable of imposing its influence upon the legislative and executive functions of government. In the opinion of the Revolutionaries, law making was exclusively a function of the legislature, and because of their faith in the feasibility of a legal system based entirely on statutes, the rôle of the judiciary was narrowly circumscribed.

Concerning the establishment of a new judicial hierarchy, the Constituent Assembly was guided by a dominant principle: to maintain a distinction between civil and criminal jurisdictions and to create different courts to administer these separate jurisdictions.\textsuperscript{311} In this regard, the
Law of August 16-24, 1790, brought about a significant reorganization of the judiciary - especially with respect to civil matters. Three types of judges were distinguished by this law: arbiters, justices of the peace and judges properly so called.

In cases of arbitration, all persons were permitted to nominate one or more arbiters "to pass upon their private interests, in all cases and on all matters without exception" (Tit. I, Art. 2). An appeal from arbitral decisions was not permitted unless the parties expressly reserved this right by mutual consent (Tit. I, Art. 4). Where the right to appeal was not reserved the decisions of the arbiter were to be executed by means of an ordinance of the district court (Tit. I, Art. 6).

Although the designation "juge de paix" had been borrowed from the English "justice of the peace," the functions assigned to this member of the judiciary were quite distinct from those of his English counterpart. In addition to the matters stipulated to be within his competence under the Law of August 16-24, 1790, he was also expected to mediate disputes between parties in concert with elected "prud'hommes assesseurs." In principle, no writ to commence a civil action would be admitted to a district court unless mediation had been attempted before an office of peace and conciliation presided over by a justice of the peace (Tit. X, Art. 2).
The law further declared that a justice of the peace was to be elected for every canton (several in the larger towns); he could only be chosen from among citizens eligible for departmental and district administrations and fully thirty years of age; and he was to be elected with an absolute majority of votes by the active citizens united in primary assemblies (Tit. III, Art. 1 et seq.). It should be noted that the conditions of eligibility made no reference to the need for judicial knowledge or training. As A. Esmein observes: "On n'exigeait du juge de paix aucune connaissance juridique, et cela était conforme au rôle qu'on lui assignait."

Appeals from judgments of justices of the peace, when they were subject to appeal, were to be brought before judges of district courts—the next rung in the newly created hierarchy. In addition to the appellate jurisdiction just mentioned, the district courts were given cognizance in the first instance of all personal, real, and mixed suits of every kind, excepting those declared to be within the competence of justices of the peace (Tit. IV, Art. 4). In certain cases, their jurisdiction was extended to first and last instance: "The district judges shall have cognizance in first and last resort of all personal and personal property suits up to a value of 1000 livres of principal, and of real estate suits of which the principal item is fifty livres of fixed income, in either rent or lease price" (Tit. IV, Art. 5). In all civil
suits involving larger sums of money, or other causes of action, it was provided that district courts should act as courts of appeal with regard to each other (Tit. V, Art. 1). 320

The establishment of the district courts marked the upper boundary of the hierarchy of civil justice. Although a Court of Cassation was soon instituted to ensure the uniform interpretation of the law throughout the country (Decree of November 27, 1790), in matters of appellate jurisdiction the Constituent Assembly chose not to create a court superior to the district court. The two basic reasons for this decision are concisely stated by A. Esmein: "1° le désir de rapprocher la justice des justiciables, pour la rendre accessible à tous; 2° la crainte des grands corps judiciaires en qui pourraient ressusciter les parlements." 321

On January 20, 1791, a decree of the Constituent Assembly attributed the prosecution and judgment of crimes involving afflicting punishments to district courts in each department. These courts, which dealt with criminal cases in the first instance and on appeal, were composed of an elected president and three judges from neighbouring district courts selected in rotation. 322

The establishment of the district criminal courts was followed shortly by the creation of courts of summary jurisdiction, pursuant to the Decree of July 16-22, 1791, for the judgment of minor offences.
The composition of these courts, which were situated in the principal town of each canton, consisted of two judges and an assessor in towns with more than one justice of the peace; elsewhere, they were composed of a justice of the peace and two assessors. Prosecutions were initiated either by the injured party, or by the local public prosecutor, or by "des hommes de loi commis à cet effet par la municipalité."\(^{323}\)

As mentioned above, a national Court of Cassation was established by the Decree of November 27, 1790, with members chosen for four years by the electoral assemblies of the departments. In spite of the desire to prevent the restoration of any court analogous to the former parlements, the majority of the deputies wished to see the creation of a supreme jurisdiction.\(^ {324}\) However, in order to ensure that this court would never overstep its authority, the Constituent Assembly strictly limited the functions assigned to it. Article 1 of the enabling decree prescribed the specific character of the appeals to be taken before it: "Il annulera toutes les procédures dans lesquelles les formes auront été violées et tout jugement qui contiendra une contravention expresse au texte de la loi ... Sous aucun prétexte et en aucun cas le tribunal ne pourra connaître du fond de l'affaire; après avoir cassé les procédures ou le jugement, il renverra le fond des affaires aux tribunaux qui devront en connaître."\(^ {325}\)
Thus the Court of Cassation could not pass upon the merits of the cases brought before it, nor was it permitted to interpret the laws (a right reserved to the legislature under the Constitution of 1791; Tit. III, Chap. V, Art. 21). Nevertheless, with its creation was realized the uniformity of court decisions which is a necessary complement of legislative unity.

As a result of the new judicial organization with which the Constituent Assembly endowed the country, the exceptional courts (tribunaux d'exception) were suppressed, save the commercial courts whose judges were elected by leading merchants. The costs of litigation, if not actually gratuitous, were greatly diminished, and the workings of the judicial system were made more amenable to the average citizen who was obliged, without distinction, to sue before the same judges and according to the same forms. As J. Godechot observes: "L'organisation judiciaire de la France par la Constituante a sans doute été une des parties les plus réussies de son oeuvre." Although the succeeding Revolutionary assemblies introduced several changes, the broad outlines of the judicial organization created by the Constituent Assembly remained in existence. Under the Convention, conditions of professional capacity with respect to the election of judges were suppressed by the Decree of October 14, 1792. Henceforth, judges could be chosen from among all citizens who had attained twenty
five years of age. At the same time, the judicial power was brought under the direct control of the executive. Relying upon its quality as a sovereign assembly, the Convention, by means of a number of decrees, intervened directly in the administration of justice. It annulled the judgments of elected magistrates, adjudicated cases itself, and ignored the electoral process by appointing several judges. Indeed, by virtue of the Decree of 14 Ventôse, An III (1795) the legislative committee was subsequently authorized to appoint all administrative officers, municipal officers, and judges. Thus, during the period of the Convention, the principle of the separation of powers gradually disappeared, to be replaced by a concentration and unity of powers under the Revolutionary government.

The judicial system instituted under the Terror saw the creation of extraordinary tribunals of expeditious procedure and the suppression of safeguards for the protection of the individual. As J. Godfrey observes: "[The Revolutionary tribunal] must, in the final analysis, be judged as an institution for the achievement of the Revolutionary purpose and not as a court for the administration of law and justice as ordinary social necessities." The Constitution of 5 Fructidor, An III, instituted further modifications in judicial organization. Having abolished the district as an administrative unit, it also abolished the district courts and
replaced them with departmental courts for purposes of civil suits in the first instance and on appeal (Tit. VIII, Art. 216).\textsuperscript{332} Henceforth, each department in France maintained two courts located in its principal city, one for civil justice, and the other for criminal justice.

The effect of this provision was to drastically reduce the number of courts and to make justice more remote from the citizens it was intended to serve.\textsuperscript{333} Furthermore, the character of the civil courts under the Directory assumed an appreciably different form from that of the preceding courts. The magistrates, who were elected by a minority of citizens of means, were sometimes partisans of the old regime during which they had exercised analogous functions. However, their election was subject to confirmation by the Directory, and the governments were able to revoke the election of those magistrates whose qualifications, in their opinion, were found wanting.\textsuperscript{334} Thus the elective system, though maintained in theory, was gradually abandoned in practice.

On the whole, the judicial system functioned satisfactorily during the period of the Directory, even though the government increasingly exercised its prerogative of appointing judges.\textsuperscript{335} However, after the coup d'état of 18 Fructidor, An V (September 4, 1797), the government removed a large number of judges and directly appointed their replacements, thereby gravely endangering the independence still enjoyed by the magistracy. From this moment, it was only a matter of time until the
elective system gave way entirely to executive appointment. As J. Godechot observes: "Il n'en reste pas moins que, là comme en bien d'autres domaines, le Directoire en nommant des magistrats, a frayé la voie à l'Empire." 336

Under the Consulate, the Constitution of 22 Frimaire, An VIII (December 13, 1799), tended to slight the judiciary; however it was subsequently complemented by other laws concerned with judicial administration. Article 61 of the Constitution provided that there should be courts of first instance and courts of appeal in civil matters. 337 No reference was made to the number of courts except that every communal arrondissement was to be served by one or more justices of the peace elected directly by the citizens for three years (Tit. V, Art. 60.) 338 Further provision was made for the establishment of a Court of Cassation with powers similar to those granted during the Revolutionary period (Tit. V, Art. 65 and 66.) 339 The judges of this court were to be chosen from a list of national notables, while judges of courts of first instance and appeal were to be chosen from departmental lists (Tit. V, Art. 67). 340 Article 45 provided that all judges were to be appointed by the First Consul, with the exception of justices of the peace, thus abolishing the elective system. 341 Judges, other than justices of the peace, were to hold office for life, unless found negligent in the performance of their duties (Tit. V, Art. 68). 342 However, this provision was modified by
a "senatus-consultum" of October 12, 1807, which withheld life tenure until after a judge had sat for five years. Finally, the Constitution retained from the Revolution such practices as the use of the grand and trial juries, arbitration, and the handling of conciliation by justices of the peace (Tit. V, Art. 60 and 62).

When Napoleon found the opportunity to turn his full attention to the matter of judicial organization, he largely reestablished the system created under the Revolution. By virtue of the law of 28 Pluviôse, An VIII, courts of first instance were created in each arrondissement with authority to judge all civil matters, including appeals lodged from judgments pronounced by justices of the peace. However, appeals from one court of first instance to another court of first instance were abolished. Instead, a series of intermediate appellate courts were created to review judgments of courts of first instance as well as judgments from the commercial courts.

Under the Consulate, the judges of the appeal courts were mainly recruited from the same background as those of the courts of first instance; that is to say, from among personnel of the Revolutionary period. However, in the later years of the Empire, the appeal courts were mainly peopled by magistrates, or the sons of magistrates, of the former parlements. Thus imperial justice tended to become more akin to old regime justice.
As in the case of the civil courts, the organization of the criminal courts remained, on the whole, similar to that which existed during the Revolution - at least until 1810. These courts were situated in the principal city of each department and were composed of a president, chosen by Napoleon, together with judges drawn from the appellate courts. However, as previously mentioned, numerous special criminal courts were created in 1801 to deal with matters affecting the security of the State. Other than the implementation of these special criminal courts, the most significant departure from the existing system concerned the establishment of Courts of Assize in 1810 which replaced the regular criminal courts for reasons of economy.347
When the *cahiers* spoke of equality and liberty, they represented the demands of the middle class for equality of rights, equal justice, security of private property, and, finally, political power. Although equality and liberty remained the ideals to which society had formally pledged itself at the onset of the Revolution, these ideals were inevitably given a partial and class interpretation by the leaders of the Revolution who were mainly men of substance from the upper strata of the Third Estate. As they were not very mindful of the grievances of the poorer classes, their conception of equality was limited to the desire to abolish privilege. As Alfred Cobban observes: "Privilege was the enemy, equality the aim, though it must be remembered that the equality desired by the Third Estate was an equality not of property but of status."\(^{348}\)

On August 25, 1789, the middle class laid the definitive foundations of the new society with the Declaration of Rights of Man and the Citizen. As this proclamation of equality of rights made the free ownership of private property seem equivalent to social equality, a continuing conflict between haves and have-nots was inevitable given the existing inequalities of wealth. This conflict was to lead the Revolution on to a democratic challenge to the narrower interpretation of the Declaration, and ultimately to cause the bourgeoisie to appeal to military dictatorship to protect its
social and economic preeminence.

As would be expected, the legislation enacted throughout this period accurately reflected the changing attitudes displayed by the different Revolutionary Assemblies and by Napoleon. At the outset, the Constituent Assembly proclaimed, along with liberty and equality, the sanctity of private property, though this did not include "feudal" prerogatives which were renounced by the Decrees of August 4. Nevertheless, the respect paid to property rights was upheld by the qualifications which were allowed to remain concerning redemptions and compensation. Similarly, the desire to prevent any return to the situation which existed under the old regime was reflected in the Decrees of March 15, 1790, and April 8, 1791, abolishing primogeniture and proclaiming equal inheritances. (But specific prohibitions against willing property unequally were only introduced in 1794.)

That criminal law and the judicial system needed drastic change was immediately recognized by the Constituent Assembly and, as has been shown, the reforms brought about by this body were of lasting significance.

Under the Legislative Assembly, the compromises, hesitations, and uncertainties which characterized much of the civil legislation of the prior Assembly tended to disappear. The various circumstances, such as the struggle with the royal power and the war with Europe, imposed a more rigorous course of action upon the legislators. In the space of six weeks, from August 14 to September 20, 1792, a series of important
decrees were passed. On August 14, the division of communal lands was ordered together with the confiscation of the property of the emigrés; on August 20, 25 and 27, all "droits seigneuriaux" were destroyed without indemnity, and on September 20, the decrees secularizing marriage and regulating divorce were promulgated. As P. Sagnac succinctly remarks: "Après avoir affranchi les terres, elle affranchit les personnes."349

Between 1792 and 1794, the Convention Assembly attempted to define the gains of 1789 in the direction of equality. Accordingly, the legislation produced by this body, in reaction to the precepts of Roman law, imposed limitations upon property rights by granting natural children successional shares equal to legitimate children, by curtailing paternal authority, and by calling for an equal division among heirs irrespective of the wishes of the testator. The ability of the individual to deal with private property was thus circumscribed in the belief that the perpetuation of gross inequalities of wealth must necessarily lead to the ruin of democracy. Briefly stated, "l'égalité légale ne serait qu'un mot si les grandes inégalités de fait continuaient à subsister."350

Although the Constitution of An III returned political power to the bourgeoisie by means of property qualifications for suffrage, the fear remained that a political democracy would be resurrected which would lead to social democracy and the division of property. Thus, under the Directory, attempts were made to redefine, protect, and institutionalize the gains of the new governing class.
The Declaration of Rights accompanying the Constitution of An III was generally conceived in the spirit of the liberal "principles of 1789," but with significant departures from it. Equality now became essentially equality before the law and not in civil rights: "L'égalité consiste en ce qui la loi est la même pour tous" (Art. 3). Economic liberty was expressly confirmed by the definition given to private property: "La propriété est le droit de jouir et de disposer de ses biens, de ses revenus, du fruit de son travail et de son industrie" (Art. 5). Finally, the Declaration saw the country as being governed by landowners as part of the natural order of things: "C'est sur le maintien des propriétés que repose la culture des terres, toutes les productions, tout moyen de travail, et tout l'ordre social" (Art. 8).

The overriding concern of the propertied class under the Directory (1795-1799), a period of intense political and economic instability, was the maintenance of a social hierarchy and the protection of individual and family property rights from interference by the State. Thus, much legislation of the previous Assemblies was amended, especially that concerning divorce and the rights granted to natural children. In addition, the legislators reestablished imprisonment for debt and regularized to their advantage the sale of national property.

As the Revolutionary decade progressed, therefore, there emerged a new and even stronger system of vested interests than existed before 1789. The liberal experiment of the Constitution of An III had not been
successful, having been undermined by dictatorial expedients. Thus, behind the facade of a liberal Constitution, the ground was gradually prepared for the dictatorship of Bonaparte. By 1799, a regime of repeated coup d'etat made dictatorship appear preferable to either Jacobinism or royalist reaction, especially when the economic and social conquests of the Revolution seemed to be threatened.

Under the tutelage of Napoleon, the upper middle class was able to consolidate its supremacy and complete the work of the Revolution in terms of many of its aims of 1789. The provisions of the Code Napoléon protected the property settlements of the Revolutionary period while maintaining the principles of equality before the law and equality of opportunity. The Roman law tradition continued to recover its influence and this was reflected both in the restoration of paternal authority and the freer disposition of private property, as well as in the increased severity of the provisions of the Penal Code. In essence, the Code Napoléon gave permanence to the ideals and aspirations of the upper middle class. As J. Godechot observes: "Rédigé par des bourgeois, il a en vue uniquement l'intérêt de la classe possédante. Il règle les conditions d'existence de la famille, considérée sous l'angle de la propriété: le contrat de mariage, les partages, les donations, les successions sont les principaux objets de ses préoccupations. Il considère la propriété comme un droit absolu, indiscutable, inviolable et sacré."
It would be unduly restrictive, however, to portray the Revolutionaries as being concerned exclusively with material interests. The humanitarian and institutional reforms achieved in the areas of criminal law and procedure and judicial administration were, for the most part, significant and durable. Similarly, the various attempts to codify the civil laws provided an indispensable foundation for the eventual successful codification under Napoleon. In the final analysis, the work of the Revolutionary Assemblies was lasting because it gave concrete expression to ideals which had been long suppressed under the old regime.
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